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Realising the Human Right to Adequate Housing in Indonesia through Accountability as a Process

Erna Dyah Kusumawati

Realising the Human Right to Adequate Housing in Indonesia through Accountability as a Process

Erna Dyah Kusumawati

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university of
 groningen

Realising the Human Right to Adequate Housing in Indonesia through Accountability as a Process

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. C. Wijmenga
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Monday 13 January 2020 at 12.45 hours

by

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born on 30 March 1977
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Groningen, December 2019
Erna Dyah Kusumawati

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AComHPR	African Commission on Human and People's Rights
ActHR	African Court on Human and People's Rights
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
ARKOM	<i>Arsitek Komunitas</i>
Art	Article
ASEAN	Association of South East Asian Nations
BAL	Basic Agrarian Law
BPN	<i>Badan Pertanahan Nasional</i> - National Land Agency
BPS	<i>Badan Pusat Statistik</i> (National Statistical Agency)
BTN	<i>Bank Tabungan Negara</i>
CAT	Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CO	Concluding Observations
ComHR	Commission on Human Rights
CRC	Convention on the Rights of the Child
CRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
CSW	Commission on the Status of Women
CSW	Committee of the Status of Women
CtRC	Committee on the Rights of the Child
CtRPD	Committee on the Rights of Persons with Disabilities
DIY	<i>Daerah Istimewa Yogyakarta</i>
DKI Jakarta	<i>Daerah Khusus Ibukota Jakarta</i>
DPR	<i>Dewan Perwakilan Rakyat</i> - People Representative's Assembly
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECOSOC	Economic and Social Council
EctHR	European Court of Human Rights
ESC	Economic, Social and Cultural
ECSR	European Committee of Social Rights

FEANTSA	European Federation of National Organizations working with the Homeless
FLPP	<i>Fasilitas Likuiditas Pembiayaan Perumahan (Mortgage Facilities)</i>
GC	General Comment
HRBA	Human Rights Based Approach
HRC	Human Rights Council
HRCtee	Human Rights Committee
IA Commission	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	International Convention on on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDR	Indonesian Rupiah
IHRL	International Human Rights Law
ILO	International Labour Organisation
IMF	International Monetary Fund
IPR	<i>Ijin Pemakaian Rumah</i>
IPT	<i>Ijin Pemakaian Tanah - Permission to Use Land</i>
JDIH	<i>Jaringan Dokumentasi dan Informasi Hukum</i>
KK	<i>Kartu Keluarga – Family Card</i>
KOMNAS HAM	<i>Komisi Nasional Hak Asasi Manusia</i>
KPR	<i>Kredit Pemilikan Rumah</i>
KTP	<i>Kartu Tanda Penduduk (Identity card)</i>
LAPOR	<i>Layanan Aspirasi dan Pengaduan Online Rakyat</i>
LAS	League of Arab States
MPR	<i>Majelis Permusyawaratan Rakyat - People Consultative Assembly of the Republic of Indonesia</i>
MUSRENBANG	<i>Musyawaharah Rencana Pembangunan</i>
MUSRENBANGDES	<i>Musyawaharah Rencana Pembangunan Desa</i>
NGOs	Non-governmental Organisations
NHRI(s)	National Human Rights Institution(s)
NIHE	Northern Ireland Housing Executive
NPM	New Public Management
NPWP	<i>Nomor Pokok Wajib Pajak – Tax Identification Number</i>
NYIA	New Yogyakarta International Airport
OAS	Organisation of American States
OP	Optional Protocol
ORI	Ombudsman Republik Indonesia
PAG	Pakualaman Ground
Perda	<i>Peraturan Daerah – Local Regulation</i>

Perum Perumnas	<i>Perusahaan Umum Pembangunan Perumahan Nasional</i> - State owned National Housing Development Company
PP	<i>Peraturan Pemerintah</i> - Government Regulation
PPR	Participation and Practice of Rights Project
PT KAI	<i>PT Kereta Api Indonesia</i> – Indonesian National Railway Company
RANHAM	<i>Rencana Aksi Nasional Hak Asasi Manusia</i> - National Action Plan of Human Rights
REI	The Association of Indonesian Real Estate Developers
RESC	Revised European Social Charter
RKP	<i>Rencana Kerja Pemerintah</i>
RPJMN	<i>Rencana Pembangunan Jangka Menengah Nasional</i> - National Medium-Term Development Plan
RPJPN	<i>Rencana Pembangunan Panjang Nasional</i> - National Long-Term Development Plan
RS	<i>Rumah Sederhana</i>
RSS	<i>Rumah Sangat Sederhana</i>
RUSUNAWA	<i>Rumah Susun Sederhana Sewa (Rented Public Housing)</i>
SG	State Gazette
SKT	<i>Surat Keterangan Tanah</i> - letter of land clarification
SltnG	Sultanate Ground
SMS	Short Messages Service
SP	<i>Surat Perintah</i>
UDHR	Universal Declaration on Human Rights
UMR	<i>Upah Minimum Regional</i> – Provincial Minimum Wage
UN	United Nations
UNCHS	United Nations Centre for Human Settlements
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UPR	Universal Periodic Review

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Housing plays a central role in people's lives. Housing conditions will influence people's health, the relationship between members of the households as well as their social life.¹ A house cannot be seen as just a building but also as a home which serves as "territory, a means of identity and self-identity for its occupiers, and a social and cultural phenomenon."² The United Nations (UN) has also emphasised the importance of housing fulfilment for all people, especially for those within low-income brackets which often cannot access housing in the market; therefore, the UN suggested several methods to facilitate access to adequate housing for this group.³ Evidently problems related to housing, such as homelessness, eviction, and inadequate quality of houses, remains a persistent problem all over the world.⁴ Developed countries such as the United Kingdom⁵ and Canada⁶ also experience housing problems. The United States, as one of the wealthiest countries in the world, suffers high rates of housing insecurity and homelessness.⁷ However, people living in developing countries, mostly those in Asia and Africa as well as in South America, experience the worst living conditions, with inadequate houses that lack clean and safe drinking water as well as adequate sanitation.⁸

The right to adequate standard of living including the right to housing is considered crucial because the fulfilment of housing, as one of the basic material needs, is a precondition of a free and dignified life.⁹ The recognition of housing as a human right has become vigorous following the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Under

¹ David Clapham, *The Meaning of Housing: A Pathway Approach* (The Policy Press 2005).

² Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29 *Journal of Law and Society* 580. See also Kristen David Adams, 'Do We Need a Right to Housing' (2009) 9 *Nevada Law Journal* 275.

³ United Nations Human Settlement Programme, *Housing for All: The Challenges of Affordability, Accessibility and Sustainability* (UN-HABITAT 2008) <<https://unhabitat.org/books/housing-for-all-the-challenges-of-affordabilityaccessibility-and-sustainability/>>.

⁴ Un-Habitat, *The Challenge of Slums-Global Report on Human Settlements* (2003) <<http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=1156%5Cnhttp://www.loc.gov/catdir/toc/ecip045/2003013446.html>> accessed 10 December 2018.

⁵ Sarah Wallace, 'What Does the Right to Housing in the United Kingdom Entail and Can it be Said to be Fair and Non-discriminatory' in G.J. Vonk and A. Tollenaar (eds), *Homelessness and the Law: Constitution, Criminal Law and Human Rights* (Wolf Legal Publishers 2014).

⁶ Margot Young and Sophie Bender Johnston, 'A Tale of Two Rights: the Right to the City and a Right to Housing' in Julian Sidoli, Michel Vols and Marvin Kiehl (eds), *Regulating the City: Contemporary Urban Housing Law* (Eleven International Publishing 2017) 15-18.

⁷ K. R. Libal & S. Harding, *Human Rights Based in Community Practiced in the United States*, Springer, New York 2015, 40 and 51; see also the United Nations General Assembly (UNGA), 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik on his Mission to the United States of America' (12 February 2010) A/HRC/13/20/Add.4, para 79.

⁸ UN Habitat (n 3).

⁹ Jessie Hohmann, *The Right to Housing: Law, Concepts and Possibilities* (Hart Publishing 2014) 16-17; see also A. Eide, 'Adequate Standard of Living' in D. Moeckli et al (eds), *International Human Rights Law* (OUP 2018) 187-188.

the UDHR, the right to housing is part of the right to an adequate standard of living and, together with the right to health and clothing,¹⁰ are interpreted as basic human needs. Another primary protection of the right to housing can be found in various subsequent international instruments, such as in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹ Article 11 (1) ICESCR guarantees the recognition of everyone's right to an adequate standard of living for himself and family, including adequate food, clothing and housing and to the continuous improvement of living conditions.¹² The right to adequate housing in this instrument has been interpreted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 4 with a holistic conception in mind and highlighting the concept of adequacy.¹³ In addition, numerous other human rights instruments targeting specific groups have also recognised this right, for example, the Convention on the Elimination of all Forms of Discriminations against Women (CEDAW).¹⁴

Due to its extensive recognition and protection at an international level, the right to adequate housing has strong legal foundations both internationally and nationally.¹⁵ The ICESCR, that guarantees the right to housing in Article 11, has been ratified by 169 countries worldwide.¹⁶ Moreover, regional human rights instruments, such as in Europe, America and Africa, have also recognised this right.¹⁷ The fact that the majority of states in the world has ratified the treaties stipulating the right to housing, through either international or regional instruments, demonstrates a universal recognition of the existence of right to housing. Such strong recognition should make this right enforceable, particularly in the jurisdiction of the state parties to the international treaties mentioned above. In spite of this, the realisation of this right is still far from ideal.¹⁸

In contrast to its international legal recognition, the fulfilment of the right to housing is nevertheless underdeveloped. The UN estimated that in 2005 approximately 100 million people worldwide were without a place to live, of which 20-40 million lived in urban areas, and over 1 billion people were inadequately housed.¹⁹ A report from UN Habitat mentioned that as many as 1.6 billion people lacked adequate housing.²⁰ Both the UN Committee on Economic, Social

¹⁰ Universal Declaration of Human Rights (10 December 1948) UN Doc A/ 810 (UDHR) art 25.

¹¹ International Covenant on Economic, Social and Cultural Rights (adopted in 16 December 1966, entered into force 3 January 1976) 993 (p3) UNTS (ICESCR).

¹² *ibid* art 11 (1).

¹³ M. Kothari, 'Homelessness and the Right to Adequate Housing: Confronting Exclusion, Sustaining Change', in Y. Danieli *et al* (eds) *The Universal Declaration of Human Rights, Fifty years and Beyond* (Baywood Publishing Company Inc. 1999) 204-205.

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS, arts 11-12. See for details of the instruments and articles in Annex 1.

¹⁵ Padraic Kenna, *Housing Rights and Human Rights* (FEANTSA - European Federation of National Organizations working with the Homeless 2005) 11.

¹⁶ United Nations Treaty Series (UNTS), International Covenant on Economic, Social and Cultural Rights <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en#2> accessed 22 December 2018.

¹⁷ The recognition on the right to housing in these three regions will be discussed further in Chapter 2.

¹⁸ *ibid*, 1-2; see also UN Commission on Human Rights, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari' (3 March 2005) UN Doc. E/CN.4/2005/48, para 2.

¹⁹ UN Commission on Human Rights (n 18), paras 3 & 11.

²⁰ 'Up for Slum Dwellers- Transforming a Billion Lives Campaign Unveiled in Europe' (UN HABITAT, 2 July 2016) <<https://unhabitat.org/up-for-slum-dwellers-transforming-a-billion-lives-campaign-unveiled-in-europe>>

and Cultural Rights (CESCR) and the UN Special Rapporteur on the right to adequate housing acknowledge that every country, even the most developed, faces multiple problems regarding the fulfilment of housing rights.²¹ Although wealthy countries experience grave problems in offering housing opportunities to their population, developing countries greatly suffer more severe repercussions. Developing countries in Africa, Asia and Latin America experience a correlation between a fast growing population and an imminent threat of homelessness.²² Moreover, the problem of housing and homelessness is further exacerbated by the increasing impact of globalisation.²³ Experts have observed that global free market has caused inflation in some countries worst contributing to a general decline of minimum wage, and a wider gap between the rich and the poor.²⁴ Thus, the global free market seems to actually reduce the ability to afford a house, and to further increase the growing number of homeless people.²⁵

As a developing country and the fourth most populous country in the world, Indonesia faces many problems, primarily relating to poverty, urbanisation, availability of workplaces, land as well as housing. The National Statistical Agency (*Badan Pusat Statistik*) predicts that Indonesia's total population will reach 285 million people by 2025.²⁶ Poverty hits both urban and rural inhabitants. In 2012 about 11.6 per cent, or 28.6 million people, lived below the poverty line and 38 per cent of the population lived 1.5 times below the poverty line.²⁷ The poverty rate was successfully reduced to 9.8 per cent in 2018.²⁸

As economic and government activities are concentrated on Java, many citizens move to this island. Urbanisation has made Java's population denser than the populations of the rest of the country's islands. In addition, two-thirds of Indonesia's low-income population live on Java. As a result, housing, work, and land (both workable and residential) are becoming scarce. The housing problem is increasingly connected to the shortage of land for housing and the sharply increasing housing and land prices. The limited availability of residential areas due to urbanisation and the sharp population increase has made housing very problematic for many Indonesians.

In terms of the right to housing, the Indonesian Constitution and Indonesian human rights law, do protect this right. Besides the aforementioned instruments, several national and

accessed 13 December 2018; see also 'Affordable Housing Key for Development and Social Equality, UN Says on World Habitat Day' (UN News, 2 October 2017) <<https://news.un.org/en/story/2017/10/567552-affordable-housing-key-development-and-social-equality-un-says-world-habitat>> accessed 13 December 2018.

²¹ UN Committee on Economic, Social and Cultural Rights (UN CESCR), 'General Comment No. 4: Article 11 (1) (The Right to Adequate Housing)' (13 December 1991) UN Doc E/1992/23 (General Comment 4), para 4; see also UN Commission on Human Rights (n18) para 16.

²² United Nations Human Settlements Programme, *Housing for All: The Challenges of Affordability, Accessibility and Sustainability: The Experiences and Instruments from the Developing and Developed Worlds: A Synthesis Report*, (UN Habitat 2008) 1.

²³ Padraic Kenna, 'Globalization and Housing Rights' (2008) 15 *Indiana Journal of Global Legal Studies* 397, 403; see also UN Commission on Human Rights, *Preliminary Report: The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights* (15 June 2000) UN Doc E/CN.4/ Sub.2/2000/13, para 44.

²⁴ Kenna 2008 *ibid*, see also UN Commission on Human Rights, *ibid*.

²⁵ *ibid*.

²⁶ National Statistical Agency, 'Proyeksi Penduduk Menurut Provinsi, 2010-2035' *Badan Pusat Statistik* <<https://www.bps.go.id/statictable/2014/02/18/1274/proyeksi-penduduk-menurut-provinsi-2010---2035.html>> accessed 12 December 2018.

²⁷ *ibid*.

²⁸ *ibid*.

local programmes have been conducted to improve the housing conditions of poor settlements. Almost all of international human rights instruments that the Indonesian government has ratified, stipulate and protect the right to housing. Furthermore, Indonesian housing legislation, *i.e.* Law No. 1/2011 and No. 20/2011, make both national and local governments responsible for providing housing for its inhabitants, particularly for the low-income groups.²⁹

Nevertheless, numerous problems related to the human right to housing persist in Indonesia. For example, eviction, forced resettlement, and other issues related to housing are common practice. Based on a report provided by the UN Special Rapporteur on adequate housing following a visit to Indonesia, forced eviction and forced resettlement problems are prevalent.³⁰ The law (both national and provincial or municipal) authorises a local government to evict people from privately owned land, or from areas which are not intended for habitation according to the local master plan, such as river banks, green spaces or along the train tracks.³¹

Moreover, there are also groups of people who do not have houses or cannot access public housing provided by local governments. These groups cannot access housing market either. The houses sold in the market are mostly private housing of which the prices continue to rise,³² making it unaffordable for the low-income brackets to buy. This condition has forced poor people to settle in slums which sometimes are categorised as illegal. Living in illegal settlements has created additional burdens for these groups, since this type of settlements is prone to flooding and eviction.

Merely guaranteeing the right to housing in the national law is not enough to progressively fulfil the right. Clearly, there is a discrepancy between the purpose of the law and how that law is applied. In this regard, the concept of accountability as a constructive process might become one of the contingent factors which can lessen this discrepancy. Accountability related to the right to housing may assist to enhance the fulfilment of this human right if the concept is applied in the decision-making process as well as the implementation of housing related policies.

The term accountability, when used in non-legal literature, mostly relates to public administration, good governance, economics, such as management and accounting, politics, public policy and development programmes.³³ The legal research on accountability focuses more on the accountability mechanisms and procedure rather than accountability as continuous

²⁹ Law No. 1/2011 on Housing and Settlement Areas (*Undang-Undang No. 1/2011 tentang Perumahan dan Kawasan Pemukiman*) State Gazette (SG) 7/2011, Consideration para D, art 3, 13 (1), 14 (h & i), 15 (m & n); Law No. 20/2011 on Tower Blocks (*UU No 20/2011 tentang Rumah Susun*) SG 108/2011, Consideration para D, art 3(e).

³⁰ United Nations General Assembly (UNGA), 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Raquel Rolnik, Mission to Indonesia' (23 December 2013) UN Doc A/HRC/25/54/Add.1, para 55.

³¹ *ibid* para 58.

³² See for example Bank of Indonesia, 'Residential Property Survey Quarter IV-2018' Bank of Indonesia Website) 2 February 2019 <<https://www.bi.go.id/en/publikasi/survei/harga-propterti-primer/Pages/SHPR-Tw.IV-2018.aspx>> accessed 26 June 2019; Adisti Madella Elmanisa and others, 'Land Price Mapping of Jabodetabek, Indonesia' (2017) 4 (1) *Geoplanning: Journal of Geomatics and Planning* 53.

³³ See for example Mathias Koenig-Archibugi, 'Accountability in Transnational Relations: How Distinctive Is It? (2010) 33 *West European Politics* 1142; Melvin Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms' (2005) 28 *Public Performance and Management Review* 376; Angela Wood, 'Power Without Responsibility? Enhancing Learning and Policy Accountability at the International Monetary Fund' in Barry Carrin and Angela Wood (eds), *Accountability of the International Monetary Fund* (Ashgate 2005) 67-87.

process.³⁴

This study will be based on the notion of accountability that relates to human rights. Helen Potts' work relating to accountability (of the right to health) will be employed as a departure point.³⁵ Helen Potts suggests that as a constructive process, accountability requires continuous monitoring, accessible accountability mechanisms, availability of remedies, and participation.³⁶ These four elements will be employed to analyse the accountability concept related to the implementation of the right to adequate housing in Indonesia.

While much research on accountability in Indonesia has been conducted in non-legal areas,³⁷ research linking accountability to human rights, particularly for economic, social and cultural rights, has yet to be conducted. In the field of human rights, several researchers have investigated the relationship between accountability and the right to health either at an international level,³⁸ or by taking an example of a specific country's practice.³⁹ Considering the above-mentioned facts on the lack of research on accountability and its relationship with human rights, particularly with regard to the right to housing, this study endeavours to examine the role of accountability in the implementation of the right to housing by investigating a specific country's experience, *i.e.* Indonesia (see Section 1.2 for the research questions).

As Indonesia is a democratic country and bases itself on the rule of law,⁴⁰ it recognises accountability as a principle of good governance in all aspects of public services provided by the government.⁴¹ Based on Indonesian legislation, such as the 1945 Constitution (*Undang-Undang Dasar 1945*), the Law on Judicial Power (*Undang-Undang Kekuasaan Kehakiman*), the Law on Public Services (*Undang-Undang tentang Pelayanan Publik*), and the Law on Human Rights (*Undang-Undang Hak Asasi Manusia*), Indonesia enables accountability

³⁴ See for example Sandro Cabral and Maria-Fatima Santoz, 'Accountability Mechanisms in Public Services: Activating New Dynamics in a Prison System' (2018) 21 *International Public Management Journal* 795; Yi Zhang, *Advancing the Right to Health Care in China – Towards Accountability* (Intersentia 2018).

³⁵ Helen Potts, 'Accountability and the Right to the Highest Attainable Standard of Health' (University of Essex Human Rights Centre 2008) 13 <<http://repository.essex.ac.uk/9717/1/accountability-right-highest-attainable-standard-health.pdf>> accessed 14 December 2018.

³⁶ *ibid.*

³⁷ See for example Sebastian Eckardt, 'Political Accountability, Fiscal Conditions and Local Government Performance-Cross-Sectional Evidence from Indonesia' (2008) 28 *Public Administration and Development* 1; Rusdi Akbar, Robyn Pilcher, and Brian Perrin, 'Performance measurement in Indonesia: the Case of Local Government' (2012) 24 *Pacific Accounting Review* 262 <<https://doi.org/10.1108/01140581211283878>>; Akbar Rusdi, 'Performance Measurement and Accountability in Indonesian Local Government' (PhD thesis, Curtin University 2011) <https://espace.curtin.edu.au/bitstream/handle/20.500.11937/1910/186791_Akbar2012.pdf?sequence=2> accessed 14 December 2018; Teddy Jurnali & A.K. Siti-Nabiha, 'Performance Management System for Local Government: The Indonesian Experience' (2015) 16 *Global Business Review* 351; Tommy Firman, 'Decentralization Reform and Local Government Proliferation in Indonesia: Towards a Fragmentation of Regional Development' (2009) 21 *RURDS* 143.

³⁸ Potts 2008 (n 35); see also Helen Potts, 'Accountability and the Right to the Highest Attainable Standard of Health' in Paul Hunt and Tony Gray (eds), *Maternal Mortality, Human Rights and Accountability* (Routledge 2013); Benyamin Mason Meirer *et al.*, 'Accountability for the Human Right to Health through Treaty Monitoring: Human rights Treaty Bodies and the Influence of Concluding Observations' (2018) 13 *Global Public Health* 1158.

³⁹ Shengnan Qiu and Gillian Macnaughton, 'Mechanisms of Accountability for the Realization of the Right to Health in China' (2017) 19 *Health and Human Rights* 279; Zhang (n 34).

⁴⁰ The Constitution of the Republic of Indonesia of 1945 (Indonesian Constitution), art 1 (2) and (3). The Constitution has been amended four times in 1999, 2000, 2001 and 2002. The official translation of the Constitution is available at <http://peraturan.go.id/uud/nomor-tahun-1945.html>.

⁴¹ Law No. 25/2009 on Public Services (*Undang-Undang No. 25/2009 tentang Pelayanan Publik*) SG 112/2009, art 4.

mechanisms to challenge responsible parties into account for all adopted measures. Research has shown that accountability mechanisms such as judicial and quasi-judicial, administrative, political and social mechanisms exist in Indonesia. This study will not discuss political and social accountability mechanisms. It primarily focuses on the judicial, quasi-judicial and administrative accountability mechanisms relating to the right to housing. It will show not only that accountability mechanisms, as well as other elements of accountability, are available, but also will reveal that accountability in practice is currently deficient in Indonesia.

Following the analysis of all elements of accountability, this study offers an additional feature of accountability, *i.e.* enforcement mechanisms, that could fill the deficiency gap of accountability as a process. Helen Potts did not discuss enforcement mechanisms as a part of accountability in addition to compensation and remedies. In this regard, enforcing or executing decisions stemming from accountability mechanisms is still problematic in Indonesia. For example, the Indonesian Supreme Court, in the case of *Kepala Dinas DKI Jakarta v Sukarna et al*, ruled that the Jakartan government has to pay compensation to the amount 4.7 billion Indonesian Rupiah (IDR) to the people affected by the local government's policy, which⁴² has not been paid up until present. The affected communities have suffered both physically and mentally, as they have been waiting for three years since the Court's decision, not to mention the time and money spent following the eviction in 1997 which left them homeless. Within this period no compensation or alternative accommodation was provided for the affected communities. This study argues that the procedure following an accountability mechanism should also be considered; that states are obliged to establish the accountability mechanisms as well as the enforcement measures to guarantee that people will be able to receive and to enjoy the result of the process.

As stated in the previous paragraphs, Indonesia is currently experiencing a housing backlog that was already reaching 15 million households in 2014 and was predicted to increase by 0.7-1 million households per year.⁴³ In the same year, 34 million people still lived in slums and illegal settlements.⁴⁴ With regard to housing needs, the national government aimed to build 1 million houses per year from 2015⁴⁵ and targeted 100 per cent adequate sanitation, 0 per cent slums as well as 100 per cent access to clean and safe drinking water in 2019 under the 100-0-100 programme.⁴⁶ Given the fact that evictions, and limited access to housing are rampant, and that millions of people are still without shelter, the quantitative targets mentioned above of the

⁴² Mahkamah Agung Republik Indonesia (MARI), *Kepala Dinas DKI Jakarta v Sukarna et al*, Reg No. 700/PK.pdt/2014, 19 May 2015.

⁴³ N. Tri Utomo, 'Affordable Housing Finance Policies on Indonesia' 28–29 May 2014 (World Bank) <<http://siteresources.worldbank.org>> accessed 10 October 2016; see also D. Widyoko, 'Good Governance and Provision of Affordable Housing in DKI Jakarta-Indonesia: Case Study' in M. Sohail (ed.), *Partnering to Combat Corruption series* (WEDC, Loughborough University 2007) 1-68.

⁴⁴ 'Poverty in Indonesia: Around 34.4 Million Indonesians Live in Slums' (Indonesia-investment.com) <<https://www.indonesia-investments.com/news/todays-headlines/poverty-in-indonesia-around-34.4-million-indonesians-live-in-slums/item2476?>> accessed 10 October 2016.

⁴⁵ One Million Houses Programme was launched on April 2015 by President Joko Widodo. It is categorised as one of the National Strategic Projects stipulated in Presidential Regulation No. 3/2016 as amended by Presidential Regulation No. 58/2017 and No. 56/2018 on the Acceleration of the Implementation of National Strategic Programmes (*Peraturan Presiden No. 3/2016 sebagaimana telah di ubah dengan Peraturan Presiden No. 58/2017 dan No. 56/2018 tentang Percepatan Pelaksanaan Proyek Strategi Nasional - PSN*).

⁴⁶ The program of 100-0-100 is based on the 6 priority targets of the development on the field of housing and settlement enshrined in the National Medium-Term Development Planning 2015-2019.

government are, to a certain extent, unfeasible.⁴⁷ Therefore, it is crucial to analyse the progress of these programmes and other housing policies from both an accountability and human rights perspective underlined by Indonesia's international human rights obligations.

This study concurs with the argument that international human rights obligations of a state can be extended to local governments.⁴⁸ Moreover, local governments are located closer to the people than the national government, meaning that they can better perceive what the best interests are of their inhabitants. Indonesian housing law recognises the responsibility of local governments in housing affairs. Therefore, the implementation of the right to housing by local governments, and to what extent local governments are accountable for their actions relating to the right to housing, will also be examined in this study. Due to the vast territory of Indonesia, this research will not be able to investigate the practices of all local governments. Thus, this study limits its focus on four specific cities: Jakarta, Surabaya, Yogyakarta and Surakarta, all located on the densely populated island of Java. The ratio behind the selection of these cities is provided in the section on methodology (Section 1.3).

1.2 RESEARCH QUESTIONS

The primary and overarching research question of the project is:

What is the role of accountability as a process in the context of the right to adequate housing, and how can it improve the realisation of the right to adequate housing in Indonesia?

In order to answer the main question, this book examines nine sets of sub-questions. These questions are:

1. What does the right to adequate housing entail in the international and regional context? What are the core obligations enshrined in it? Which obligations are progressive in nature and which are immediate obligations? How is the right to housing regulated and interpreted by the UN bodies as well as the regional bodies?
2. To what extent has the right to adequate housing, enshrined at the international level, been adopted and regulated in Indonesia? To what extent do Indonesian policies on

⁴⁷ The government has struggled to search for state expenditure to fulfil the budget for this programme (See the further discussion in Chapter 4 *infra*). Since 2016, the target to develop one million houses has been missed. However, in the end of 2018, the targets has been fulfilled which most of the houses were built by private developers. However, the success of building houses should then ideally be followed with a proper distribution and monitoring in order to ensure that the lower incomes can afford such houses. See 'Satu Juta Rumah: Pasokan Rumah MBR Terlampai, Janji Pun Terlunasi' *Indonesia.go.id* (28 December 2018) <<https://www.indonesia.go.id/narasi/indonesia-dalam-angka/ekonomi/pasokan-rumah-mbr-terlampai-janji-pun-terlunasi>> accessed 26 June 2019.

⁴⁸ UNGA, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Leilani Farha,' (22 December 2014) A/HRC/28/62; Martha F Davis, 'Cities, Human Rights and Accountability: The United States Experience' in Barbara Oomen, Martha F Davis, Michele Grigolo (eds), *Global Urban Justice: The Rise of Human Rights Cities* (Cambridge University Press 2016) 23-43; Michele Grigolo, 'Local Governments and Human Rights: Some Critical Reflections' (2017) 49 *Columbia Human Rights Law Review* 67; Conrad Mugoya Bosire, 'Local Government and Human Rights: Building Institutional Links for the Effective Protection and Realisation of Human Rights in Africa' (2011) 11 *African Human Rights Law Journal* 147.

housing mirror its international obligations?

3. What are the challenges faced by the Indonesian local governments in implementing the right to adequate housing?
4. Does the right to adequate housing as implemented by the Indonesian local governments comply with international human rights obligations?
5. What is the meaning of accountability as a constructive and continuous process? What are accountability mechanisms and what is accountability as a process? What are the elements of “constructive” accountability as a process?
6. What is the relationship between accountability as a process and human rights implementation? What is the analytical framework of accountability as a process in human rights? Do the elements of accountability as a process exist in international human rights law, in particular regarding the right to adequate housing?
7. How does Indonesia perceive the concept of accountability? Do all elements of accountability exist and are they implemented? What are the existing mechanisms in Indonesia to hold the public authorities to account for an infringement of the right to housing?
8. Are the generally recognised elements of accountability as a process sufficient to guarantee the fulfilment of the right to adequate housing in Indonesia? Should enforcement as an element of accountability be added for a better realisation of the rights?
9. Would improving accountability as a constructive and continuous process have an effect on the implementation of the right to housing in Indonesia? And if so, which recommendations can be made?

1.3 RESEARCH METHODOLOGY

In answering the aforementioned research question, this study combines three methods of legal research: a doctrinal, a vertical “top-down” comparative method, and empirical research. These three methods will be explained in the following sub-sections. Furthermore, this section will also elaborate on the problems and limitations of the methodology used in this research. Since not all methods were used in every chapter, sub-section 1.3.4 will provide a description on which methods are employed in each chapter.

1.3.1 Doctrinal or normative legal method

The doctrinal research adopted in this research is the normative method which collects, interprets, and analyses normative, and authoritative sources related to the subject of research.⁴⁹

⁴⁹ Marck van Hoecke, ‘Legal Doctrine: Which Method(s) for What Kind of Discipline?’ in Marck van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 1-44; Jan M. Smits, Redefining Normative legal Science: Towards an Argumentative Discipline’ in Fons Coomans *et al* (eds), *Methods of Human Rights Research* (Intersentia 2009) 45-58; Terry Hutchinson, ‘Doctrinal Research: Researching the Jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 7-33; Suzanne Egan, ‘The Doctrinal Approach in International Human Rights Law Scholarship’ in Lee McConnell and Rhona Smith (eds), *Research Method in Human Rights* (Routledge 2018) 24-41.

At the first stage, relevant materials were collected through a library based research focusing on reading and analysis of the primary (*e.g.* legislation and case law) and secondary materials (*e.g.* commentaries on the law, and legal journals). To provide further context and achieve a comprehensive understanding on the role of accountability in realising human rights, a literature review of academic books as well as academic journals relating to accountability and human rights, focusing on the right to housing was conducted. The result stemming from this approach will provide a general theoretical perspective on accountability relating to human rights.

The doctrinal approach is crucial in researching the laws and regulations laid down in international, regional and national human rights law, as well as case law at the international and national levels. In addition to hard law, soft law from the UN human rights committees such as reports or concluding observations on Indonesia, and state reports with regard to specific treaties or conventions, as well as the universal periodic review of Indonesia will be reviewed.

In addition to the concluding observations on Indonesia, this study also used concluding observations related to other countries. These were consulted to evaluate how the committee gives further shape to states' obligations concerning the right to housing. These documents were selected on the basis of keywords such as the right to housing, obligation to protect, obligation to respect, obligation to fulfil, housing policy, settlement, discrimination, place of residence and evictions, through a number of search engines, which are Refworld (<https://www.refworld.org>), Bayefsky (<http://www.bayefsky>), and Google. The search results were cross reference to the official website of the CESCR, to locate the general comments. The documents used in this research were, then, selected on the bases of countries which have experienced persisting problems and challenges in fulfilling the right to adequate housing of their inhabitants. Based on these consideration, around 116 documents were studied. The author is aware that the concluding observations consulted for this study might not cover all the relevant situations related to housing problems. Given the fact that the conditions in each country vary greatly, the recommendations to each state are usually different; therefore, one recommendation might not be applicable to other states. However, they can give an indication of the content of the right and the states's obligations as interpreted by the Committee in its practice with regard to the measures states adopt to implement them.

Moreover, as already indicated, Helen Potts work on accountability will serve as a general basis of theoretical reference to provide further insight into the legal doctrinal approach to accountability. To support the use of Potts work, this thesis benefits from Mark Bovens' work on accountability as a mechanism which then becomes an element of a broader accountability as a constructive process suggested by Potts.

In analysing the normative content of the right to adequate housing, the present author did not attempt to interpret Article 11 ICESCR herself, and hence did not rely on the interpretation methods enshrined in the Vienna Convention on the Law of Treaties 1969.⁵⁰ Instead, the present author relied on the interpretation already provided by the Committee in General Comment Nos 4 and 7 and through its concluding observations as well as other documents, such as the ECOSOC resolutions, and the the Basic Principles and Guidelines on Development-based

⁵⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS 1155 (p.331) arts 31-33.

Evictions and Displacement. The author also used the secondary resources such as literature on the right to housing to reflect how the other authors perceive the content of the right.

1.3.2 Vertical “top-down” comparative method⁵¹

This method is typically employed to assess the incorporation (vertical diffusion) of international norms, regulations and concepts in a national legal system.⁵² It clarifies the interpretation of the elements of housing rights enshrined in the international instruments, both hard and soft law, and how these are adopted at Indonesia’s domestic level. To assess the compatibility of Indonesia’s practices with regard to practices concerning this right, this study employs the authoritative interpretation on the right to adequate housing and states’ obligations provided by the CESCR in its General Comments No. 3, 4, 7 and No. 20.⁵³ This method will also be applied in examining the reception of accountability concepts, elements and norms that first emerged at the international level to promote good governance, at the national level. Moreover, this method is beneficial to examine the position of international law particularly the human rights law in Indonesia, and whether the international human rights norms can be directly invoked at the domestic courts.

1.3.3 Empirical research

This study also adopts an empirical method aiming to create arguments that are founded in evidence-based human rights research, which is currently lacking in human rights studies.⁵⁴ The empirical research was conducted by setting out the approach and the study areas as explained in the following paragraphs.

1.3.3.1 Approach and rationale for cities selection

⁵¹ The growing literature on comparative international law includes the differentiation between vertical and horizontal dimension of comparative law. See for example Mathias Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018) pp 289-301; Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds), *International Comparative Law* (OUP 2018); Roberto Scarciglia, ‘Comparative Methodology and Pluralism in Legal Comparison in Global Age’ 2015 (6) Beijing Law Review 42. This method is similar to a method called “comparative-international domestic (human rights) law” that encompasses both international and domestic law. See Samantha Besson, “Comparative Law and Human Rights” in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1222-1249.

⁵² Darren Rosembaum, ‘Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods’ (2007) 45 Columbia Journal of Transnational Law 759; Aleksandar Momirov and Andria Naudé Fourie, ‘Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law’ (2009) 02 Erasmus Law Review 291; Mathias Siems, ‘New Directions in Comparative Law’ in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 853-874.

⁵³ UN Committee of Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 3 The Nature of State Parties’ Obligations (Art.2 Para. 1 of the Covenant)’ (14 December 1990) UN Doc E/1991/23; CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23; CESCR, ‘General Comment No. 7: The right to adequate housing (Art.11.1): Forced Evictions’ (20 May 1997) UN Doc E/1998/22; CESCR, ‘General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2 July 2009) UN Doc E/C.12/GC/20.

⁵⁴ Hans-Otto Sano and Hatla Thelle, ‘The Need for Evidence-based Human Rights Research’ in Fons Coomans et al (eds), *Methods of Human Rights Research* (Intersentia 2009) 91-109.

The empirical data in the form of qualitative, quantitative or administrative data is indeed useful to illustrate and analyse the implementation of human rights in a particular country.⁵⁵ This study uses a qualitative rather than a quantitative approach. To achieve such purposes, the present author employed a single country study,⁵⁶ in this case Indonesia.

In order to obtain more comparable data, this study limits the research area to a selection of Indonesian cities which have aspects relevant to the fulfilment of housing rights in common, in particular, the population density, risks of and exposure to natural disasters, and problems of forced evictions. The study is also limited to Java as housing problems in this overpopulated island are increasing as indicated in Section 1.1. Based on the similarity criteria set out and the island limit, the selection resulted in four cities: Jakarta, Surabaya, Yogyakarta, and Surakarta.

1.3.3.2 Data collection and analysis

In addition to that the data collection conducted through a library research, interviews were conducted with public authorities responsible for housing matters. This study used an elite-based interview method that refers to a process of data collection by interviewing elites/actors who have played a role in shaping a particular policy or situation,⁵⁷ in this case the implementation of the right to housing in Indonesia.⁵⁸ These interviews are used to supplement the data collected from the library-based research and to obtain a deeper understanding of practices at the local level. Moreover, this method of obtaining data can add an interesting point to this study, as the elite-based interview is still underexploited in human rights research.⁵⁹ The elite-based interview can serve as a powerful instrument in addressing governance and human rights accountability because the interviewees may occupy influential and important position within the organisations that are under study.⁶⁰ Thus being a well-qualified person, they may provide information concerning how governance and accountability work or fail in practice. Furthermore, such interviews can provide some information on constraints that the elites face, which could be useful to develop a solution for a particular problem,⁶¹ particularly in relation to accountability in human rights.

This study opted for in-depth interviews in the four cities, to be held with stakeholders responsible for housing policies in each of the cities. Moreover, interviews were also held with stakeholders at the national level as well as with the authorities from the monitoring bodies. In addition to the core stakeholders in housing policies, this study selected actors from NGO's, lawyers and knowledgeable and experienced persons on the topic. The interviewees were

⁵⁵ *ibid* 91.

⁵⁶ Todd Landman, 'Social Science Methods and Human Rights' in Fons Coomans *et al* (eds), *Methods of Human Rights Research* (Intersentia 2009) 19-44.

⁵⁷ David Richards, 'Elite Interviewing: Approaches and Pitfalls' (1996) 16 (3) *Politics* 199.

⁵⁸ Although it is still debatable on the qualification of elites in this regard, this study uses a broader definition which target elites as actors who occupies a position that is responsible for the adoption of the housing policies, the implementation of the right to housing as well as supervision of such implementation. See Christopher Lamont, *Research Methods in International Relations* (Sage 2015) 84.

⁵⁹ Sano and Thelle (n 54) 101.

⁶⁰ *ibid* 100.

⁶¹ Rhona Smith and Lorna Smith, 'Qualitative Methods' in Lee McConnell and Rhona Smith (eds), *Research Method in Human Rights* (Routledge 2018) 70-93; see also Suzanne Egan, 'The Doctrinal Approach in International Human Rights Law Scholarship' in Lee McConnell and Rhona Smith (eds), *Research Method in Human Rights* (Routledge 2018) 70-93.

categorised as set out in Table 1.1.

Table 1.1 Categories of interviewees

Categories of interviewees
National government officials
Local government officials
Supervisory bodies
Representatives of non-governmental organisations
Lawyers
Others

Within these categories, references to interviewees might differ from city to city. The differences are mostly caused by the different names of institutions responsible for housing and the availability of the stakeholders in the cities. The difference in institution is possible due to the regional autonomy that gives mandate to local government to autonomously arrange their affairs.

Based on the categories mentioned above and preliminary research conducted by the present author, the stakeholders involved in the interviews are set out in Table 1.2. The interviewees were a representative of the institutions mentioned in Table 1.2. In total, there were 30 interviewees. These interviewees were chosen because their work significantly influences the process of making, implementing and monitoring the housing-related policies. The monitoring bodies are relevant here because the bodies deal with the examination of cases relating to human rights maladministration practices of the government agencies in providing services for citizens.

Table 1.2 The list of interviewees

Categories of Interviewees	National	Cities			
		Jakarta	Surabaya	Yogyakarta	Surakarta
National government officials	Ministry of Public Works and Housing				
Local government officials		Department of Housing and Building (currently, the department's name was recently changed into Department of Public	The Department of Land and Building	1. Department of Social Affairs 2. Department of Settlement and regional Infrastructure	1. Department of Community empowerment 2. Department of Public Works

		Housing and Settlements)			
Supervisory bodies	1. The Ombudsman of the Republic of Indonesia 2. The National Human Rights Commission		Ombudsman Representative	Yogyakarta Local Ombudsman	
Representatives of non-governmental organisations		1. Urban Poor Linkage 2. Ciliwung Merdeka	Paguyuban Strenkali Surabaya	Arsitek Komunitas	Solo Kota Kita
Lawyers		Jakarta Legal Aid Institute	Surabaya Legal Aid Institute	Yogyakarta Legal Aid Institute	
Others	1. BAPPENAS 2. Perum Perumnas (Housing State-owned enterprise)	An assistance of the Governor of Jakarta	The former head of department of Land and Building		The former of the Head of Setabelan District

For the purpose of interviews, a general list of questions was developed for three categories i.e. government officials, monitoring bodies and NGOs. The questions were then developed to suit the other category such as experts and lawyers. However, when it came to each interviewee, the general questions were amended to suit the role and the position of the actors. Such amendments enabled the interviewers to extract other information that might be relevant to this research.⁶² The general questions included the following topics:⁶³

- i) the Indonesian housing policy; history and the current policy on providing housing for the low income groups;
- ii) changes in housing policies following the Indonesia ratification to the ICESCR;
- iii) the implementation of the international obligations at local level;

⁶² This type of interview method is called semi-structured interviews which allows the interviewer to deviate from the planned structure and allows for cross-referencing between each interviewees. The semi-structured interviews enable the interviewer to broaden the scope of interview in a more in-depth questions on particular issues that be of interest to the interviewer. See Lamont (n 58); Svend Brinkmann, 'Unstructured and Semi-Structured Interviewing' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (OUP 2014).

⁶³ The detailed questions list is enclosed to this study in Annex IV.

- iv) challenges in implementing housing policies;
- v) the available accountability mechanism and how the officials are held to account;
- vi) the public participation and supervisory function by communities and NGOs.

Short field research was performed in three phases to collect materials and conduct interviews.⁶⁴ All interviews were conducted in person with verbal informed consent of the interviewees and recorded with their permission.⁶⁵ On two occasions, the interviewees requested not to be recorded, particularly with regard to sensitive issues in their departments.⁶⁶ All of the interviews have been transcribed word by word (*verbatim* transcription).⁶⁷

In analysing the data, the primary research maintained the category of interviewees in order to search for similarities and differences between the categories of questions, such as housing policies, challenges, local governments' response to challenges and perception on accountability. While the similarities were treated as general facts applicable in all cities, the differences were treated as specialities of the cities in question or reflecting a unique perception of the interviewees. In all interviews, the researcher crosschecked the data brought forward by interviewees, such as statistical data, local and national legislation and policy briefs. If there are similarities in the answers between interviews as well as with other data, it is likely that the information is valid. If no coherence was found, it is likely that the result mirrored the opinion of the interviewees and could not be used to generalise the findings.

1.3.3.3 Data Protection and Privacy

The General Data Protection Regulation (GDPR) was adopted and applied in all European Union member states in 2018. The University of Groningen is obliged to implement this regulation to all research conducted within the university. The regulation aims to guarantee transparency and emphasis on the rights of the research participants. The regulation requires that personal data used in research is gathered, processed and secured under a legitimate procedure. Moreover, it also aims to build ethical best practices for scientific research.

One of the methods used in this study that should comply with the regulation is interviews. The interviews used in this research were conducted in 2016, 2017 and 2018. When gathering, processing, and storing data, this study has tried as far as possible to comply with the requirements enshrined in the regulation.

The interviews were conducted and transcribed in Indonesian, and no English version is available. Pursuant to the GDPR, the results of the interviews (both the recording and the transcripts) are securely stored in the University of Groningen (RUG) storage. The data will be deleted from the storage after five years following the publication of this book. In addition, the use of the interviewees' names, institution, and information gathered from the interviews were based on the informed consent of the interviewees. Several interviewees also stated their

⁶⁴ Data collection took place in September-November 2016; February-March 2018 and September-October 2018.

⁶⁵ The informed consent was requested before each interviews started.

⁶⁶ In this situations, either the name of the interviewees or the issues concerned was not be revealed in this study.

⁶⁷ The interviews were conducted in Bahasa Indonesia and so the transcriptions reflect this. Unfortunately no English version of the transcripts is available due to lack of time and financial restraints to translate into English. The transcript were conducted by the primary researcher and three student assistants, under the supervision and guidance of the primary researcher.

concern that the interviews should not be disclosed, particularly with regard to cases concerning accountable actors. In this situation, when discussing actors that can be held accountable through an accountability mechanism, the interviewees' names and institutions are kept anonymous.

1.3.4 Problems and Limitations

As in any other research, this study has several limitations in terms of methodology. Firstly, most of the legislation is in Bahasa Indonesian. Rarely are official translations to English of national legislation provided. The author found the official translation of the Constitution on the Government's website (peraturan.go.id), yet the translation of other legislation is not available. To tackle this situation, the author searched for unofficial translations provided by a United Nations body: the International Labour Organisation or national institutions, such as KOMNAS HAM. Whenever an English version is not available, the author provides the translation herself. In some cases the author chooses to use the Indonesian terms, particularly when the translation results in 'awkward' English terms. This barrier also persists in researching the Indonesian domestic courts' rulings.

Secondly, obstacles in searching for the local legislation and domestic courts' rulings exist. Many local regulations were gathered from the internal search engines of the municipalities' websites, namely *Jaringan Dokumentasi dan Informasi Hukum (JDIH)*, in which all local regulations (ideally) can be downloaded. However, not all files of the local legislation in the four cities are available, and therefore, the author contacted the interviewees to access the relevant legislation. As for the courts' rulings, the researcher tried to contact the lawyers of the cases to access the rulings if they cannot be retrieved from the Supreme Court's website. Although the researcher has tried this approach, a few decisions of the first instance courts still cannot be gathered and therefore the analysis was merely based on the available rulings.

Thirdly, there are the limits experienced in conducting the empirical research. Not all the interviewees who were contacted responded to the request or were available during the interview period. A few did not reply to the request, and some had a tight schedule due to their official work, thus only had a limited time to be interviewed. This situation influenced the interview results. The researcher has tried to minimise the disruption by: (1) continuing on another day, (2) rescheduling the interview in the second field research or (3) following up the interview by phone or email. The latter particularly could be done by sending in other types of data, such as legislation or legal cases. Overall, a field research with elite-based interviews should have been conducted during a longer period of time to avoid such hassles, particularly the complex bureaucracy, as well as available time slots of the interviewees.

Fourthly, the analysis of this study is limited only to the areas covered in this research. Although housing policies are adopted at the national level, the implementation and implication of the policies might vary. Therefore, this analysis cannot be used as a generalisation and should be interpreted primarily in the context of the specific cities under this study. Nevertheless, this study can be used as a departure point for a more general analysis on the specific issues identified in this study.

1.3.4 The three methods mirrored in the study

The three methods discussed in the previous sections (1.3.2 – 1.3.3) were used throughout this study. The three methods could be used as a single method in a chapter or as a mixed method. The usage of the three methods in this study can be seen in detailed in the following paragraphs.

For delineating the normative contents of the right to housing, as well as the states' obligations with regard to the right to adequate housing both at international level (in Chapter 2) and national level (in Chapter 4), this study adopts the doctrinal/normative research method. Primary legal resources at the two levels were investigated and analysed. The large extent of this research at the international level is based on the concepts and elements of the right to an adequate standard of living derived from Article 11 of the ICESCR and its authoritative interpretation mainly provided in the General Comment No. 4 on the Right to Adequate Housing No. 7 on Forced Eviction and No. 20 on Non-discrimination.

A combination of the normative analysis and the vertical top-down comparative method was conducted to assess the national legislation stipulating the right to adequate housing that implements international law, such as the Indonesian Constitution of 1945, the Human Rights Law No. 39/1999 as well as Housing Laws No.1/2011 and No. 20/2011 as well as other national and local legislation relating to housing and settlements. The housing policies and programmes adopted by the national and local governments are also examined.

The normative analysis is also used in Chapter 3 to examine the applicability of international law at the national level and how Indonesia approaches this matter. For this purpose, the Indonesian Constitution and national legislation on International Agreements No 24/2000 were investigated.

Following the normative analysis, this study moves on to investigating the Indonesian local government's practices in implementing their international obligations relating to the right to housing in Chapters 5-9. For these chapters, the empirical method was used, particularly in the form of interviews. Nevertheless, the normative analysis is used also in these chapters, particularly when analysing the local legislation. The author used 16 local legislations relating to the implementation of the right to adequate housing. All of these legislations are in Indonesian, and therefore the translations are provided by the author.

The keywords employed to search national and local regulations with regard to housing are for example: housing (*perumahan*), settlements (*pemukiman*), slums (*kumuh*), riverbanks (*pinggir sungai*), illegal (*ilegal*), poor (*miskin*), poverty (*kemiskinan*), rented tower blocks – rented public housing (*rumah susun sederhana sewa-rusunawa*), railway tracks (*rel kereta api*), eviction (*penggusuran/gusur*), city planning (*tata kota*). Nevertheless, this list is not exhaustive and more terms have been used in searching and locating the local legislation and local policies relating to housing.

The analysis of the states' obligation, that will be presented in Chapters 6, 7 and 8, is based on interviews and library research. The focus of Chapter 6 is the obligation to provide security of tenure, which is closely related to land tenure. This reveals that the land tenure problem causes the insecurity of tenure for people living in illegal settlements in urban areas. Moreover, this study investigates the practice of local governments in limiting access to public housing for non-residents, which might be inconsistent with the immediate nature of the

obligation to adopt non-discriminatory housing policies (Chapter 7). Another immediate obligation that should be fulfilled by governments is to refrain from conducting evictions. Chapter 8 examines whether evictions carried out by the Indonesian government are in compliance with the principle of reasonableness and proportionality under the international human rights law.

In the following chapters: 9, 10 and 11, both doctrinal and empirical approaches are adopted. Chapters 9 and 10 employ doctrinal methods and literature studies with regard to accountability from a variety of disciplines. In addition, these chapters use a number of publications on accountability provided by the international organisations such as the World Bank, the International Monetary Fund, and the Asian Development Bank. These institutions published a considerable volume of work on the accountability from a governance and public administration perspective in developing countries.

To better understand the application of accountability as a process in Indonesia, Chapter 11 examines existing accountability mechanisms in Indonesia as well as their practical implementation. The data on the application was obtained through two methods. The first method is searching online for cases related to housing. The verdicts of all Indonesian courts can be found on an online platform provided by the Indonesian Supreme Court, *i.e.*, <<http://putusan.mahkamahagung.go.id/>>. The platform is relatively recent, therefore, not all judgments are available. However, this official directory of cases is the most reliable source of Indonesian Courts' judgements. Cases were collected by firstly using keywords, such as eviction and forced evictions (*penggusuran* and *penggusuran paksa*). The second method is contacting and interviewing lawyers, representatives from quasi-judicial bodies, officials from the housing sector and non-governmental organisations (NGOs). This method is used whenever the court's rulings were not available in the Supreme Court's website.

1.4 STRUCTURE OF THE STUDY

The book is divided into five parts. Part I provides the theoretical framework for the research. Therefore, it deals with the position of international law at the domestic level as well as the international and national legal framework on the right to housing and legal obligations therein. Part II deals with the explorative framework of the study which results from fieldwork in the four cities of the research. It provides characteristics and problems on the right to housing and its implementation in each of the cities. Part III investigates the common problems experienced by the cities in implementing the right to housing and relates them to judicial accountability mechanisms at the national level. It thus examines the "compliance of international human rights obligations by the Indonesian local governments." Moreover, Part III proposes "promoting accountability as a process to fulfil the right to adequate housing." Finally, "conclusions and recommendations" are provided.

Part I is composed of three chapters (Chapters 2, 3 and 4) on the theoretical and normative framework of the right to housing at international and domestic law. It also discusses the rationale on how international norms are applicable and justiciable at the domestic level. This part of the study answers the first and the second research questions on the nature of the states' obligations with regard to the right to adequate housing, and to the extent of the Indonesian

government is adopting this right at the domestic level and complying with its international obligations on the right to housing.

Chapter 2 assesses the content and core obligations of the right to housing as interpreted by the Committee on Economic, Social and Cultural Rights in its General Comments and by the regional courts. Chapter 3 explains how international norms, particularly human rights norms derived from international treaties, are applicable to the Indonesian domestic legal system. It also provides a recent interpretation by the Indonesian Constitutional Court concerning the binding nature of international norms by a ratification instrument. Chapter 4 examines the legal framework of the right to adequate housing at the national and local levels under the decentralisation adhered to by Indonesia and identifies the interplay between various actors and stakeholders with regard to the implementation of the right to adequate housing. These three chapters (Chapters 2 to 4) remain general and explanatory in nature.

Part II uses the parameters set out in part I to examine the local government's obligations and practices in realising the right to housing of its inhabitants. Part II answers the third and fourth research questions on the challenges faced by the governments and on the compliance achieved by the authorities. Chapter 5 explores the housing regulations and policies in the four Indonesian cities as well as the possible challenges and drawbacks experienced by local governments. The drawbacks are examined critically in the next three chapters (Chapters 6, 7 and 8). Chapter 6 is dedicated to analysing the lack of urban land available for human settlements due to the persistence of land registration under Indonesia's land tenure system. Chapter 7 investigates the indirect discriminatory practices of the local governments with regard to access to public housing for poor internal migrants. Chapter 8 addresses the forced evictions that often occur on the grounds of public interests such as development projects, with no compensation and remedies provided for the affected community.

Part III of this study, consisting of Chapters 9, 10 and 11, moves on to the concept of accountability as a process that can be employed to advance the human rights implementation, particularly of the right to adequate housing. Chapter 9 answers the fifth research question on the concept of accountability. It also explains elements of accountability that should be part of a continuous and constructive process. It clarifies the meaning of accountability as a mechanism, accountability mechanisms and accountability as a process. More specifically, it discusses accountability as a process for the realisation of human rights. Chapter 10 relates accountability to human rights realisation, which answers the sixth question. This chapter provides an analytical framework of accountability as a process for the realisation of human rights based on the elements that have been discussed in Chapter 9. Moreover, Chapter 10 investigates the available elements of accountability as a process for the right to adequate housing at the international level. Chapter 11 answers the research questions 7, 8 and 9 by undertaking a thorough examination on accountability in Indonesia as to whether all elements of accountability exist in the Indonesian system and are put into effect. This chapter proposes a new element of accountability, i.e. enforcement measure as pivotal to guaranteeing the right to adequate housing.

Finally, the last chapter of this study provides conclusions and recommendations. This chapter summarises the findings of each chapter and presents conclusions on the aforementioned research questions. Moreover, the conclusion emphasises the answers to the primary research question as well as sub-questions, highlights the contributions and the limits

of this study, and suggests topics for further research in the field of the right to housing. The recommendations target all stakeholders that play crucial roles in advancing accountability in their work to further realise the right to adequate housing in a non-discriminatory manner in Indonesia.

PART I

The Legal Framework on the Right to Adequate Housing

CHAPTER 2

THE LEGAL FRAMEWORK OF THE RIGHT TO ADEQUATE HOUSING AT THE INTERNATIONAL AND REGIONAL LEVEL

2.1 INTRODUCTION

Part one of this book discusses the legal recognition of the right to housing at both the international (Chapter 2) and the domestic level (Chapters 3, 4, and 5). As affirmed and discussed in Chapter 1, the right to housing is vital to achieve the adequate standard of living as enshrined in Article 11 of the ICESCR.

It is undeniable that the right to adequate housing as formulated in the ICESCR has been recognised worldwide.¹ States have also adopted this right under their domestic law and have also committed to “ensure access for all to adequate, safe and affordable housing and basic services and upgrade slums” by 2030 under the Sustainable Development Goal No. 11.² However, its effective implementation is still lacking, leaving the right to housing still in “rhetoric commitments” phase.³ Adopting this right into domestic law does not mean that states have solved the problem of housing and homelessness.⁴ The mere recognition of this right is not sufficient to guarantee the affordability of housing in a country. Further commitments and efforts are needed to fully realise this right.

The crucial step for effectively implementing the right is to ensure that the international obligations enshrined therein are progressively taken into account. Similar to other social, economic and cultural rights, the right to housing obliges states to adopt several measures, such as legislative, administrative, financial, educational and social measures.⁵

This chapter aims to answer questions posed in the previous chapter: What does the right to adequate housing entail from a legal perspective? What are the core obligations enshrined in it? Which obligations are progressive and which are immediate? How is the right to housing

¹ Until 2019, 169 states have ratified the ICESCR. See UNTS website <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en#2> accessed 14 May 2019.

² United Nations, ‘Goal 11: Make Cities Inclusive, Safe, Resilient and Sustainable’ (United Nations) <<https://www.un.org/sustainabledevelopment/cities/>> accessed 20 December 2018. The SDGs are voluntary commitment of states, however, are not legally binding. Although SDGs are related to many international human rights treaties, States do not have legal obligations to transform SDGs into their domestic legal system. See the discussion in Rakhyun E Kim, “The Nexus between International Law and the Sustainable Development Goals” (2016) 25 *Review of European, Comparative International Law* 15; Frank Biermann, Norichika Kanie, Rakhyun E Kim, ‘Global Governance by Goal-setting: the Novel Approach of the UN Sustainable Development Goals’ (2017) 26-27 *Current Opinion in Environmental Sustainability* 26.

³ United Nations General Assembly (UNGA), ‘Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (4 August 2015) UN. Doc A/70/270, para 35.

⁴ Kristen David Adams, ‘Do We Need a Right to Housing?’ (2009) 9 *Nevada Law Journal* 275, 294-298.

⁵ UN Committee of Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 3 The Nature of State Parties’ Obligations (Art 2 para 1 of the Covenant)’ (14 December 1990) UN Doc E/1991/23, para 7 (General Comment 3); see also Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003).

regulated and interpreted by the UN bodies as well as the regional bodies?

To address these questions, a thorough investigation on the legal instruments and scholarly literature on the right to adequate housing. The primary legal materials used in this chapter are the ICESCR, particularly Article 11 and its authoritative interpretations stipulated in General Comments related to the right to adequate housing, such as General Comment No. 3, 4, and 7 as well as No. 20. Several cases before regional courts and the UN treaty bodies will also be used to illustrate the interpretation of this right. These cases, however, will not be assessed in a detailed manner. Rather, these cases are of interest to outline the practice in implementing the right to housing. In addition, secondary materials such as reports of the UN bodies and academic works in the field of housing are discussed.

This second chapter is divided into six sections. Section 2.2 defines the concepts of home and housing, as these two concepts appear to be interchangeable; yet, they are not the same. Therefore, this section explains how the two terms will be used in the thesis. Section 2.3 offers the description of how the right to housing is recognised within the international treaties as well as regional human rights instruments. Section 2.4 moves on to providing an analysis of the contents of the right to adequate housing based on the authoritative interpretation by the CESCR. This section also discusses the practice of the UN human rights bodies as well as regional bodies in interpreting the right to adequate housing. Section 2.5 provides a discussion on the protection against evictions as one of the immediate obligations related to this right. Furthermore, Section 2.6 elaborates on the ICESCR member states' core obligations based on the normative contents interpreted by several bodies. Section 2.7 ends Chapter 2 with preliminary remarks on the right to adequate housing.

2.2. THE CONCEPTS OF HOME AND HOUSING

The terms of home and housing will be used frequently in this thesis. Although they have significantly different meaning, in the discussion on the right to housing the two terms are sometimes interchangeable. Many studies in psychology, sociology, semantics, culture, have been conducted to determine the meaning of home. However, the results of these studies do not seem to be in conformity with its legal meaning of home and housing.⁶ Therefore, a clarification is necessary to understand their legal connotations, particularly in the perspective of the human right to housing.

To construct the meaning of home, one must start with etymology. The Cambridge Advanced English Dictionary defines “home” in various ways: home as a place to live, home as a property, and home as a place where a person belongs to.⁷ A house is also defined as a building that people, usually one family, live in.⁸ Thus, the dictionary has differentiated between the meaning of house as a building and home as a place where a person feels to belong to. B.

⁶ Lorna Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge’ (2002) 29 *Journal of Law and Society* 580, 588.

⁷ Cambridge Advance Dictionary, “the house, apartment, etc., where you live, especially with your family; a house, apartment, etc., when it is considered as property that you can buy or sell; someone's or something's place of origin, or the place where a person feels they belong”

⁸ *ibid.*

Edgar and J. Doherty divide the concept of homes into three domains:⁹ 1) having a house (or space) that is adequate to satisfy the needs of individuals and his/her family (the so called physical domain); 2) maintaining privacy and having social relations (social domain); 3) enjoying exclusive possession and legal rights (legal domain).

Furthermore, Benjamin Barros divides home as a legal issue into two broad concepts.¹⁰ The first concept relates to a statement “a man’s home is his castle,” which means that home gives protection to the people residing in it, especially if it is related to the issue of privacy, security and freedom or autonomy. This doctrine establishes home as a private area, which is resistant to public interference,¹¹ of course with some limitations based on local law.¹² The second concept concerns the possession of a home by a person in a particular place. In this regard, a home is seen as a property owned by someone.

With respect to the meaning of a “house”, it is usually treated as units of accommodation which can be described by size, amenities, form, or other standards.¹³ A house is only seen as a building which provide shelter for people who reside in it. A house as a building should meet numerous standards imposed by governments. Such standards indicate the quality of houses, such as “adequate,” “satisfactory.”¹⁴ However, a house can be more than a shelter, especially if it involves social aspects, such as emotions, relations, and behaviour,¹⁵ between those who possess a house and those who do not have. This relationship between a house and a home, in a broader sense, can exist in those two conditions.

As discussed above, both a house and a home have their own characteristics. A house as a place and as a property; yet, can also be a place to live with an emphasis on the emotional relations between inhabitants. It seems that the concepts of house and home are actually related to each other. However, home is an independent concept that implies more than a permanent or temporary house which is the human dimension of life and the relations people may have in life.¹⁶ Home is a broader concept than house, home includes the relation between the members or persons who reside in it as well the condition of the surroundings (social aspects in its surrounding). This relation can be symbolised by factor X representing the social, physiological and cultural values.¹⁷ Thus, home = Housing + X.¹⁸

In the human rights perspective the two concepts are often related. This relation can be seen in numerous interpretations by the human rights bodies and courts. The Committee of

⁹ B. Edgar and J. Doherty, *Women and Homelessness in Europe: Pathways, Services and Experiences* (The Policy Press 2001).

¹⁰ D. Benjamin Barros, ‘Home as a Legal Concept’ (2006) 46 Santa Clara Law Review 255; D. Benjamin Barros, ‘Legal Questions for the Psychology of Home’ (2009) 83 Tulane Law Review 645; D. Benjamin Barros, ‘Legal Questions for the Psychology of Home’ in Asifa Begum (ed), *Law and Justice: Psychology Role-Play* (The Icfai University Press 2009) 176-193.

¹¹ Barros 2009, 179.

¹² Emphasis from the author, for example officials or police officers are allowed to enter a home and seek for a criminal with a justified reason and if they fulfil the requirements provided by the law.

¹³ See David Clapham, *The Meaning of Housing: A Pathways Approach* (The Policy Press 2005) 7-35.

¹⁴ *ibid* 119-126.

¹⁵ *ibid*, 136.

¹⁶ Padraic Kenna, ‘Applying a Human Rights Based Approach to Homelessness, From Theory To Practice’ in Samara Jones (Ed), *Mean Streets: A Report on the Criminalisation of Homelessness in Europe* (Foundation Abbe Pierre; FEANTSA; Housing Rights Watch 2013).

¹⁷ Lorna Fox, *Conceptualizing Home: Theories, Laws and Policies* (Hart Publishing 2007).

¹⁸ *ibid*.

Economic, Social and Cultural Rights (CESCR) suggests that a house has a broader meaning than “four walls and one roof.”¹⁹ Therefore, the right to housing should be seen as the right to live in an adequate shelter that offers security, peace and dignity.²⁰ The word adequate shelter includes “adequate privacy, adequate space, adequate security, ...”²¹

The words “privacy and security” are often linked to the right to respect of one’s home. For example, Article 8 (2) of the European Convention of Human Rights, which protects the home from interference of public authorities,²² refers the concept of home as a protector of people who reside in it. Furthermore, the European Court of Human Rights (ECtHR) ruled that a home is a place to live, which establishes a sufficient and continuous link between the people and the house to maintain their identities and traditions regardless the lawfulness of the occupation or ownership.²³

It is worth to notice that it is not only the CESCR and ECtHR that relate the two concepts, but also other bodies such as the Inter-American Court of Human Rights and the African Commission on Human and People’s Rights. Nevertheless, their interpretations will be discussed in detail in Section 2.7.2. The interpretations of the human rights bodies mentioned above serve as an example of the meaning of a home and a house. Based on the discussion on the meaning of a home and a house, one can understand that these concepts are, to a certain extent, non-identical.

In terms of human rights, housing and home can be interpreted in a similar notion. Particularly, the protection offered in the right to protection of home has been interpreted to include the protection to the right to housing and *vice versa*. The interpretation of the international and regional human rights instruments on this regard will be discussed in detail in Sections 2.4 and 2.7. Therefore, this interrelated interpretation between the right to housing and the right to respect for home is in line with the underlying concepts of the right to housing discussed above; *i.e.* security, privacy, and socioemotional relation.²⁴ In addition, the UN Special Rapporteur on the Right to Adequate Housing emphasises that “the human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community to live in peace and dignity.”²⁵

This thesis follows the relationship between the meaning of home and housing established by the UN bodies and institutions mentioned above. The interpretation of these bodies offers

¹⁹ CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23 (General Comment 4) para 7.

²⁰ *ibid.*

²¹ *ibid.*

²² Council of Europe, The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No. 005, article 8 (2) which states that there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society.

²³ European Court of Human Rights (ECtHR), *Winterstein and Others v France*, Application No. 27013/07, (17 October 2013) paras 69, 70. See also the previous judgements of the Court in *Buckley v The United Kingdom*, Application No 20348/92 (29 September 1996) paras 52-54, *Prokopovitch v Russia*, Application No. 58255/00 (18 November 2004) para 36, also in *Yordanova and others v Bulgaria*, Application No. 25446/06 (24 April 2012) para 103.

²⁴ Lorna Fox, 2002 (n 17); see also Antoine Buyse, ‘String Attached: the Concept of “Home” in the Case Law of the European Court of Human Rights’ (2006) 3 European Human Rights Law Review 294.

²⁵ UN Commission on Human Rights (ComHR), ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mr. Miloon Kothari, Submitted Pursuant to Commission Resolution 2000/9’ (25 January 2001) UN Doc E/CN.4/2001/51 para 8.

clarity on the meaning of the right to housing, as enshrined in the human rights instruments. Therefore, when discussing the right to housing, the two concepts of home and house are inseparable. This means that the right to housing examined in this thesis does not only entail to the right to a house as a shelter but also a house as a home reflecting the residing's ways of life which include social and cultural values.

2.3 HOUSING AS HUMAN RIGHT: A LEGAL FRAMEWORK

2.3.1 The right to adequate housing in international human rights instruments

Housing as a human right is enshrined in numerous international human rights instruments. The right to housing can be found in general instruments and in treaties addressing specific groups. This sub section provides a brief discussion on these instruments.

2.3.1.1 *The Universal Declaration on Human Rights (UDHR)*

The first document guaranteeing human rights is the Universal Declaration of Human Rights 1948 (hereinafter referred to as UDHR).²⁶ Although international instruments addressing specific human rights were adopted far before the UDHR; e.g. on the slave trade and the rights of religious and ethnic minorities which could be traced back to the seventeenth century, the UDHR was the most comprehensive text in its time. The advent of articles enshrined in the UDHR dates from the end of the First World War.²⁷ Its significant impact is clearly recognised by the international community, where its influence is growing more extensive in terms of adoption of its norms and principles in domestic legal systems as well as recognition by employing UDHR norms as the basis of judgments in the regional or international courts.²⁸

The UDHR is also the first document which recognises the right to housing at the international level. Although as a United Nations General Assembly (UNGA) resolution, it is not legally binding in itself, it “would apply to all states and would have a great authority of the United Nations”.²⁹ Considering its major support by states, to this end the UDHR has served its function as a “catalyst of national and international legislation,”³⁰ as the contents of many states’ constitutions or national laws reflect the values of the Declaration. It has become a part of international customary law,³¹ which binds the international community.

²⁶ Universal Declaration on Human Rights (adopted 10 December 1948) UN Doc A/RES/3/217 A.

²⁷ William A. Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Preparatory*, Volume I (October 1946 to November 1947) (CUP 2013) xxii.

²⁸ Egon Schwelb, ‘The Influence of the Universal Declaration of Human Rights on International and National Law’ (1959) 53 *Proceedings of the American Society of International Law*, 217; Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995) 25 *Georgia Journal of International and Comparative Law* 287.

²⁹ John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry (Transnational Publishers 1984) 64.

³⁰ *ibid.*

³¹ Melissa Robbins, ‘Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement’ (2005) 35 *California Western International Law Journal* 275, 280. See also Anne Lowe, ‘Customary International Law and International Human Rights Law: A Proposal for the Expansion of the Alien Tort Statute’ (2013) 23 *Indiana International and Comparative Law Review* 523.

The formulation of articles in the UDHR is influenced by the Four Freedoms addressed by President Roosevelt in 1941.³² The UDHR recognises housing as an element of the fulfilment of the right to an adequate standard of living.³³ Regarding the right to housing, Article 25 (1) UDHR stipulates that:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

The drafting Committee based the wording of Article 25 on the third freedom: freedom from want that “means economic understandings which will secure to every nation a healthy peace time life for its inhabitants – everywhere in the world.”³⁴ At that time, particularly in the United States, this freedom was translated predominantly into the right to work, food and housing and the right to social security.³⁵ The Drafting Committee seemed to follow this translation.

In the first draft of the International Bill of Rights, the Committee proposed the right to housing in Article 42 that “every one has the right to good food and housing and to live in surroundings that are pleasant and healthy.”³⁶ This draft shows that the right to housing was recognised as an independent right. During the first drafting session, the preliminary draft contained a wide range of economic rights. The United States suggested numerous changes to the articles in the draft. One of its proposals was to change Article 38, on the right to good working conditions, into the “right to economic security.”³⁷ The introduced change stated that:³⁸

“Everyone has a right to a decent standard of living [...] and to protection against loss of income and account of disability, unemployment, or old age. It is the duty of states to undertake measures [...]; and assure adequate food, housing, [...] necessary to the well-being of the people.”

Although, the proposal recognised housing, in a broader sense, as economic security, it did not change Article 42 on the right to food and housing as enshrined in the preliminary draft. In the draft prepared by Professor Cassin, a decent standard of living came with the right of workers (Article 37), and housing was connected to the right to protect the health of individuals which could be achieved by promoting “public hygiene and the betterment of housing condition [...] (Article 39).³⁹

Following session one, the discussion of the drafters in session two, after having considered several suggestions and having combined some articles, led to the conclusion that housing

³² Asbjorn Eide, ‘Article 25’ in Asbjorn Eide *et al*, *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 390-391.

³³ Jessie Hohmann, *The Right to Housing: Law, Concepts and Possibilities* (Hart Publishing 2014) 16.

³⁴ Speech of Franklin D Roosevelt, ‘Message to Congress 1941’ (*Franklin D Roosevelt Library and Museum*) <<https://fdrlibrary.org/documents/356632/390886/readingcopy.pdf/42234a77-8127-4015-95af-bcf831db311d>> accessed 21 January 2019.

³⁵ Eide 1992 (n 32).

³⁶ Com HR, ‘Drafting Committee: Draft Outline of International Bill of Rights (Prepared by the Division of Human Rights)’ (4 June 1947) UN Doc. E/CN.4/AC.1/3.

³⁷ Com HR, ‘Drafting Committee: United States Suggestions for Redrafts of Certain Articles in the Draft Outline E/CN.4/AC.1/3’ (11 June 1947) UN Doc. E/CN.4/AC.1/8.

³⁸ *ibid* art 38.

³⁹ Com HR, ‘Drafting Committee on an International Bill of Human Rights: First Session: Report of the Drafting Committee to the Commission on Human Rights’ (1 July 1947) UN Doc E/CN.4/21, Annex D, arts 37 and 39.

should be included in Article 25. The draft article stated:⁴⁰

“Every one without distinction as to economic and social conditions has the right to the preservation of his health through the highest standard of food, clothing, housing and medical care which the resources of the state or community can provide [...].”

In this draft, the French delegation suggested that “[...] everyone without distinction as to economic and social conditions had the right to protection of his health by all appropriate means relating to food, clothing, housing and medical care [...]”.⁴¹ Additionally, the United States proposed that “everyone has the right to a standard of living necessary for health and general well-being, including [...] the opportunity to obtain adequate food, clothing, housing and medical care.”⁴²

Based on the discussion of the drafters of the UDHR, it can be concluded that Article 25 underwent several changes prior to its final adoption. It is evident that in its inception, the right to housing, together with the right to food, was not designed to be an independent human right, but instead as elements of the right to live in a healthy environment. In the final text of the UDHR, the right to housing has become part of a broader right to a standard of adequate living. However, in its development in the subsequent human rights treaties, that will also be discussed in this sub-section, the right to housing has received much attention and has been interpreted as a distinct right that to be developed further in the UN treaty system.

Article 25 UDHR does not further elaborate on the meaning of “adequate.” The adequacy of the right to a standard of living should be interpreted in conformity with the purpose of the article, which is “adequate for the health and well-being of himself and of his family.”⁴³ Nevertheless, the standards for what constitute as adequate cannot be stated in general terms, as adequacy depends very much on the condition or society where people live.⁴⁴ The least minimum threshold of ‘adequate’ is that no one should deprive themselves of their fundamental freedoms only to satisfy their needs.⁴⁵ Furthermore, the UDHR suggests that the realisation of all rights guaranteed in UDHR can be achieved through national efforts and international co-operation in conformity with the aims of the United Nations and resources of each state.⁴⁶

Considering its non-binding nature,⁴⁷ it is still debatable whether this instrument has already formulated states’ obligation to fulfil human rights obligations, including, the right to adequate housing. However, the role of the UDHR is intrinsic in providing guidance to the establishment of a more legally binding instrument recognising the right to adequate housing. The UDHR can be considered as a seed of human rights recognition which has grown and spread around the world. The UDHR not only serves as one of the most influential documents legally, but also

⁴⁰ Com HR, ‘Drafting Committee Second Session: Report of the Drafting Committee to the Commission on Human Rights’ (21 May 1948) UN Doc. E/CN.4/95, page 11.

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Asbjorn Eide, ‘Adequate Standard of Living’ in D. Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (OUP 2018) 187-188.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ UDHR (n 26) arts 22 & 28.

⁴⁷ Asbjorn Eide and Gudmundur Alfredsson, ‘Introduction’ in Asbjorn Eide *et al* (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992).

philosophically, politically and to other human rights instruments across the world.⁴⁸

2.3.1.2 *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*

The ICESCR⁴⁹ is one of the subsequently adopted documents following the UDHR. Under this treaty, the right to adequate housing is stipulated more comprehensively⁵⁰ and could be considered to be the clearest legal provision on the right to housing, compared to other instruments containing this right, due to an authoritative interpretation on the right to housing provided by the CESCR.⁵¹ Article 11 (1) guarantees the recognition of everyone's right "[...] to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. [...]"⁵²

This covenant is a binding international instrument; therefore, it creates international legal obligations upon the states ratifying it. States have to comply with all of the obligations enshrined in this Covenant. The obligations relating to the right to housing are qualified by the general obligations of the other economic, social and cultural (ESC) rights. These obligations are enshrined Article 2, which requires states to "take appropriate steps to achieving progressively the full realisation of all human rights by using the maximum available resources both individually and through international assistance and cooperation".⁵³

The obligations related to the right to housing are intended not only to provide (build) houses for the people, but also to adopt "appropriate steps", which could mean subsidies, tax exemptions, loans, providing budgeting for public houses, and any other measures. The measures that may categorise as steps towards the fulfilment of the right to adequate housing have been discussed in numerous documents prior to the adoption of the Covenant.⁵⁴ All the steps taken by states toward the realisation should be taken in order to achieve "progressively" the full enjoyment or realisation of all rights enshrined in the Covenant, including the right to housing. Retrogressive measures toward these rights are generally prohibited; however, to a certain extent, are allowed if the measures are based on "the most careful consideration" and "fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".⁵⁵ Yet, the regressive nature of governments' policies should also be analysed on the basis of states' performances as a whole, to include constraints faced by states, such as limited resources,⁵⁶ and human rights limitations

⁴⁸ Hohmann (n 33)17.

⁴⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS 993 (ICESCR).

⁵⁰ Miloon Kothari, 'Homelessness and the Right to Adequate Housing: Confronting Exclusion, Sustaining Change' in Yael Danieli *et al* (eds), *The Universal Declaration of Human Rights, Fifty years and Beyond* (Baywood Publishing Company Inc. 1999) 201-217, 204.

⁵¹ Hohmann (n 33) 16.

⁵² ICESCR (n 49) art 11 (1).

⁵³ *ibid* Article 2 (1).

⁵⁴ See for example United Nations General Assembly (UNGA), 'Annotations on the Text of the Draft International Covenants on Human Rights' (1 July 1955) UN Doc A/2929, Chapter VIII para 31; ComHR, 'Summary Record of the Two Hundred and Eighteenth Meeting of the Commission on Human Rights' (22 May 1951) UN Doc E/CN.4/SR.218, p 23; ComHR, 'Summary Record of the Two Hundred and Third Meeting' (24 April 1951) UN Doc E/CN.4/SR.203 in the Statement of Mr. Morosov (a delegation from the Soviet Union) at 6.

⁵⁵ General Comment 3 (n 5) para 9.

⁵⁶ *ibid*.

committed by states within the scope of Article 4 ICESCR.

The UN human rights instruments established a system to monitor and control the states' compliance with all human rights instruments which they have ratified. Thus, UN human rights monitoring bodies have been established to tackle these tasks. The body responsible for monitoring states' implementation of their ICESCR obligations is the UN Economic and Social Council (ECOSOC).⁵⁷ The ICESCR text does not provide for the creation of a specialised independent supervisory body. Moreover, ECOSOC is not an independent body as it consists of state representatives and is already burdened with diverse task and agenda.⁵⁸

The ECOSOC, consequently, established a Committee on Economic, Social and Cultural Rights (hereinafter referred to as CESCR) which is responsible for supervising the implementation of states parties' international obligations. Thus, the ECOSOC delegated its competence clarified in Part IV of the ICESCR.⁵⁹ In its initial establishment, The ICESCR received criticism for being a subsidiary body of the ECOSOC and not being a treaty-defined body, despite the fact that it successfully adopted General Comments and examined state reports as any other human rights body did.⁶⁰ In 2007, the Human Rights Council sought to rectify the legal status of the CESCR in order to place the Committee on the same level as other human rights treaty bodies.⁶¹ The CESCR, however, always act in total independence like any other bodies, and further efforts to strengthen its legal position must be led by the parties to the ICESCR.⁶² The adoption of the Optional Protocol (OP) to the ICESCR that entered into force in 2013, gave the power to the CESCR to receive individual communications, inter-state communications as well as conduct inquiry procedure.⁶³ This new mandate arguably proves that the Committee indeed has been given the same status as other UN human rights monitoring bodies.

The CESCR has adopted numerous General Comments (GCs) containing authoritative interpretations of the various articles enshrined in the ICESCR. These documents do not have a legally binding nature; nevertheless it does not mean that they do not have legal significance.⁶⁴ Some of the GCs are considered to have weight due to their interpretation of the ICESCR and can be regarded as a quasi-legislative in nature.⁶⁵ For example the General Comment No 4 on the right to adequate housing sets out in reasonable detail the content of the right to housing

⁵⁷ See art 16 paras 1 and 2 of the ICESCR.

⁵⁸ Malcolm Langford and Jeff A. King, 'Committee on Economic, Social and Cultural Rights: Past, Present and Future' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 478.

⁵⁹ UN ECOSOC, 'Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights,' (28 May 1985) Resolution 1985/17.

⁶⁰ Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2013) 110-111.

⁶¹ Langford and King (n 58); see also Human Rights Council (HRC), 'Rectification of the Legal Status of the Committee on Economic, Social and Cultural Rights' (30 March 2007) Res 4/7.

⁶² Odello and Seatzu (n 60).

⁶³ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008 enter into force 5 May 2013) UNTS vol 2922 (Optional Protocol to the ICESCR) arts 1, 10 and 11 respectively.

⁶⁴ Urfan Khaliq and Robin Churchill, 'The Protection of Economic and Social Rights: a Particular Challenge?' in Hellen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 199-260, 205.

⁶⁵ *ibid* 206.

and states' obligations enshrined therein.⁶⁶

Moreover, the CESCR has adopted General Comment No. 7 on Forced Evictions (GC 7).⁶⁷ Together with GC No. 3 on the Nature of States Parties' Obligations, these General Comments will further be discussed in Section 2.4, 2.5, and 2.6 on the normative content for the right to housing, protection against eviction and minimum core obligations of the right to housing.

2.3.1.3 The international conventions containing the right to housing addressed specific themes and groups

Besides the two previous instruments regulating the right to housing, other international treaties or conventions also address the right to housing. Unlike the ICESCR, that targets all people, these instruments target specific groups such as women, children, migrant workers, persons with disabilities and minority groups. These instruments are:

2.3.1.3.1 Convention on the Elimination of all Forms of Discriminations against Women (CEDAW)

The CEDAW⁶⁸ recognises the right of women in rural areas to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications (Article 14 para 2 (h)). This article apparently only gives a limited protection for women in rural areas. Then the question might arise, whether this convention excludes the protection of women in urban areas. Experience shows that women, both in rural and urban, suffer from discrimination in accessing their rights, including the right to housing.⁶⁹

The original draft of this article⁷⁰ and its negotiation process of this article suggest that the intention of the drafters was to provide equal treatment in the field of economic, social and cultural rights between men and women.⁷¹ The preparatory works did not specify the differentiation between rural and urban women.⁷² The drafters' intention seemed to be that the article would be applicable to all women regardless of status or place of residence.⁷³ However,

⁶⁶ *ibid* 206.

⁶⁷ CESCR, 'General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions' (20 May 1997) UN Doc E/1998/22 (General Comment 7).

⁶⁸ Convention on the Elimination of all Forms of Discriminations against Women (adopted 18 December 1979, entered into force 3 September 1981) United Nations Treaty Series Vol. 1249.

⁶⁹ Human Rights Council (HRC), 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik' (26 December 2011) A/HRC/19/53; UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), 'General Recommendation No. 34 (2016) on the Rights of Rural Women' (7 March 2016) UN Doc CEDAW/G/CG/34 (General Recommendation 34), paras 3-6.

⁷⁰ The original draft of article 14 was article 10 in the early draft.

⁷¹ See for example Commission on the Status of Women (CSW), 'International Instruments Relating to the Status of Women: Draft Convention on the Elimination of all Forms of Discriminations Against Women' (21 June 1976) UN Doc E/CN.6/591, para 149, Annexes, particularly annex 3; see also UNGA, 'Draft Convention on the Elimination of all Forms of Discriminations Against Women: Report of the Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination against Women : addendum' (1 December 1978) UN Doc A/C.3/33/L.47/Add 1, para 3.

⁷² UN Doc E/CN.6/591 (21 June 1976) *ibid*.

⁷³ *ibid*, see the draft of art 14, para 118.

there was a proposal from several countries⁷⁴ that requested states to draw specific attention to the protection of women in rural or underdeveloped areas, since two-thirds of the female population at that time lived in underdeveloped areas, and continued to experience systematic and persistent barriers to the full enjoyment of their human rights.⁷⁵ Therefore, the drafters chose “rural” as the wording of the article, to not only show the emphasis of protection, but also that rural women have been considered as part of the development agenda.⁷⁶ In states’ reports and concluding observations, the CEDAW Committee has constructed the word “rural” relating to both geographic location and exclusion from services and opportunities experienced by women.⁷⁷ Therefore, this provision does not mean only to protect women in rural areas but also all women who experience exclusions and discriminations in accessing public services.⁷⁸

2.3.1.3.2 *Convention on the Rights of the Child (CRC)*

The CRC⁷⁹ recognises the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development (Article 27 para 1). The issue of housing is mentioned in Article 27 (3) which obliges state parties to take appropriate measures in accordance with their national conditions and within their means in assisting parents and those who are responsible to implement the right to a standard of living. Furthermore, states also have to provide material assistance and support programmes, especially if it is related to nutrition, clothing and housing. Based on the wording of Article 27, the primary responsibility to secure the living conditions necessary for children’s development is the parents, or guardians of the child.⁸⁰ This responsibility is of course within, or limited to, the parents’ abilities and financial capabilities.⁸¹

However, the realisation of this provision might only be a dream for some children. The

⁷⁴ These countries include Egypt, Indonesia, India, Iran, Pakistan, Thailand and the United States.

⁷⁵ CSW, ‘International Instruments Relating to the Status of Women: Draft Convention on the Elimination of Discriminations Against Women’ (28 September 1976) UN Doc E/CN.6/L.687; Lars Adam Rehof, *Guide to Travaux Préparatoires of the United Nations Convention on Discrimination against Women* (Brill Publisher 1993).

⁷⁶ See for example UNGA Res 3523 (XXX) (15 December 1975); UNGA Res 62/136 (18 December 2007) UN Doc A/RES/62/136; UNGA Res 3524 (XXX) (15 December 1975); see also the commentary on article 14 in Marsha A. Freeman *et al* (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2013) 357-385, see also the discussion on the adoption of article 14 in Lisa R. Pruitt, ‘Deconstructing CEDAW’s Article 14: Naming and Explaining Rural Difference’ (2011) 17 William and Mary Journal of Women and the Law 347.

⁷⁷ CEDAW Committee, ‘Concluding Observations Morocco’ UN Doc A/58/38 (SUPP No. 38), paras 170, 171, 176; CEDAW Committee, ‘Concluding Observations Albania’ (16 December 2010) UN Doc CEDAW/C/ALB/CO/3, paras 36 and 37; CEDAW Committee, ‘Concluding Comments Ireland’ (22 July 2005) UN Doc CEDAW/C/IRL/CO/4-5, paras 22, 27, 34, 35, 36.

⁷⁸ See UNGA, ‘United Nations Decade for Women: Equality, Development and Peace: Draft Convention on the Elimination against Women, Report of the Secretary-General’ (12 October 1977) UN Doc A/32/218/Add 1, para 44; see also Pruitt (n 76).

⁷⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series Vol 1577.

⁸⁰ Asbjorn Eide, ‘Article 27 The Right to an Adequate Standard of Living’ in André Alen, Johan Vande Lanotte, *et al.* (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2006) 1.

⁸¹ *ibid.*

inadequate conditions of shelters has been seen as a pervasive violation of children's rights.⁸² Worldwide, there are more children in want of shelter and sanitation than those deprived of food, education and health care.⁸³ While little attention has been paid to the issue of adequate housing for children, it has been proven that it is an influential element in development of children both mentally and physically. Research on the influence of housing on children has shown that living in inadequate housing may result in structural failures, such as collapse and fire hazards, health problems and domestic violence.⁸⁴ The poor shelter conditions in slum areas, such as poor sanitation, lack of ventilation, overcrowding and inadequate natural light, cause chronic diseases among the children and adults alike.⁸⁵ In addition, homeless kids risk the possibility of being exposed to violent acts, such as rape and trafficking.

In cases where parents are unable to secure the living conditions of children, states, then, have responsibilities to assist parents, or others responsible, to enable them in providing the necessary elements for children, including providing the materials needed; such as food, clothing and housing.⁸⁶ It can be concluded that states also have a responsibility, after parents or others who are responsible. This does not mean that states may act passively in this regard; in contrast, states hold "two tiers responsibilities"⁸⁷ to ensure that parents can facilitate children's need and states should provide assistance for parents in case of parents incapability.

2.3.2.3.3 *International Convention on the Elimination of All forms of Racial Discrimination (ICERD)*

Article 5 (e) of the ICERD⁸⁸ lists ESC rights, including the right to housing (e. iii), which should be equally implemented for all persons without any discrimination on the basis of race colour, or nationality or ethnic origin.⁸⁹ In many countries, such as in the United Kingdom and in the United States⁹⁰, discrimination on the basis of race in accessing housing continues to

⁸² UNICEF, 'The State of the World's Children 2012: Children in Urban World' (UNICEF 2012) 14 <http://www.unicef.org/sowc2012/pdfs/SOWC%202012-Main%20Report_EN_13Mar2012.pdf> accessed 2 January 2017.

⁸³ *ibid*.

⁸⁴ See the discussion on the problems faced by homeless children in Panos Vostanis and Stuart Cumella (eds), *Homeless Children: Problems and Needs* (Jessica Kingsley Publishers 1999) chapter III, IV, VI and IX. The more current research shows that overcrowding and unsanitary conditions could transmit diseases, for example pneumonia and diarrhea, these two are known as killers to children younger than 5 years old worldwide. In addition outbreaks of measles, tuberculosis and other vaccine-preventable diseases are also more frequent in slum areas. For more details see report of the UNICEF, *The State of the World's Children 2012: Children in Urban World*, (UNICEF 2012) pp 5, 14-16.

⁸⁵ R.R. Habib *et al*, 'Housing Quality and Ill Health in a Disadvantaged Urban Community' (2009) 123 *Journal of Public Health* 174.

⁸⁶ Eide 2006 (n 80) 2.

⁸⁷ *ibid* 2 para 5.

⁸⁸ International Convention on the Elimination of All forms of Racial Discrimination (adopted 21 December 1965 entered into force 4 January 1969) United Nations Treaties Series Vol. 660 (ICERD).

⁸⁹ *ibid* art 5.

⁹⁰ See the discussion on the racial discrimination on housing in these two countries in Xavier de Sousa Briggs, *Geography of Opportunity: Race and Housing Choice in Metropolitan America* (Brookings Institution Press 2005) and Harris Beider, *Race, Housing and Community: Perspective on Policies and Practices* (Jhon willey and Sons Publisher 2012). In addition for current practices of the US and its compliance to the UN CERD, see also shadow report prepared by Megan Haberle of the Poverty & Race Research Action Council and Jorge Soto of the National Fair Housing Alliance on the Discrimination and Segregation on Housing, 'Continuing Lack of Progress in United States Compliance with the International Convention on the Elimination of All Forms of

exist, and is faced by minorities in these communities. Racial discrimination can be carried out by government, housing agencies or individuals (e.g. agents). The discrimination committed by housing agencies is often in the form of giving different information or differential preference directed to the different groups such as black or white people.⁹¹ Thus, under international human rights law, governments are obliged to fully comply with the obligation to respect, protect and fulfil human rights, as these obligations are also mandated under the ICERD.⁹²

2.3.2.3.4 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW).

In addition to reaffirming and complementing the existing human rights instruments, the ICMW convention places and ensures the rights of migrant workers and their families.⁹³ This convention ensures that the registered migrant workers and migrant workers in a regular situation share the same rights with the nationals of the employment state. One of the equality of treatment's guarantees is "access to housing, including social housing schemes, and protection against exploitation in respect of rents".⁹⁴ Under this convention, states are also obliged not to prevent an employer to establish housing or other cultural facilities for the migrant workers.

2.3.2.3.5 Convention on the Rights of People with Disabilities (CRPD)

For people with disabilities, adequate housing remains a major issue. The main problem for them is accessibility.⁹⁵ This especially concerns housing facilities and neighbourhoods, which should be designed in a disability-friendly manner. The traditional design, which does not include disabled people in decision-making, has created an exclusionary group from the rest of the community. Thus, the CRPD aims to ensure that people with disabilities can achieve full inclusiveness in their community to maximise their role and ability in participating in the society.⁹⁶

The CRPD requires States to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, including their rights

Racial Discrimination, Report to the UN Committee on the Elimination of Racial Discrimination July 2014 as a response to the 2013 Periodic Report of the United States of America'

<http://www.prrac.org/pdf/CERD_Shadow_Report_Housing_Segregation_July_2014.pdf> accessed 20 January 2017.

⁹¹ Margery Austin Turner and Stephen L. Ros, 'How Racial Discrimination Affects the Search for Housing' in Xavier de Sousa Briggs (ed), *Geography of Opportunity: Race and Housing Choice in Metropolitan America* (Brookings Institution Press 2005) 81-100.

⁹² ICERD (n 88) art 2.

⁹³ Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1980 entered into force 1 July 2003) United Nations Treaties Series Vol. 2220 (ICMW).

⁹⁴ ICMW art 43 para. 1 (d).

⁹⁵ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006 entered into force 30 March 2007) United Nations Treaties Series Vol. 2515 (CRPD) art 9; CESCR, 'General Comment No. 5: Persons with Disabilities' (9 December 1994) UN Doc E/1995/22, paras 16, 22, 33; see also UN Committee on the Rights of Persons with Disabilities (CRPD Committee), 'General Comment No. 2 Article 9: Accessibility' (22 May 2014) CRPD/C/GC/2, paras 17, 42.

⁹⁶ CRPD ibid art 1.

to adequate housing. Article 28 recognises the right to an adequate standard of living for them and their families, including the right to housing. The CRPD Committee acknowledges the crucial aspects of accessibility of people with disabilities in accessing housing.⁹⁷ It affirms that Article 19 (c) on ensuring equal community services and facilities also covers access to safe and adequate housing.⁹⁸ To this end, states are required to take appropriate steps to safeguard and promote the realisation of access to safe and adequate housing on equal basis and without discrimination on the basis of disability.⁹⁹

2.3.2 The right to adequate housing in regional human rights instruments

The right to housing is recognised not only at the international level, as discussed in the previous section, but also at the regional level. While a regional arrangement is still developing, some of them have been very advanced in the term of human rights protection, including the right to housing. Regional bodies established to monitor these treaties have developed case law interpreting to the content of this right, such as Europe, Inter-America States and Africa Union. The other regional arrangements such as ASEAN and Arab Union, are far behind in the terms of human rights protections and human rights enforcement.

Although Indonesia is not a party to these regional arrangements, with the exception of ASEAN, the development of the recognition of the right to housing in other regions offers insight for a more comprehensive practice in Indonesia. This section aims to list the recognition of the right to housing in regional human rights conventions and their meaning. The practice of the regional bodies will be discussed in Section 2.4.3.

2.3.2.1 *The Council of Europe*

Two of the European main conventions deal with the issue of human rights to housing, i.e. the Revised European Social Charter (RESC),¹⁰⁰ the Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁰¹ which is also known as the European Convention on Human Rights (ECHR).

The RESC protects the right to housing in Article 31. This article is one of provisions resulting from the amendment of the Charter in 1996. The revised Charter gives flexibility as states may choose which articles they would like to ratify.¹⁰² It introduces nine core human

⁹⁷ CRPD Committee, 'General Comment No. 5 (2017) on Living Independently and being Included in the Community' (27 October 2017) UN Doc CRPD/C/GC/5 (General Comment No 5) para 34.

⁹⁸ *ibid.*

⁹⁹ *ibid* para 38 (b).

¹⁰⁰ Council of Europe (CoE), the European Social Charter (Revised) (3 Mei 1996) CETS NO. 163 (RESC).

¹⁰¹ CoE, the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No. 005.

¹⁰² *Ibid.* Article A paragraph 1 (b) enables them to choose at least six of the following nine articles of Part II (Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20), in addition they may consider themselves bound by an additional number of articles or numbered paragraphs of Part II, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs (paragraph 1.b). This flexibility creates what Jessie Hohmann called as core rights (for rights mentioned in paragraph 1.a) and non-core right—for rights mentioned in paragraph 1.b) see Hohmann (n 33) 52.

rights, in which member states ought to select six out of nine articles.¹⁰³ Article 31 that refers directly to the right to housing is not categorised as the core provisions; therefore not all member states accept the obligation under the article. Within the core nine articles, only Article 16¹⁰⁴ mentions the general provision on family housing; this article has been accepted more widely (28 states) than Article 31 (13 member states).¹⁰⁵

According to article 31, the right to housing will be fully achieved if (1) housing is accessible for everyone and fulfils the adequate standard; (2) homelessness is gradually reduced or even eliminated; 3) housing prices are affordable,¹⁰⁶ especially for poor people. The second and third points are linked to the obligations of member states stemming from Article 30. This article requires states to protect its population from poverty and social exclusion.¹⁰⁷ One of the areas that should be tackled by member states is to provide access to housing for people (including their families) live or living with the risk of poverty and social exclusion.¹⁰⁸

Moreover, on the implementation of the right to housing, the RESC acknowledges the principle of non-discrimination or equality principle.¹⁰⁹ Thus, discrimination based on any ground such as race, colour, sex, language, religion, political or other opinions, is strictly prohibited.

The supervisory mechanism of the RESC has developed a body of jurisprudence with regard to the right to housing. States parties to this Convention agreed that the full realisation of the rights listed in the RESC, has to be the aim of their policy and the right to housing is mentioned as one of these rights.¹¹⁰ Further, it obliges states parties to adopt specific measures to achieve the realisation of the right to housing.

Article 16 on the provision of family housing and Article 31 on the right to housing create an overlapping obligation on the right to housing. Although these articles are different from a personal and material scope, in particular elements i.e. the notions of adequate housing and eviction, they are identical.¹¹¹

Besides the two articles mentioned above, the RESC also protects and guarantees the right to housing for specific groups, such as for physically and mentally disabled persons (Article

¹⁰³ These nine core provisions are the right to work (Article 1), the right to organise (Article 5), the right to bargain collectively (Article 6), the right to social security (Article 12), the right to social and medical assistance (Article 13), the right of migrant workers and their families to protection and assistance (Article 19), the right of children and young persons to protection (Article 7), the right of the family to social, legal and economic protection (Article 16) and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20).

¹⁰⁴ RESC (n 100) art 16 “With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.”

¹⁰⁵ See the data on the declaration and reservations made by member states at *Council de Europe* <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/declarations?p_auth=5B8MS2Xh> accessed 20 January 2019.

¹⁰⁶ RESC (n 100) art 31; see also Matti Mikola, ‘Housing as Human Rights in Europe’ (2010) 8 (3) *European Journal of Social Security* 249.

¹⁰⁷ RESC (n 100) art 30.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid* art E.

¹¹⁰ RESC (n 100) Part I, No. 31.

¹¹¹ *European Roma Rights Centre v Bulgaria*, European Committee of Social Rights (ECSR) Case No. 31/2005 (18 October 2006) para 35, see also *European Roma Rights Centre v Greece*, ECSR Case No. 15/2003 (7 February 2005) para 17.

15), children and young persons (Article 17), migrant workers (Article 19), elderly persons (Article 23). Thus, the RESC is quite a comprehensive instrument in ensuring the protection of the right to housing at the European level.

The next Convention is the European Convention on Human Rights (ECHR), adopted on 4 November 1950. It does not directly protect the right to housing per se. The only article related to housing is Article 8 (1) which recognises “right of everyone to respect for his private and family life, his home and his correspondence”. Based on the wording, this article is directed to protect people who already have a home and not for people who do not have one.¹¹² This article also contains positive obligations which should be adopted by states in order to respect one’s home and family life.

These two instruments, the Revised European Social Charter and the European Convention on Human Rights, have played a significant role in guaranteeing the right to housing. The articles in the RESC are more comparable with the economic and social rights as mentioned in the ICESCR, whereas the ECHR has a civil rights dimension. Nevertheless, the enforcement of these two through the case law of the Court and the Social Committee have proven that housing rights are justiciable. The development of case law can also be seen as an enforcement measure to urge European states to comply with their obligations with regard to this right.

2.3.2.2 Organisation of American States (OAS)

On April 1948, American states adopted their first human rights instrument, the American Declaration of the Rights and Duties of Man¹¹³ (hereinafter referred to as “American Declaration”). This document can be considered as the beginning of human rights protection in this region.

The American Declaration recognises the civil, political, economic, social and cultural rights ranging from the rights to: life, liberty and personal security (Article I); equality before the law (Article II); protection of honour, personal reputation, and private and family life (Article V); residence and movement (Article VIII); inviolability of the home (IX); the preservation of health and well-being including food and housing (Article XI); to the right to property (Article XXIII).

With regard to the right to housing, the Declaration directly recognises it as one of the pre-requisite conditions to achieve the preservation of health and well-being. These conditions include sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.¹¹⁴

The next instrument stipulating the right to housing is the American Convention on Human Rights (herein after referred to as ACHR).¹¹⁵ The ACHR does not contain a list of economic, social, and cultural rights like some other regional and international human rights instruments

¹¹² Ida Elisabeth Koch, ‘Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights’ (International Studies in Human Rights Vol 101, Martinus Nijhoff Publisher 2008) 113-148.

¹¹³ The Organisation of American States (OAS), ‘American Declaration of the Rights and Duties of Man’ adopted 2 May 1948 at the Ninth International Conference of American States, Bogotá, Colombia.

¹¹⁴ *ibid* art XI.

¹¹⁵ OAS, American Convention on Human Rights (Pact of San Jose) adopted 22 November 1969 entry into force 18 July 1978 (Pact of San Jose).

do, but it does mention in Article 26 that states should progressively realise certain rights that are implicit in the economic, social, educational, scientific, and cultural standards to be found in the OAS Charter. It also protects the right to private life, family and home under the right to privacy in Article 13 (1). Moreover, the Convention also protects the right to property (Article 21).

Thus, to read properly whether the ACHR protects and recognises the right to housing, one should link it with the OAS Charter.¹¹⁶ Pertaining to this relation, Article 34 (k) of the Charter states that

“The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing adequate housing for all sectors of the population.”

A contextual reading of Article XI of the Declaration, together with Article 26 ACHR and Article 34 (k) of the OAS Charter, suggests a recognition of the right to housing. Although the recognition as such does not necessarily establish it as an independent right, this “implied” right can be considered as a relevant element to achieve “basic objectives of integral development”¹¹⁷ and the “preservation of health.”¹¹⁸ The member states have agreed to commit their greatest efforts to attain adequate housing for all population.¹¹⁹

Another instrument stipulating ESC rights within the Americas is the Protocol on Economic, Social and Cultural Rights, which is also known as the Protocol of San Salvador.¹²⁰ This protocol does not directly mention either the right to housing or the right to property. However, it contains some relevant articles which are related to these rights, such as the right to health, the right to healthy environment, and the right to the formation and the protection of families.¹²¹ However, none of these housing-related rights are directly justiciable under this Protocol. In fact, only the right to form trade unions and the right to education can be directly invoked.¹²²

Two bodies responsible to oversee the implementation of human rights within the region are the Inter-American Commission on Human Rights (the IA Commission) and the Inter-American Court of Human Rights (IACtHR). The IA Commission functions to promote the observance and protection of human rights in the American region and serves as an advisory body to the OAS.¹²³ Furthermore, it has mandates “to promote respect for and defense of human rights” in the region such as monitoring of the human rights situation in the Member States and devoting its work to prioritised thematic areas.¹²⁴ It is also competence to examine individual

¹¹⁶ OAS, Charter of the Organisation of American States (adopted 30 April 1948, entry into force 13 December 1951) (OAS Charter).

¹¹⁷ OAS Charter art 34 (k).

¹¹⁸ American Declaration of the Rights and Duties of Man (n 113) art XI.

¹¹⁹ OAS Charter art 34 (k).

¹²⁰ OAS, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OAS Treaty Series No. 69/1989, <<http://oas.org/juridico/english/treaties/a-52.html>> accessed 18 January 2019 (Protocol San Salvador).

¹²¹ *ibid* art 10, 11 and 15 respectively.

¹²² See Article 19.6 of the Protocol San Salvador that gives a preference to the rights to form trade unions (art 8 (1) and the right to education (art 13) to claim any violations of these rights before the IAICHR and the IACtHR.

¹²³ OAS Charter (n 116) art 106.

¹²⁴ Pact of San Jose (n 115) art 41.

petitions on any violations of the rights guaranteed in the ACHR.¹²⁵ Furthermore, the Statute of the Commission enumerates its powers with regard to member states who are not parties to the American Convention on Human Rights.¹²⁶ These powers include to hear individual petition on alleged violations on the American Declaration of the Rights and Duties of Man.¹²⁷

The IACtHR established under the ACHR has a mandate to examine allegations of human rights violations occurring within the region.¹²⁸ It has jurisdiction encompassing only member states which have declared to accept the Court's competence.¹²⁹ However, individuals cannot directly invoke a claim before the court, only state parties or the Commission can bring the individuals complaints. The Court's decisions are binding.¹³⁰

In terms of providing human rights protection in the region, the Commission and the Court are complementary in nature.¹³¹ The Commission will examine complaints from individuals whose states have not yet accepted the competence of the Court.¹³² Individuals coming from a party to the Statute of the Court may bring their complaints to the Commission to achieve a friendly settlement. If a settlement cannot be achieved, then the Commission will refer the cases to the Court if the state in question has accepted the Court's competence.¹³³

As these two bodies have a complementary function, their roles in the development of jurisprudence also complement each other. Unfortunately, they have not dealt with claims on direct violations of the right to housing yet,¹³⁴ which is understandable considering that there is no right to housing articulated in the human rights documents of this region. Moreover, in the development of their case law, both the Commission and the Court have addressed violations of certain human rights, for example the right to privacy and the right to a dignified life, that could be seen as leeway to provide protection to housing.¹³⁵ Further discussion on the approach of the Commission and the Court on this matter will be followed in Section 2.4.3.

2.3.2.3 African Union

This region adopted the African Charter on Human and Peoples' Rights¹³⁶ on 27 June 1981 which entered into force on 21 October 1986. To date, it has a wide coverage as 53 out of 55

¹²⁵ *ibid* art 44.

¹²⁶ OAS General Assembly, Statute of the Inter-American Commission on Human Rights (adopted October 1979) Resolution No. 447, arts 18 and 20 (OAS Statute).

¹²⁷ *ibid*.

¹²⁸ Pact of San Jose (n 115) chapter VIII art 52.

¹²⁹ *ibid* art 62.

¹³⁰ *ibid* art 61.

¹³¹ Hohmann (n 33) 84.

¹³² OAS Statute (n 126) art 20.

¹³³ See OAS, 'Rules of Procedure of the Inter-American Commission on Human Rights' (approved by the Commission at its 109th special session held from December 4 to 8, 2000 and amended at its 116th regular period of sessions, held from October 7 to 25, 2002) art 44; Tara J. Melish, 'The Inter-American Commission on Human Rights: Defending Social Rights through Case Based Petition' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 348-349.

¹³⁴ *ibid* 85; see also Centre on Housing Rights and Evictions (COHRE), *Enforcing Housing Rights in the Americas: Pursuing Housing Rights Claims within the Inter-American System of Human Rights* (Geneva 2012) 20.

¹³⁵ Hohmann (n 33) 85.

¹³⁶ The Organisation of African Union, 'African (Banjul) Charter on Human and Peoples' Rights' (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Banjul Charter).

member states of the African Union have accepted and ratified it.¹³⁷ The African states have also adopted other human rights treaties related to specific groups such as refugees, children, women, youth and internally displaced persons.¹³⁸ However, this part will only deal with the African Charter on Human and People's Rights (hereinafter referred to as the African Charter).

The African Charter comprises of all “three” generations of human rights: civil and political rights, ESC rights, and peoples' rights otherwise known as group or collective rights. The collective rights include the right to a generally satisfactory environment,¹³⁹ the right to economic, social and cultural development,¹⁴⁰ and the right to national and international peace and security.¹⁴¹ This is regarded as an improvement over the traditional bifurcation of types of rights in separate legal instruments, as seen in the International, European and American settings.¹⁴² While other regions separated civil political rights from economic, social, cultural rights, this Charter, in its preamble observes that all of these rights are indivisible and interrelated.¹⁴³ This approach has facilitated the justiciability of socio-economic rights both before a quasi-judicial (the African Commission on Human and Peoples' Rights – Commission) and a judicial (the African Court on Human and Peoples' Rights - ACtHR) body.¹⁴⁴

The Commission is mandated to interpret, promote and ensure all rights laid down in the Charter.¹⁴⁵ It may receive “communications” on human rights violations submitted by non-state actors, individuals, non-governmental organisations and member states.¹⁴⁶

With regard to ESC rights, the African Charter has a limited or “minimalist”¹⁴⁷ approach towards them. Some of the rights recognised in the ICESCR are missing; these include the rights to an adequate standard of living, including adequate food, clothing and housing,¹⁴⁸ social security, and the right to the continuous improvement of living conditions. These “fundamental

¹³⁷ Only one member, the Republic of South Sudan, which has not yet signed and ratified the Banjul Charter, see the status of ratification in <http://www.achpr.org/instruments/achpr/ratification/>, accessed 05 August 2015.

¹³⁸ African Union (AU), Convention Governing Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969 entered into force 20 June 1974) CAB/LEG/24.3; African Charter on the Rights and Welfare of the Child (adopted 01 July 1990 entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 7 July 2003 entered into force 25 November 2005); African Youth Charter (adopted 2 July 2006, entered into force 8 August 2009), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 23 October 2009 entered into force 6 December 2012).

¹³⁹ Banjul Charter (n 133) art 24.

¹⁴⁰ *ibid* art 22.

¹⁴¹ *ibid* art 23.

¹⁴² Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 214-215; see also Manisuli Ssenyonjo, ‘Economic, Social and Cultural rights in the African Charter’ in Manisuli Ssenyonjo (ed.), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights*, International Studies in Human Rights (Martinus Nijhoff Publishers 2012) 55.

¹⁴³ Paragraph 8 of the preamble of the African Charter states that “... the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”.

¹⁴⁴ The African Court on Human and People's rights will eventually merge with the African Court of Justice (ACJ). However, currently only a small number of member states had ratified the protocol which combines the competencies of two courts (the ACtHR and the ACJ).

¹⁴⁵ Banjul Charter (n 136) art 45.

¹⁴⁶ *ibid* arts 47-55.

¹⁴⁷ Viljoen (n 142) 216.

¹⁴⁸ Emphasised by the author to show that right to housing is not directly protected in the African Charter.

rights for human survival and for living in dignity”¹⁴⁹ are not included in the African Charter.

Although the right to adequate housing is not mentioned, the practice of the Commission reveals an approach that takes it into consideration. The Commission tends to relate to or combine this right with other provisions enshrined in the Charter, such as the right to enjoy the best attainable state of mental and physical health (Article 16), the right to property (Article 14) and the protection of the family (Article 18 paragraph 1). The practice of the Commission and the Court in providing the protection on the right to adequate housing will be discussed further in Section 2.4.3.

2.3.2.4 *League of Arab States*

The Arab League which is also known as the League of Arab States (LAS) was established in Cairo on March 22, 1945. In 1994, it adopted its first Charter on Human Rights; however, no member state ratified it. Furthermore, they redrafted the Charter in 2004, and adopted the Revised Arab Charter on Human Rights, which entered into force on 15 March 2008¹⁵⁰

The Charter establishes the human right to housing as one element of the right to an adequate standard of living, together with food, clothing, services and the right to healthy environment,¹⁵¹ the fulfilment of which ensures individual “well-being and a decent life.” This article is similar to those enshrined in the international instruments such as the UDHR and the ICESCR.

However, due to the lack of a specific mandate allowing it to deal with individual complaints, the Arab Charter’s monitoring body, the Arab Human Rights Committee, has not yet been able to provide any meaningful views or interpretation on the content of the right to housing or the right to an adequate standard of living found in the Charter.¹⁵² There is no available mechanism for individual complaints proclaimed in the Charter. Thus, the human right to housing in this region still needs to be developed. Currently, the Arab Human Rights Committee established in 2009 is monitoring member states’ implementation of the Charter, by receiving and examining state reports and further issuing its annual report,¹⁵³ nevertheless, the direction of the development of human rights in this region is still “uncertain.”¹⁵⁴

2.3.2.5 *The Association of South East Asian Nations (ASEAN)*

The Association of South East Asian Nations, to which Indonesia is a party to, was established in 1967, triggered by the need to promote regional cooperation and to contribute peace and stability in the region.¹⁵⁵ At that time, there was no aim in the region to protect human rights. However, further developments reveal current trend towards addressing this issue. These developments include the establishment of a human rights institution, the ASEAN Intergovernmental Commission on Human Rights (AICHR), in 2009 as mandated by the

¹⁴⁹ Ssenyonjo (n 142) 56.

¹⁵⁰ Arab League, Arab Charter on Human Rights (adopted 22 May 2004 entered into force 15 March 2008).

¹⁵¹ *ibid* art 38.

¹⁵² Hohmann (n 33) 92.

¹⁵³ Arab Charter (n 150) art 45 para (1).

¹⁵⁴ Hohmann (n 33) 92.

¹⁵⁵ The 1967 ASEAN Declaration (Bangkok Declaration), signed on 8 August 1967, Preamble.

ASEAN Charter¹⁵⁶ and the adoption of the ASEAN Human Rights Declaration (AHRD) in 2012.¹⁵⁷ So far, The AICHR's activities do not reveal any significant impact on human rights protection due to the fact that it is an intergovernmental institution in which members are still accountable to their sending governments. This means they are not independent as such lending the body a more "political" character. In addition, one may observe that it has "no teeth" due to lack of monitoring tools and that it is merely, in regard to human rights, promotional in nature.¹⁵⁸ The establishment of the Intergovernmental Commission indicated the intention of the ASEAN member states, under pressure of the international community,¹⁵⁹ to include human rights protection in the region.¹⁶⁰ Besides clarifying the mandate of the AICHR, the AHRD serves as an important document for the foundation of a stronger institution to protect human rights, just like in the Americas where the American Declaration of the Rights and Duties of Man was followed by the American Convention on Human Rights¹⁶¹ and the Inter American Court of Human Rights. In its Declaration, ASEAN reaffirms all of the rights (both civil and political, as well as economic social and cultural rights) enshrined in the UDHR.¹⁶²

With regard to the right to housing, the Declaration further stipulates in Article 28 (c) that "Every person has the right to an adequate standard of living for himself or herself and his or her family including the right to adequate and affordable housing." This wording is similar to that used in the international human rights instruments such as the UDHR and the ICESCR, which includes the right to housing as a part of right to an adequate standard of living. However, the ASEAN Declaration slightly modified the wording used in these instruments to affirm that the right to housing should not only be adequate, but also affordable.

The affordability of housing can be found in the elements of adequate in the General Comment 4 provided by the CESCR. It seems that this element of the right to housing is maybe more prominent in the ASEAN's approach to this right, given the region's situation where housing is unaffordable for most people. However, the reason to include affordability in the wording of the right cannot be tracked in the preparatory works of the drafting process of this

¹⁵⁶ Charter of the Association of South East Asian Nation (adopted on 20 November 2007 entered into force on 15 December 2008) (*ASEAN*) <https://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf> accessed 20 December 2018.

¹⁵⁷ ASEAN Human Rights Declaration (*ASEAN*, 9 November 2012) <<http://www.asean.org/news/asean-statement-communications/item/asean-human-rights-declaration>> accessed 20 December 2018 (AHRD).

¹⁵⁸ Ary Hermawan, 'AICHR: ASEAN's Journey to Human Rights' *the Jakarta Post* (Jakarta, 11 January 2010) <<http://www.thejakartapost.com/news/2010/01/11/aicmr-asean%E2%80%99s-journey-human-rights.html>> accessed 20 April 2017.

¹⁵⁹ See the discussion on the external value and pressure on ASEAN in Hiro Katsumata, 'ASEAN and Human Rights: Resisting Western Pressure or Emulating the West?' (2009) 22 *The Pacific Review* 619.

¹⁶⁰ Tan Hsien Li emphasis the importance of the development especially in the adoption of ASEAN Charter in which all ASEAN members have agreed, simply because this is the first real action in promising human rights protection compare to "vague" promises prior to its adoption and it becomes legally binding document for all member states, thus they cannot refrain from their regional obligations to protect human rights. See details in Tan Hsien Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalizing Human Rights in Southeast Asia* (CUP 2011) 4.

¹⁶¹ Catherine Shanahan Renshaw, 'The ASEAN Human Rights Declaration 2012' (2013) 3 *Human Rights Law Review* 557, 558; see also American Bar Association Rule of Law Initiative, *The ASEAN Human Rights Declaration: A Legal Analysis*, 2014 <<http://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf>> accessed 21 January 2017.

¹⁶² ASEAN Declaration on Human Rights, arts 10 and 26.

Declaration, as the process was not transparent and was not made public.¹⁶³

To date, there are no documents interpreting either the right to housing or the right to adequate standard of living found from the ASEAN Declaration. Under the ASEAN framework, the only initiative relating to urban issues is the ASEAN Smart Cities Network (ASCN) that launched in 2018.¹⁶⁴ Yet, this initiative does not specifically address the right to adequate and affordable housing, but instead focuses on broader issues such as poverty and other related urban issues, and on sharing best practices between cities that participate in the ASCN.

As specified in its mandates, the AICHR plans to undertake a further study on thematic human rights issues, such as the right to health, right to education, as well as business and human rights. However, in its five-year work plan of 2016-2020, the AICHR does not include the right to an adequate standard of living as one of the themes to study.¹⁶⁵ This seems to suggest that the right to adequate standard of living, which includes the right to housing, has yet to fall under the purview of the AICHR. In the same vein, the annual report produced by the AICHR does not mention this right in its activities.¹⁶⁶

In the future, the mandate of the AICHR works should be further expanded beyond being than only as a promoter of human rights and as an advisory body to the ASEAN.¹⁶⁷ The AICHR should be a watchdog of the implementation of the Declaration within the member states. Given the fact that so far ASEAN has been very permissive with regard to the human rights violations within its member states, mainly due to the “non-interference” principle enshrined in the AHRD and the AICHR’s Terms of Reference,¹⁶⁸ currently no ASEAN member can touch the issue of human rights violations in other member states. To extend the mandate of the AICHR would require an amendment of the AICHR’s Terms of Reference or, more effectively, the establishment of a legally binding treaty that settles member states’ obligations and the mandates of the AICHR. Ideally, ASEAN should establish a more independent body with the possibility to investigate possible human rights violations in the region, preferably on the basis of a binding human rights treaty.

2.3.2.6 Summary of the right to housing at the regional level

The recognition of the right to housing in regional instruments is actually quite extensive, aside from the fact that some regional bodies such as the Arab Union and ASEAN are just “toddlers” compared to other regions. The European, Inter-American and African states are quite advanced in their human rights regime, including in interpreting the substantive meaning of right to housing. The relation between housing and home as well as private life, as founded by the European Court of Human Rights, shows the right to housing not only refers to a “house” as a

¹⁶³ See Helen Quane, ‘The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms’ (2015) 15 Human Rights Law Review 283, 286; see also Renshaw (n 161).

¹⁶⁴ ASEAN Smart Cities Network, Concept Note, adopted at the 32nd ASEAN Summit on 28 April 2018 (ASEAN) < <https://asean.org/storage/2019/02/ASCN-Concept-Note.pdf> > accessed 10 May 2019.

¹⁶⁵ ASEAN Intergovernmental Commission on Human Rights (AICHR), ‘Five-year Work Plan of the AICHR (2016 – 2020)’ adopted on 15 June 2015, endorsed at the 48th AMM on 3 August 2015.

¹⁶⁶ AICHR, ‘Annual Report 2018: July 2017-June 2018’ ASEAN Websites < https://asean.org/?static_post=asean-intergovernmental-commission-human-rights-aicrh-annual-report-2018 > accessed 14 May 2019.

¹⁶⁷ The Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (ASEAN) < <http://aichr.org/documents/> > accessed 21 January 2017 (AICHR TOR).

¹⁶⁸ ASEAN Charter (n 156) art 2 para 2e; AICHR, *ibid* art 2 para 1b.

building with a roof, but also as a relation between people who live inside a house (home) as well as cultural relation within the community. Not all of the aforementioned regional instruments directly recognise the right to housing as an independent right. For example, the OAS human rights instruments recognise it as an implied right. The right to housing under the OAS instruments can be deduced from the right to health, the right to healthy environment, and the right to the formation and the protection of families. This is also the case with the African Union. However, the non-existence of the right to housing does not stop the regional human rights monitoring bodies to adjudicate this right in their respective region. The interpretation on the right to housing by regional monitoring bodies will be discussed in Section 2.6.2. The other two regional arrangements, League of Arab States and ASEAN, still have a long journey to strengthen the protection of human rights, including the ESC rights in the region.

2.4. THE NORMATIVE CORE CONTENTS OF THE RIGHT TO ADEQUATE HOUSING

Internationally, the CESCR has enacted two General Comments with regard to elements of the right to housing. These are General Comment No. 4 on the right to housing (Articles 11-21) of the ICESCR and General Comment No. 7 on Forced eviction. Although they are not legally binding in nature, they have influenced the jurisprudence of regional or national courts as well as other domestic law in the content of this right.

Based on the discussion from the previous section, it can be summed up that no other international or regional human rights monitoring bodies have issued an interpretation of the contents of this right. It can, therefore, be concluded that General Comment No. 4, in spite of being adopted some while ago, is “the single most authoritative legal interpretation of the meaning of the right to adequate housing under international law.”¹⁶⁹

The Committee states that right to housing should be widely interpreted, not only as a shelter with a roof or shelter as a commodity, but it also should be seen as “the right to live somewhere in security, peace and dignity.”¹⁷⁰ This observation is based on two reasons. First, the relation between the right to housing with other human rights mentioned in the Covenant and second, the emphasis on the adequate nature of housing.¹⁷¹ Although the Committee does not further explain the term adequate,¹⁷² it does mention that adequacy underlines some relevant factors for the right to housing which should be considered for the purpose of the Covenant.¹⁷³

The Committee formulates seven essential elements that serve as a guideline for states to identify the adequacy of housing. These elements are as follows: i) legal security of tenure; ii) availability of services, materials, facilities and infrastructure; iii) affordability; iv) habitability; v) accessibility; vi) location; and vii) cultural adequacy. Each of these elements will be described in the following paragraphs:

¹⁶⁹ COHRE (n 134) 73.

¹⁷⁰ General Comment 4 (n 19) para 7.

¹⁷¹ *ibid.*

¹⁷² Hohmann (n 33) 21.

¹⁷³ General Comment 4 (n 19) para 8.

2.4.1 Legal security of tenure

The legal security of tenure has been a primary concern of the Committee as well as human rights advocates for a long time. Tenure can be in any form, such as ownership, lease, rental accommodation or even informal settlements. The General Comment 4 does not define the meaning of security of tenure. Nevertheless, security of tenure refers to as “tenure of land and/or housing which ensures a secure home and enables one to live in security, peace and dignity.”¹⁷⁴ The Committee emphasises that regardless of any form of tenure, inhabitants should possess a degree of security of tenure that can protect them against seizure or forced evictions or other threats.¹⁷⁵

Moreover, to ensure the security of tenure, the Committee requires states to “take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection.”¹⁷⁶ However, the Committee does not provide further guidance on what kind of actions may fall under these immediate obligations. Having regard that the practice of member states on the security of tenure also varies, the issue of security of tenure is based on national legislation and is placed under the national property law rather than international law or human rights.¹⁷⁷ The lack of reference to international human rights law is caused by the unclear definition of the meaning of “degree of security of tenure” and to which tenure that “degree” should be applied.¹⁷⁸

On the other hand, the Committee has affirmed that insecurity of tenure results in evictions both in General Comments 4 and 7. The latter General Comment provides safeguards that should be carried out in the case of justified evictions. To assist states conducting evictions, the Basic Principles and Guidelines on Development-based Evictions and Displacement have also been adopted that are very clear and straightforward.¹⁷⁹ Nevertheless, the states’ obligations to provide security of tenure for the poor has not been very clear.¹⁸⁰ The Guidelines only concern protections against evictions and not on general minimum measures that can be adopted to ensure that all forms of tenure are protected.¹⁸¹

Indeed, eviction occurring in many countries are often caused by the lack of security of tenure.¹⁸² Evictions can adversely affect families, individuals and communities. Legal security

¹⁷⁴ HRC, ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik’ (30 December 2013) UN Doc A/HRC/25/54, para 23.

¹⁷⁵ General Comment 4 (n 19) para 8a.

¹⁷⁶ *ibid* para 8a.

¹⁷⁷ Bret Thiele, ‘Security of Tenure: legal and Judicial Aspects’ Research Paper prepared for the Special Rapporteur on on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik, to inform her Study on Security of Tenure (22-23 October 2012) <<https://www.ohchr.org/Documents/Issues/Housing/SecurityTenure/BretThiele-BackgroundPaper-Jan2013.pdf>> accessed 16 January 2019.

¹⁷⁸ *ibid*.

¹⁷⁹ Human Rights Council (HRC), Basic Principles and Guidelines on Development-Based Evictions and Displacement (5 February 2007) UN Doc A/HRC/4/18, Annex 1, pp 13-26; see also Hohmann (n 33) 23.

¹⁸⁰ HRC, Report of the Special Rapporteur on on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik (24 December 2012) UN Doc A/HRC/22/46, paras 49-50, 52.

¹⁸¹ HRC, UN Doc A/HRC/22/46, *ibid*.

¹⁸² See for example CESCR, ‘Concluding Observations of Turkey’ (12 July 2011) UN Doc E/C.12/TUR/CO/1, paras 26 & 27; CESCR, ‘Concluding Observations on the Sixth Periodic Report of the Russian Federation’ (16

of tenure is the heart of the right to housing, without it, people can be a subject to seizure at any time.¹⁸³ The devastating effects of eviction have made the Committee call on member states to adopt and impose legal measures to prevent forced evictions.¹⁸⁴

Although, the Committee has focused on evictions as the primary effect of insecurity of tenure, the underlying problems, causes and sources of insecurity of tenure have not received due attention.¹⁸⁵ Such problems may vary between member states, for example, lack of availability of land for housing would limit the access to land for the poor which could force them to live in illegal settlements with insecurity of tenure. Without addressing the lack of access to land tenure as one of the causes of insecurity of tenure, evictions will continue to exist.

In its recent decision on the individual complaint of *Mohamed Ben Djazia and Naouel Bellili against Spain*, the Committee stressed the fact that the provision of security of tenure also applies to people living in rental accommodation.¹⁸⁶ This case involved a family who were evicted following the end of their rental agreement, due to several months of rent in arrears and a continued inability to afford the rent. Ben Djazia was jobless and depended on state subsidies to cover their expenses. For such reason, he could not find affordable accommodation for his family and their eviction from the rented housing had made them homeless. The Committee underscored that people living in rental accommodation should also receive protection against evictions.¹⁸⁷ The enjoyment of the right to housing does not end if the lease expires.¹⁸⁸ This means that states have an obligation to protect tenants that if any evictions occur stemming from a contractual obligation between lessor and lessee, states have to ensure that the eviction does not infringe Article 11 of the ICESCR.¹⁸⁹

Even though the Committee emphasises the importance of security of tenure in its views of the above-mentioned case, the concrete actions that should be adopted by states to improve the security of tenure to prevent evictions are still unclear. However, the Committee merely provides broad recommendations, for example by requesting the state to ensure that the evictee should be given a remedy and an alternative accommodation, without mentioning whether Spain has to ensure that the accommodation should be securely tenured.

To guide states in improving the aspect of security of tenure, the UN Special Rapporteur on the Right to Housing developed a set of Guiding Principles on Security of Tenure for the Urban Poor in 2013.¹⁹⁰ The Guiding Principles tries to add clarity of states obligations in ensuring tenure security. Some of the obligations include:¹⁹¹

October 2017) UN Doc E/C.12/RUS/CO/6 paras 46 & 47; CESCR, 'Concluding Observations on the Sixth Periodic Report of Spain' (25 April 2018) UN Doc E/C.12/ESP/CO/6, paras 37 & 38; CESCR, 'Concluding Observations on the Fourth Periodic Report of Argentina' (1 November 2018) UN Doc E/C.12/ARG/CO/4, para 48a.

¹⁸³ Hohmann (n 33) 21.

¹⁸⁴ CESCR General Comment 7 (n 67) para 8; see for example CESCR, 'Concluding Observations Peru' (30 May 2012) UN Doc E/C.12/PER/CO/2-4, para 19; CESCR, 'Concluding Observations Bolivia' (8 August 2008) UN Doc E/C.12/BOL/CO/2, para 27 (h).

¹⁸⁵ Hohmann (n 33) 23.

¹⁸⁶ CESCR, *Mohamed Ben Djazia and Naouel Bellili v Spain*, communication date 20 February 2015, adoption of views 20 June 2017 (21 July 2017) UN Doc. E/C.12/61/D/5/2015 (Ben Djazia case), para 13.2.

¹⁸⁷ CESCR, General Comment 7 (n 67) para 11.

¹⁸⁸ CESCR, Ben Djazia case (n 186) *ibid*.

¹⁸⁹ *ibid*, para 14.1.

¹⁹⁰ UN Doc A/HRC/25/54 (n 174) part II pp 3-7.

¹⁹¹ For the detailed see Guiding Principles, *ibid*, para 5.

- (a) Strengthening a variety of tenure forms, including those deriving from statutory, customary, religious and hybrid tenure systems,
- (b) Improving security of tenure by developing citywide strategies for securing tenure and upgrading settlements on different categories of land and with variety of tenure arrangements,
- (c) Prioritising in situ re-settlements if any evictions occur.

The Guiding Principles, however, do not have legally binding power that can impose certain obligations on the states. As stated in the previous paragraph, this guidance may assist states in adopting measures that are in line with the obligations stemming from the ICESCR if an unavoidable eviction should occur. Although they are not binding, states could benefit from them, particularly if states do not have national legislation relating to eviction.

2.4.2 Availability of services, materials, facilities and infrastructure

The next element suggested by the CESCR is the availability of services, materials, facilities and infrastructure. It states that:

“An adequate house must contain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services”¹⁹²

The fulfilment of all the requirements listed can only happen in ideal conditions, for example in wealthy and developed states. However, the CESCR also realised that an ideal housing condition has not been achieved yet, even in the most developed states.¹⁹³ These conditions are apparently very difficult to achieve.

The CESCR has set the conditions mentioned above as minimum standards. Until today, many states cannot comply with these standards simply because of their level of economic development. The Committee does not further explain such paragraph and is silent on whether or not states' failure to provide these requirements will constitute a human rights violation. Therefore, as suggested by Matthew Craven, the paragraph should be interpreted as an aim or a long term goal, which should be achieved in the future.¹⁹⁴ This interpretation is also in line with the Covenant's principle of progressive realisation.

2.4.3 Affordability

Affordability means the ability of a person to afford the financial costs relating to housing. The General Comment states that this ability should be at such level as to not threaten the attainment

¹⁹² General Comment 4 (19) para 8(b).

¹⁹³ *ibid* para 4.

¹⁹⁴ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development* (OUP 1995) 345.

and satisfaction of other needs.¹⁹⁵ Housing affordability is indeed a complex issue. It is influenced by many factors such as employment and housing market, which may make it difficult for people without proper salary to own or to rent a house.

The CESCR utters that states have a positive obligation to ensure the affordability issues by providing housing subsidies for the poor. In its concluding observations, the Committee urges member states to focus more on the issue of affordability for marginalised groups, such as indigenous people, who become homeless due to an unaffordable housing market in the member states.¹⁹⁶ In addition, states have to protect the tenants by appropriate means from unreasonable rent levels or rent increases which will influence individuals' ability to pay rental fees, particularly in the private rental market.¹⁹⁷ Furthermore, states should ensure the affordability of natural materials, if such materials are used as primary building materials in their territory.¹⁹⁸ However, in its concluding observations, the Committee has not further explained the meaning of natural materials used for building houses. The Committee mentions this element in only one concluding observations, with regard to Sri Lanka, in which the Committee shows its concern for the acute shortage of construction materials needed to build houses that are in need of repair.¹⁹⁹ In addition, in another concluding observation dealing with Lebanon, the Committee recommended that the state should facilitate the movement of construction materials needed to build refugee camps.²⁰⁰ However, these two concluding observations do not make clear whether the materials should be natural. Moreover, the issue of affordability was not mentioned.

2.3.4 Habitability

The fourth element on housing adequacy is habitability, which focuses on physical safety and the safety of its inhabitants. A house is considered habitable if it provides inhabitants with "adequate space and protects them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors."²⁰¹ The Committee relies very much on the Health Principles of Housing²⁰² adopted by the World Health Organisation and urges member states to apply the Principles in their national housing policies. These principles underline that unsafe, inadequate and deficient housing triggers diseases and associated with inadequate living

¹⁹⁵ General Comment 4 (n 19) para 8(c).

¹⁹⁶ See for example, CESCR, 'Concluding Observations Australia' (22 May 2009) UN Doc E/C.12/AUS/CO/4, para 26; see also CESCR, 'Concluding Observations on the Sixth Periodic Report of Poland' (26 October 2016) UN Doc E/C.12/POL/CO/6, paras 36, 37.

¹⁹⁷ CESCR, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (14 July 2016) UN Doc E/C.12/GBR/CO/6, paras 49, 50.

¹⁹⁸ General Comment 4 (n 19) para 8(c).

¹⁹⁹ CESCR, 'Concluding Observations Sri Lanka' (16 June 1998) UN Doc E/C.12/1/Add.24, para 15.

²⁰⁰ CESCR, 'Concluding Observations on the Second Periodic Report of Lebanon' (24 October 2016) UN Doc E/C.12/LBN/CO/2, para 26a.

²⁰¹ *ibid* para 8(d).

²⁰² These principles was developed by the World Health Organisation in 1989, (WHO) <http://apps.who.int/iris/bitstream/10665/39847/1/9241561270_eng.pdf> accessed 13 October 2017. These principles underline the relation between housing and health and emphasise the need to improve the housing conditions which can improve the health of the inhabitants as well as the community. The principles are follows: 1) Protection against communicable diseases, 2) Protection against injuries, poisoning and chronic diseases, 3) Reducing psychological and social stress to a Minimum, 4) improving the housing environment, 5) Making informed use of housing, 6) protecting populations at special risks (Health Principles of Housing).

conditions such as higher mortality and morbidity rates.²⁰³ These principles do not have legally binding power and serve as a checklist to assist governments and officials involved in health, housing and socio-economic issues to tackle health problems by improving housing conditions in their countries.²⁰⁴

These guidelines make no differentiation between public housing and private healthy housing condition. The habitability elements in housing provided by private developers or by the governments can easily be monitored. This is not the case for housing built by individuals. They build their houses based on their style, culture and most importantly, their financial capacity. If informal houses are already built, but are not in compliance with the habitability elements, what measures can governments take? This situation also has been criticised by Craven, who observes that overly strict regulations on housing can hamper the ability and will of people who want to build their own house, which then could trigger housing shortage.²⁰⁵

The Committee urges member states to pay attention to situations that could fall under uninhabitable elements of a house. Such circumstances include an overcrowded house,²⁰⁶ no access to sanitation and clean water,²⁰⁷ electricity and waste disposal,²⁰⁸ and “makeshift shelters.”²⁰⁹

2.4.5 Accessibility

Accessibility comprises of two issues, i.e. access to housing for the underprivileged groups and access to land for the landless and impoverished segments.²¹⁰ The disadvantaged groups include the elderly, children, persons with both physical and mental disabilities, the terminally ill, HIV-positive persons with persistent medical problems, victims of natural disasters, people living in disaster areas and other groups. These groups should be ensured to some extent a priority consideration on their housing need in housing policies.²¹¹

This exhaustive list of disadvantaged groups has been criticised because it does not include women due to the gender neutrality of General Comment 4.²¹² However, women as a disadvantaged group can be added in the “other” groups. Thus, it can be said that women are not excluded as a disadvantaged group. This is also supported by the non-discrimination

²⁰³ General Comment 4 (n 19) para 8(d).

²⁰⁴ Health Principles of Housing (n 202).

²⁰⁵ Craven (n 194) 346.

²⁰⁶ UN ECOSOC, E/C.12/GBR/CO/6 (n197).

²⁰⁷ *ibid.*

²⁰⁸ CESCR, ‘Concluding Observations on the Second Periodic Report of Greece’ (27 October 2015) E/C.12/GRC/CO/2, para 33.

²⁰⁹ CESCR, ‘Concluding Observations Nigeria (16 June 1998) UN Doc E/C.12/1/Add.23, para 27. Makeshift shelters commonly found in Nigeria, where people affected by forced evictions and conflict built temporarily and extremely poor shelters with any materials that found in the field, such as card boxes and plastics. See also ‘Nigeria: UN expert urges authorities to halt ongoing trend of forced evictions’ (OHCHR website 23 November 2015) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16790&LangID=E>> accessed 17 May 2019; see Collins Online Dictionary <<https://www.collinsdictionary.com/dictionary/english/makeshift>> accessed 17 May 2019.

²¹⁰ General Comment 4 (n 19) para 8(e).

²¹¹ *ibid.*

²¹² Giulia Paglione, ‘Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing’ (2006) 28 Human Rights Quarterly 120.

principle recognised in the Covenant²¹³ as well as in General Comment No. 16²¹⁴ adopted by the Committee later on, which answers this criticism and emphasises the need to overcome discrimination towards women in the field of economic, social, and cultural rights.

Housing accessibility strongly relates to the access of persons with disabilities to houses, apartments or offices. Further, General Comment No. 4 requires states to ensure sustainable access to adequate housing resources; thus, states' housing laws and policies should take into account the special needs of people with disabilities.²¹⁵ In addition, General Comment No. 5, reaffirms that the right to adequate housing includes the issue of accessibility for persons with disabilities.²¹⁶ Accessibility means that housing should be physically and economically accessible to persons with disabilities, to enable them to effectively participate in the community.²¹⁷ In this regard, the CRPD Committee has adopted General Comment No. 2 that elaborates the meaning of accessibility for persons with disabilities. Relating to accessibility of buildings and housing, the CRPD Committee urges states to "to identify and eliminate obstacles and barriers to accessibility."²¹⁸ These measures include developing, promulgating and monitoring the implementation of minimum national standards for the accessibility of public facilities and services, as well as provide training to stakeholders on accessibility for persons with disabilities.

2.4.6 Location

The location of a settlement becomes one element to consider in the adequacy of housing. The location determines access to public or social services, such as health care, schools, childcare centres, as well as employment options.²¹⁹ Location will also influence the financial burden for families if the physical position of housing is far from these services. According to the Committee, in such cases, public transportation should be provided to enable people accessing public services.²²⁰ The location element closely relates to the spatial planning of the cities, in which public or social facilities ideally should be built close to the housing community.²²¹

²¹³ See Article 2 (2) of the ICESCR which guarantees that the exercise of all rights enshrined in the covenant should be from any discriminatory action. Article 3 also affirms the equality between man and women in enjoying socio economic and cultural rights.

²¹⁴ CESCR, 'General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)' (11 August 2005) UN Doc E/C.12/2005/4 (General Comment 16) paras 4,5,6, and 28; see also CESCR, 'General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20 (General Comment 20) paras 3,6, 20.

²¹⁵ General Comment 4 (n 19) para 8(e).

²¹⁶ CESCR, General Comment No. 5: Persons with Disabilities (9 December 1994) UN Doc E/1995/22, paras 1, 11, and 33.

²¹⁷ ComHR, 'Report of the Special Rapporteur on on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mr. Miloon Kothari, Submitted Pursuant to Commission Resolution 2000/9' (25 January 2001) UN Doc E/CN.4/2001/51, para 23.

²¹⁸ CRPD Committee, 'General Comment No 2: Article 9: Accessibility' (22 May 2014) UN Doc CRPD/C/GC/2, paras 17-19.

²¹⁹ General Comment 4 (n 19) para 8(f).

²²⁰ CESCR, 'Concluding Observations on the Fourth Periodic Report of France' (13 July 2016) E/C.12/FRA/CO/4, para 54.

²²¹ See for example CESCR, 'Concluding Observations of Dominican Republic' (19 December 1994) UN Doc E/C.12/1994/15, para 11; CESCR, 'Concluding Observations of the Committee on the Third Periodic Report of Ecuador' (13 December 2012) UN Doc E/C.12/ECU/CO/3, para 26.

In addition to the proximity of housing to public services, the CESCR also states that houses should not be built either on polluted sites or in the immediate zone of sources of pollution.²²² Such a location may threaten the right to health of the persons living in such housing.²²³ A similar approach was also taken by the ECtHR relating to the negative effect of people living near dangerous factories in which the Court ruled that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”²²⁴

In its concluding observations, the Committee also refers to proximity to other settlements which means that housing locations should not be “socially excluded”.²²⁵ Thus, the location of houses should enable a person to enjoy both public services and to socialise with other members of the community.

2.4.7 Cultural adequacy

Cultural adequacy is an element which should be considered in housing construction. It means that building materials and policies must enable a community to express its cultural identity and diversity of the inhabitants.²²⁶ It does not mean that the cultural identity should have a priority. For example, when building a housing complex targeted for resettlement of a particular ethnic group which have traditional houses with no window, because they live next to the forests and they do not want wild animals to enter into their house, in a more urban area, building houses with no windows does not make sense. Moreover, in urban areas the weather is hotter than in the forest, so windows are essential to allow for air flow which will influence the health condition of the inhabitants.

According to the Committee, the “...cultural dimensions of a community must not be sacrificed and on the other hand modern facilities should also be used appropriately.”²²⁷ Cultural factors cannot be used to avoid modernisation or excluding new technologies in constructing housing²²⁸ or even worse, to avoid the obligation to provide adequate housing in terms of habitability.²²⁹ Yet, states should consider the specific cultural needs²³⁰ of a community so that members of the community can maintain their cultural identity and enjoy their houses, not only as a building but also as a home. However, the Committee has not really provided a reference of what is the “cultural adequacy” in its interpretation of Article 11 ICESCR or in concluding observations.²³¹

²²² General Comment 4 (n 19) para 8 (f).

²²³ *ibid.*

²²⁴ European Court of Human Rights, *Lopez Ostra v Spain*, App no. 16798/90 (9 December 1994) para 51.

²²⁵ CESCR, E/C.12/GRC/CO/2 (n 208) para 33; CESCR, ‘Concluding Observations France’ (9 June 2008) UN Doc E/C.12/FRA/CO/3, para 24.

²²⁶ General Comment 4 (n 19) para 8(g).

²²⁷ *ibid.*

²²⁸ Hohmann (n 33)144.

²²⁹ Emphasis added.

²³⁰ CESCR, ‘Concluding Observations Greece (7 June 2004) UN Doc. E/C.12/1/Add.97, para 44 (CO Greece).

²³¹ Yvonne Donders, ‘Protecting the Home and Adequate Housing: Living in a Caravan or Trailer as a Human Right’ (2016) 5 International Human Rights Law Review 1.

2.4.8 Summary of the normative content of the right to adequate housing

The elements listed in General Comment 4 appear to be intended as essential or constituent elements of housing adequacy,²³² which should be fulfilled by the states parties in order to guarantee the right to adequate housing for their population. The Committee in the General Comment 4 refers to these elements as “[...] a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute ‘adequate housing’ for the purposes of the Covenant.”²³³ However, the Committee stopped short of explaining that these elements belong to the core content or core obligations of the right to adequate housing. These concepts were later developed by the Committee in subsequent General Comments such as General Comment No. 14 on the Right to Health.²³⁴ However, Leckie refers to these elements as core entitlements²³⁵ of the right to adequate housing, and the Committee seems to refer to these elements as belong to the core contents of the right to housing.²³⁶

These elements appear to be not cumulative. Since the right to housing involves many factors such as budgeting, planning, availability of land and buildings and institutions and governance, most states can face difficulties in fulfilling all these elements, even the developed ones. If a country is unable to meet one of factors mentioned by the Committee, it would not necessarily constitute a violation of the right to housing if the state in question can prove that it has already utilised the maximum available resources to fulfil them. This situation is in line with the nature of the progressive realisation of the right to housing. With regard to the normative contents of the right to housing, the Committee does not make it clear how the member states should take all seven factors into account. Therefore, a question might be raised as to whether it is realistic to expect states to fulfil all factors of the normative content. If the factors are not cumulative, how far are states allowed to choose the factors they are able to fulfil? Are these factors or elements even hierarchical? If one of these factors should be regarded as essential, and thus belong to the core of the right, then the Committee should make this clearer. Based on the reflections above, General Comment 4 needs to be further amended and clarified.

A differentiation should be made between public housing, which is built by states or states’ appointed agencies, and private housing, which is built by individuals or private companies. This might be complex since the housing system in each country is different. In a country in which individuals can build their own house, a state might not have the power to force people to use a particular design, as it will be seen as limiting their freedom. The states however, may still impose certain regulations, such as in terms of safety. The limitation should fulfil the limitation requirement under Article 4 of the ICESCR mentioned above.

²³² Leilani Farha, ‘Is there a Woman in the House? Re/conceiving the Human Right to Housing’ (2002) 14 Canadian Journal of Women and the Law/Revue Femmes et Droit 118; see also Ingrid Westendorp, *Women and Housing: Gender Makes A Difference* (Intensientia 2007); Hohmann (n 33) 21.

²³³ General Comment 4 (n 19) para 8.

²³⁴ CESCR, ‘General Comment No.14 The Right to the Highest Attainable Standard of Health (Art. 12)’ (11 August 2000) paras 43 and 44.

²³⁵ Scott Leckie, ‘The Right to Housing’ in Asbjørn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights* (Martinus Nijhoff 1995) 107-123.

²³⁶ See for example CO of Spain (n 182) para 36; CO of Peru (n 184) para 19; CO of Poland (n 196) paras 36 & 3; CO of Greece (n 208) para 34.

In the poorer countries, people also tend to build houses in locations that are far from public facilities because such locations are more affordable than locations in closer proximity to public services. In these kinds of situations, of course, it is much more difficult to identify a violation. However, a state may still be required to intervene in this regard, such as a states' obligation to provide public transportation could enable the dwellers to enjoy public services. The Committee should urge states to raise awareness of people about building their houses according to a certain design. This may include enough windows for the light and the air to flow, as well as good sanitation. The design should be chosen as such without leaving people's identities and cultures behind, as mentioned in the element of cultural adequacy as one element of adequate housing. States could also develop public services close to the settlements or provide public transportation to facilitate people to access to these services.

In addition, the Committee needs to clarify some essential elements of adequate housing, such as cultural adequacy and natural building materials to build local houses. In its concluding observations, the Committee does not have much discussion on the precise obligations relating to these two components, particularly when related to housing issues. However, in other General Comments, it does refer to the concept of acceptability/adequacy in the context of education, food, water and health. For example, the Committee mentions an acceptability component for health facilities and services if they are "culturally appropriate."²³⁷ Such clarification will benefit member states where indigenous people reside in implementing their obligations.

Relating to the adequacy of housing, so far, the Committee in its Concluding Observations, seems to recommend member states to adopt measures in a more general terms, such as to adopt "measures suitable with cultural needs"²³⁸ or apply housing policy in a non-discriminatory manner."²³⁹ For example, in the concluding observations on Australia, the Committee appreciates the progress made by Australia in adopting a housing policy and providing a subsidy for indigenous people.²⁴⁰ Australia invested \$1.3 billion a year to deliver appropriate housing for low and moderate income Australians and to tackle homelessness.²⁴¹ It also has invested \$5.5 billion over ten years (2008-2017) to address significant overcrowding, homelessness, poor housing conditions and the severe housing shortage in remote indigenous communities.²⁴² In the next phase of concluding observations, the Committee demonstrated concern on the fact that there is still a number of people who are still homeless or are living in overcrowded homes despite of the programmes.²⁴³ The Committee gave only general remarks and recommendations to Australia, such as requesting the government to increase its

²³⁷ See for example CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) UN Doc E/C.12/2000/4 (General Comment 14), para 12 c.

²³⁸ CESCR, CO Greece (n 230) para 44.

²³⁹ See General Comment 4; see also CESCR, "Concluding Observations on the Second Periodic Report of China, including Hong Kong, China, and Macao, China" (13 June 2014) UN Doc E/C.12/CHN/CO/2, paras 14-16, 41 and 54.

²⁴⁰ CESCR, 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights Fifth Periodic Reports of States Parties due in 2014, Australia' (2 February 2016) UN Doc E/C.12/AUS/5.

²⁴¹ *ibid* para 188.

²⁴² *ibid* para 199.

²⁴³ CESCR, 'Concluding Observations on the Fifth Periodic Report of Australia' (11 July 2017) UN Doc E/C.12/AUS/CO/5, paras 41 and 42.

investments in affordable housing and social housing. However, such recommendations do not provide general clarity or concrete details as to how Australia should further implement its international obligations with regard to Article 11.

The relation between the normative content and obligations related to the right to housing will be discussed further in the next section.

2.5 MINIMUM CORE OF STATES' OBLIGATIONS ON THE RIGHT TO HOUSING

Can it be concluded that there is a violation of the right to adequate housing if people are living on the street without adequate housing, or people are living in slums without proper sanitation or are homeless? To answer this question, one should analyse the specific obligations which could possibly have been breached, for example: the existence of discriminatory legislation, the non-existence of legislation on housing or whether existing programmes are properly carried out. There may be many possible causes for these problems.

Monitoring states' compliance with the wording of "progressive realisation" is complicated, because the realisation of these rights depends on levels of development and resources available. In order to simplify monitoring, the concept of minimum core obligations has been introduced in General Comment No. 3 on the Nature of the States' Parties Obligations²⁴⁴ and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.²⁴⁵ The purpose of the minimum core obligations is to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in every state party.²⁴⁶ The minimum core obligations reflect a universal absolute bottom-line of obligations under each of the rights of the ICESCR, which has to be respected, protected and fulfilled by all state parties, regardless of their level of economic development.²⁴⁷

General Comment 3 emphasises the relation between minimum core obligations and minimum essential levels of the rights.²⁴⁸ Although different situations, such as economic crisis,

²⁴⁴ General Comment 3 (n 5).

²⁴⁵ The Maastricht Guidelines were adopted in an expert seminar organised by the International Commission of Jurists, the Maastricht Centre for Human Rights and the Urban Morgan Institute for Human Rights in Maastricht, on 22-27 January 1997. The guidelines are published in (1998) 20 *Human Rights Quarterly* 691 and officially adopted by CESCR, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (2 October 2000) UN Doc E/C.12/2000/13.

²⁴⁶ General Comment 3 (n 5) para 10.

²⁴⁷ Amrei Muller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 *Human Rights Law Review* 557, 579-580. See for example, General Comment 14, paras 47-48; General Comment 15, paras 40, 42 and 44(c); and General Comment 19, para. 65; see also, Limburg Principles, para 25 ('States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all')

²⁴⁸ CESCR, 'General Comment 3' (n 5) para 10.

"...the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort

severe poverty, armed conflict and natural or man-made disasters, might occur in every country limiting the enjoyment of ESC rights, states are still obliged to guarantee the enjoyment of the minimum level of the rights.²⁴⁹ For example, by providing ‘basic services, including health and education infrastructure’²⁵⁰ and respecting the minimum core obligations in the context of developmental policies.²⁵¹ Minimum core obligations list the actions or requirements at the minimal level which should be met by states with the aim to achieve the enjoyment of the essential levels of a right in question. It may occur that a state claims that it could not meet the minimum obligations; however, it should demonstrate its inability to justify its claim.²⁵²

General Comment 3 itself does not provide a methodology to determine states’ minimum obligations, but does provide useful examples.²⁵³ However, the Committee started to fill this gap by identifying states’ obligations under the ICESCR in General Comment 4 and other subsequent General Comments.²⁵⁴ However, General Comment 4 also does not make it clear which obligations can be considered as core obligations. Indeed, it mentions a number of immediate obligations, such as refraining from evictions and giving priority to the most disadvantaged groups in the society.²⁵⁵ In spite of this, the General Comment 4 does not seem to clearly distinguish which states’ obligations serve as core obligations or general obligations. Such categorisation is crucial to analyse what measures can constitute a violation of the right to housing by the states.

Therefore, to understand the state obligations as they relate to the right to housing, this section will discuss them in the light of the general tripartite typology of states’ obligation: to respect, protect, and fulfil.²⁵⁶ The Committee in its concluding observations has applied this tripartite typology of states’ obligations relating to the right to housing.

The obligation to respect the right to housing means states are required to refrain from interfering with the enjoyment of this rights.²⁵⁷ The obligation to respect the right to housing includes, but not limited to, the obligations to refrain from:

has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

²⁴⁹ See CESCR, ‘Concluding Observations regarding Israel’ (31 August 2001) UN Doc E/C.12/1/Add.69, para 12.

²⁵⁰ See CESCR, ‘Concluding Observations regarding the Russian Federation’ (12 December 2003) UN Doc. E/C.12/1/Add.94, para 38.

²⁵¹ CESCR, ‘Poverty and the ICESCR: Statement by the Committee to the Third United Nations Conference on Least Developed Countries’ (10 May 2001) UN Doc E/C.12/2001/10, para 17.

²⁵² General Comment 3 (n 5) para 10.

²⁵³ For example, to promote the enjoyment of the rights enshrined in the Covenant without any discrimination, the Committee suggests the member states to adopt the provision of judicial or other form of remedies. Moreover, the Committee suggests that the appropriate measures that can be taken by the member states may include administrative, financial, educational, social as well as other measures. See CESCR, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)’ (14 December 1990) UN Doc E/1991/23, paras 5 and 7.

²⁵⁴ Audrey Chapman and Russel, ‘Introduction’ in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 10.

²⁵⁵ General Comment 4 (n 19) para 10 and 11.

²⁵⁶ These tripartite typology of obligation was developed at the first time by Henry Shue in 1980 known as types of duties. This concept then further developed by Asbjørn Eide in 1987 with a more concise name “tripartite typology”. This concept later was also referred by the CESCR in its statements, general comments as well as concluding observations. For the evolution of the tripartite typology of states’ obligation and how the CESCR approach related to this concept see Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) chapter v.

²⁵⁷ Maastricht Guidelines (n 245) para 6.

- (1) Carrying out arbitrary forced evictions;²⁵⁸
- (2) Imposing discriminatory practices that limit women's access to and control over housing, land and property;²⁵⁹
- (3) Limiting access to social housing to particular groups;²⁶⁰

The obligation to protect requires States to prevent violations of the right to housing rights by third parties.²⁶¹ In other words, states have to protect its population from landlords' or private developers' activities which could interfere with the enjoyment of the right to housing. This obligation may include that states should:

- (1) Regulate the housing and rental markets in a way that promotes and protects the right to adequate housing;²⁶²
- (2) Guarantee that banks and financial institutions extend housing finance without discrimination;²⁶³
- (3) Prevent discriminatory inheritance practices affecting women's access to and control over housing, land and property;²⁶⁴
- (4) Ensure that women who head households have access to housing;²⁶⁵
- (5) Ensure that landlords do not discriminate against particular groups;²⁶⁶
- (6) Ensure that private actors do not carry out forced evictions.²⁶⁷

The obligation to fulfil entails that states are obliged to adopt appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of housing rights.²⁶⁸ The obligation to fulfil may be said as a positive obligation to which states have to take some actions in order to realise certain rights. Such actions can be in the form of adopting housing policies and strategies,²⁶⁹ increasing housing budget,²⁷⁰ developing low cost housing,²⁷¹ providing housing subsidies for the poor or other vulnerable groups to enable them

²⁵⁸ CESCR, 'Concluding Observations on the Second Periodic Report of the Islamic Republic of Iran' (10 June 2013) UN Doc E/C.12/IRN/CO/2 (CO Iran) para 24; CESCR, 'Concluding observations Turkmenistan' (13 December 2011) UN Doc E/C.12/TKM/CO/1, para 21.

²⁵⁹ CESCR, UN Doc E/C.12/CHN/CO/2 (n 239) para 16; CESCR, CO France 2008 (n 225) paras 13 and 33.

²⁶⁰ See for example CESCR, 'Concluding Observations New Zealand' (31 May 2012) UN Doc E/C.12/NZL/CO/3, para 22; CESCR, 'Concluding Observations Hungary' (16 January 2008) UN Doc E/C.12/HUN/CO/3, para 22.

²⁶¹ Maastricht Guidelines (n 245) para 6.

²⁶² CESCR, 'Concluding Observations on the Fifth Periodic Report of Republic of Korea' (19 October 2017) UN Doc E/C.12/KOR/CO/4, para 53; CESCR, 'Concluding Observations Israel' (16 December 2011) UN Doc E/C.12/ISR/CO/3, para 25.

²⁶³ CESCR, 'Concluding Observations Dominican Republic' (19 December 1994) UN Doc. E/C.12/1994/15, para 25.

²⁶⁴ CESCR, 'Concluding Observations Canada' (22 May 2006) UN Docs E/C.12/CAN/CO/4 and E/C.12/CAN/CO/5 (CO Canada), paras 11(d), 17 and 45; CESCR, 'Concluding Observations India' (8 February 2008) UN Doc E/C.12/IND/CO/5 (CO India) para 58 (b).

²⁶⁵ CESCR, 'Concluding Observations on the Fifth Periodic Report of Sri Lanka' (4 August 2017) UN Doc E/C.12/LKA/CO/5 (CO Sri Lanka), para 54

²⁶⁶ CESCR, CO France 2008 (n 225) para 41 (c).

²⁶⁷ CESCR, CO India (n 264) para 31.

²⁶⁸ Maastricht Guidelines (n 237) para 6.

²⁶⁹ See for example CESCR, CO India (n 264), para 70; CESCR, CO Sri Lanka (n 265) para 48.

²⁷⁰ CESCR, 'Concluding Observations Sri Lanka' (9 December 2010) UN Doc E/C.12/LKA/CO/2-4 para 31; CESCR, CO Iran (n 258) para 23.

²⁷¹ CESCR, CO India (n 264) para 70.

to access to housing,²⁷² improving infrastructure and access to services,²⁷³ and ensuring adequate remedies for violations.²⁷⁴

The specific obligations are to progressively improve the right to adequate housing based on essential elements of the right to housing enshrined in General Comment 4. In its effort to fulfil the right to housing (as well as other ESC rights), states have to employ its available resources to the maximum level. Such obligations include: adopting legislative measures on housing policies, adopting housing subsidies for the vulnerable groups,²⁷⁵ as well as adopting administrative, financial, educational and social measures.²⁷⁶ The Committee also emphasises that if a state cannot rely on its available resources anymore, it may seek or request for international cooperation in accordance with Articles 11 (1), 22 and 23 of the Covenant.²⁷⁷

Although the right to housing, as well as other economic, social cultural rights, are subjected to progressive realisation,²⁷⁸ the parties to the Covenant are obliged to adopt some immediate actions under the minimum core of obligations. As discussed above that the term ‘minimum core obligations’ is not used in the General Comment 4. However, GC 4 recognises a number of obligations that should be implemented immediately. Furthermore, while reviewing state reports, the Committee has noted which steps it further considers to be additional immediate obligations next to the immediate obligations already mentioned in the GC 4. Due to the absence of a list of core obligations in GC 4, this present study suggests that the immediate obligations listed in GC 4, and those that were later introduced by the Committee in its concluding observations can be regarded as ‘core obligations’ related to the right to adequate housing. This suggestion is based on the fact that some states seem to have responded to the recommendations provided by the Committee in the COs and accepted them.²⁷⁹ This could potentially be seen as subsequent practice of the application of the ICESCR which establish the agreement of the parties regarding the interpretation of the treaties by the Committee.²⁸⁰

General Comment 4 emphasises that states need to adopt immediately steps especially in promoting the right to housing, for example, to simply refrain from certain practices that infringe upon human rights²⁸¹ and to apply the housing policies on a non-discriminatory basis.²⁸²

The need to prioritise access to housing for the poor is also a core element of states’

²⁷² CESCR, CO France 2008 (n 225) para 44.

²⁷³ CESCR, CO Canada (n 264) para 41 (a).

²⁷⁴ CESCR, CO India (n 264) para 71; CO Sri Lanka (n 265) paras 48, 52; CESCR, ‘Concluding Observations on the Initial Report of Indonesia’ (19 June 2014) UN Doc E/C.12/IDN/CO/1, para 30.

²⁷⁵ CESCR, General Comment 3 (n 5) paras 3-6.

²⁷⁶ CESCR, General Comment 3 (n 5) para 7.

²⁷⁷ *ibid* paras 13-14.

²⁷⁸ ICESCR (n 49) art 2(1).

²⁷⁹ See for example the CESCR in its COs on Australia’s reports, UN Doc E/C.12/1. Add 50 (11 September 2000) paras 34 and 36; UN Doc E/C.12/Aug/CO.4 (12 June 2009) para 26; Concluding Observation on China UN Doc E/C.12/1/Add 107 (13 May 2005) paras 46, 59 and 61; UN Doc E/C.12/CHN/CO/2 (13 June 2014) paras 16 and 17. Although there is a tendency of states following the CESCR’s recommendation in the light of implementing their human rights obligations enshrined in the Covenant, further research need to be conducted to see the trend of such fact.

²⁸⁰ See Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980) UNTS Vol 1155 (p 331) Art 31 (3b). Also, potentially the Committee’s COs and the states reaction to them could be used as a supplementary means of interpretation under article 32 of VCLT.

²⁸¹ General Comment 4 (n 19) para. 10.

²⁸² *ibid* para 9.

obligations,²⁸³ as also shown in some of the Committee's concluding observations on states' reports. In these cases, the CESCR urged states to fulfil their obligations to increase housing subsidies,²⁸⁴ adopt a system of financing of low-cost dwellings for the poorest or adopt housing strategies,²⁸⁵ recognise the right to housing in national legislation,²⁸⁶ as well as provide effective remedies if discrimination on right to housing is occurring.²⁸⁷

In various concluding observations, the Committee states its concerns with the discriminatory access to housing, especially for indigenous communities or minority communities, shortage of housing and unavailability of remedies based on national law.²⁸⁸ In certain situations discrimination had a devastating effect on societies.²⁸⁹ Based on states' obligations enshrined under Article 2 (2) ICESCR, the Committee urges states to adopt comprehensive anti-discrimination laws which should prevent discrimination as well as punish the perpetrators based on these regulations.²⁹⁰

Adopting housing policies and strategies is one of many measures which should be taken by states in fulfilling their obligations under the right to housing. Indeed, the housing strategies adopted by states might vary. However, the Committee recommends that there are some aspects in the strategies which have similarities, especially that the strategies should define objectives for the development of shelter conditions, identify the resources available to meet these goals and the most cost-effective way of using them, and set out the responsibilities and time frame for the implementation of the necessary measures.²⁹¹

Another core obligation on the right to housing is the availability of emergency accommodation, ensuring access to housing for its population in time of emergency.²⁹² The meaning of emergency is broad and may include loss of homes due to natural disasters,²⁹³ homelessness caused by evictions,²⁹⁴ and homelessness in general.²⁹⁵ A similar approach used by a national court that somehow reflects the approach of the CESCR in providing accommodation in time of crisis is the *Grootboom* judgment of the South African Constitutional

²⁸³ General Comment 4 (n 19) para 11.

²⁸⁴ CESCR, 'Concluding Observations Colombia' (6 December 2001) UN Doc E/C.12/1/Add.74, paras 42 and 47.

²⁸⁵ Ibid; see also CESCR, 'Concluding Observations Algeria' (30 November 2001) UN Doc E/C.12/1/Add.71, para 35.

²⁸⁶ CESCR, 'Concluding Observations Czech Republic' (5 June 2002) UN Doc E/C.12/1/Add.76, para 8.

²⁸⁷ CESCR, 'Concluding Observations Poland' (19 December 2002) UN Doc E/C.12/1/Add.82, para 36.

²⁸⁸ See CESCR, CO New Zealand and CO Hungary (n 249).

²⁸⁹ For example, this rooted discriminations are faced by Roma communities residing in various European countries. They are exposed to discrimination in many fields, such as access to health care, education, employment, including access to housing.

²⁹⁰ CESCR, 'Concluding Observations Slovakia' (19 December 2002) UN Doc E/C.12/1/Add.81, paras 9, 22.

²⁹¹ General Comment 4 (n 19) para 12.

²⁹² Ibid, paras 8 (a), 11. These specific paragraph does not state per se that emergency available should be available in the time of emergency. Nonetheless, it stipulates that states obligations extends during crisis (other threats) and might be more pertinent than in the normal situations.

²⁹³ Ibid, paras 8 (c & d), See General Comment No. 3 (n 5) para 11 which extends the states obligation in the time of natural disaster; see also Rebecca Barber, 'Protecting the Right to Housing in the Aftermath of Natural Disaster' (2008) 20(3) International Journal of Refugee Law 432; Stefanie Jahnsen-Wilhelm, 'A Duty to Accept Humanitarian Assistance under the ICESCR' in Andrej Zwitter et al (eds), *Humanitarian Action* (CUP 2015) 174-201; Dug Cubie and Marlies Hesselman, 'Accountability for the Human Rights Implications of Natural Disasters: a Proposal for Systemic International Oversight' (2015) 33 Netherlands Quarterly of Human Rights 9.

²⁹⁴ See for example CESCR, 'Concluding Observations on the Third Periodic Report of Ireland' (8 July 2015) UN Doc E/C.12/IRL/CO/3, paras 26 & 27.

²⁹⁵ See for example CESCR, 'Concluding Observations on the Fourth Periodic Report of France' (13 July 2016) UN Doc E/C.12/FRA/CO/4, para 35.

Court. In this judgement, the Court stated that “there was no express provision in the government policy to facilitate access to temporary relief for people who had no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis,”²⁹⁶ either because of natural disasters or because their homes are under threat of demolition.

Next to the obligations mentioned above, as a part of the obligation to adopt measures to realise the human rights obligations enshrined in the ICESCR (including the right to housing), states should establish an effective monitoring mechanism that offers remedy and redress.²⁹⁷ The CESCR suggests that this obligation is a part of the core obligations which should be carried immediately by the states.²⁹⁸ This obligation is implied in the OP to the ICESCR. To be able to bring an individual complaint, the OP requires that all remedies available on the domestic level should have been exhaustively employed.²⁹⁹ Therefore, as a part of the obligation to provide a remedy, establishing an effective monitoring system for all strategies states adopt relating to right to housing is vital for the fulfilment of such right. Policies and strategies without proper monitoring mechanism are trivial, as the monitoring can ensure that all policies are well implemented and targeted to the right groups.

Moreover, in ensuring the legal security of tenure, states are obliged to take immediate actions to ensure that all people enjoy a certain level of tenure security that will protect them against forced evictions. According to GC 7, states are immediately required to refrain from any action that could lead to forced evictions.³⁰⁰ If forced evictions can be justified by fulfilling strict requirements postulated in GC 7, states should provide alternative accommodation to prevent the affected people from being homeless.³⁰¹ Further discussion on the protection against forced eviction will be provided in Section 2.6.

Related to the progressive realisation, states are obliged to fulfil human rights “at the very, core essential levels of each of the rights.”³⁰² When they reach this level, they are prohibited to take retrogressive measures. However, the Committee realised that “the available resources” could possibly limit the ability state to realise economic, social and cultural rights.³⁰³ It states that Article 2 (1) of the Covenant implicitly opens the possibility to adopt retrogressive measures as long as states can justify these measures and show that they have employed the “maximum available resources”.³⁰⁴

To conclude, states have minimum core obligations with regard to the right to housing, which are in line with the three types of obligations; i.e. to respect, to protect, and to fulfil. In general,

²⁹⁶ The Constitutional Court of Republic of South Africa, *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169, Judgement on 4 October 2000, paras 63-69, 95, 99 (2c).

²⁹⁷ This obligation flows from Article 2 ICESCR as a part of obligation to “... take steps with a view, ...to achieving progressively the full realization of the rights ...”

²⁹⁸ General Comment 4 (n 19) para 13.

²⁹⁹ Optional Protocol to the ICESCR (n 63) art 3.

³⁰⁰ General Comment 7 (n 67) para 8.

³⁰¹ *ibid* para 16.

³⁰² General Comment 3 (n 5) para. 10.

³⁰³ Aoife Nolan *et al*, ‘Two Steps Forward, No steps back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights’ in Aoife Nolan (Ed.), *Economic and Social Rights After the Global Financial Crisis* (CUP 2013) 121-145, 124.

³⁰⁴ General Comment 3 (n 5) para 9.

the progressive nature of the fulfilment of housing rights is recognised. Based on the work of the CESCR, the minimum core obligations to be adopted immediately are:

1. Recognising the right to housing in national legislation, including providing effective remedies against discrimination;
2. Providing emergency accommodation in times of emergency;
3. Adopting national housing policies and strategies, such as on legal security of tenure, housing subsidies, low-cost dwellings or providing public housing for the poorest;
4. Enforcing the national legislation and adopting monitoring procedures to supervise the programmes or strategies which have been adopted;
5. Refraining from adopting retrogressive measures;
6. Refraining from carrying out evictions that infringe human rights;
7. Providing consultation, effective complaint mechanisms, remedies as well as compensation for the affected communities if evictions cannot be avoided;
8. Implementing all the obligations mentioned above in a non-discriminatory manner without distinction on the basis of race, religion, political believe, origin, gender, or any other basis.

Again, General Comment 4 does not provide a clear cut understanding on the normative content and the core obligations. It only recognises immediate and progressive obligations. It is indeed challenging to conclude which core elements directly relate to the obligations. However, in general, the immediate obligations may also be reflected in the tripartite obligations. For example, the oimemdiat obligation to refrain from evictions is considered as an obligation to respect of the right housing. Although the Committee has attempted to recognised and developed even more concrete states' obligations, it has done so in a non-systematic manner as these are spread in several concluding observations. As COs usually only focus on a single state situation, the obligation related to the right to housing mentioned in a specific CO can be understood as only applicable to that specific country. In light of the absence of a clear cut understanding on states obligations as well as normative content of the right to housing as discussed in Section 2.4, it might be desirable to amend General Comment 4, by using a similar approach and phrasing as the subsequesntly adopted general comments and drafting a list of minimum core obligations as well as minimum contents of the right that should be fulfilled first by member states.

2.6 PROTECTION AGAINST FORCED EVICTIONS

Under the international human rights law, forced evictions can under certain circumstances be considered as violations of human rights. The former UN Commission on Human Rights observed that forced eviction is “a gross violation of human rights, particularly the right to adequate housing.”³⁰⁵ The CESCR defines forced evictions as “the permanent or temporary removal against the will of individuals, families and/or communities from their homes and/or

³⁰⁵ ComHR, Resolution 1993/77, para 1; see also UN Sub-Commission on the Protection and Promotion of Human Rights, Resolution 1998/9 on Forced Evictions (20 August 1998) E/CN.4/SUB.2/RES/1998/9 and Resolution 2004/28.

land, without the provision of or access to appropriate forms of legal protection.”³⁰⁶ It can also apply to an eviction carried out against international law and standards, irrespective of whether the victims have legal title to the land or houses, and regardless of whether that the expulsion is carried out with force.³⁰⁷ Therefore, it should be noted that with or without a legitimate basis of ownership of land or houses, people cannot, in general, be forcibly evicted from their homes.³⁰⁸

Based on the CESCR’s definition on forced evictions, one could observe that evictions are permissible if they are not against the will of individuals, and the government provides emergency shelter as well as legal protection for the affected communities. In GC 7 on Forced Evictions, the CESCR established a list of safeguards that should be taken into consideration by the authorities in what are so-called impending forced evictions to ensure the human rights of the affected persons. These safeguards are:³⁰⁹

- a. An opportunity for genuine consultation with affected communities;
- b. Adequate and reasonable notice for all affected persons prior to the eviction;
- c. Information on the proposed evictions and all related information should be made available in reasonable time to all those affected;
- d. Government officials or their representatives should be present during an eviction;
- e. All persons carrying out the eviction should be properly identified;
- f. Not to carry out evictions in particularly bad weather or at night unless the affected persons consent otherwise;
- g. The availability of provision of legal remedies; and
- h. The availability of provision, where possible, of legal aid to persons who needs to seek redress from the courts.

In the case of impending evictions, states, therefore, should comply with the related international human rights law. This means that if states want to limit the right to adequate housing in a legitimate eviction, they should comply with limitation clause of Article 4 ICESCR as well as the general principles of reasonableness and proportionality in Article 8 (4) of the Optional Protocol with respect to state parties of the particular instrument.³¹⁰ Article 4 ICESCR affirms that limitations to the rights enshrined in the Covenant are possible and are subject to certain conditions. These interferences with the Covenant’s rights should be determined by law, be compatible with the nature of these rights and solely serve for the purpose of promoting the general welfare in a democratic society.³¹¹ This entails assessing the proportionality of the measure limiting the rights. The principle of proportionality consists of three elements: adequacy, necessity and proportionality *stricto sensu* (balancing inquiry).³¹² A set of questions

³⁰⁶ General Comment 7 (n 67) para 3.

³⁰⁷ HRC, ‘The UN Special Rapporteur on on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik, Addendum, Mission to Indonesia’ (26 December 2013) UN Doc. A/HRC/25/54/Add 1, para 56.

³⁰⁸ General Comment 4 (n 19) para 8a; see also Human Rights Watch (HRW), ‘Condemned Communities Forced Evictions in Jakarta’ (2006) 18 Human Rights Watch, 30

³⁰⁹ General Comment 7 (n 67) para 15.

³¹⁰ Optional Protocol to the ICESCR (n 63).

³¹¹ ICESCR (n 49) art 4.

³¹² Jan Sieckmann, ‘Proportionality as a Universal Human Rights Principle’ in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer 2018) 11-12.

to assess the proportionality of a government action infringing upon human rights is:³¹³ 1) is the action adequate to further a legitimate aim (adequacy); 2) is the measure necessary?; 3) do the benefits of the measure outweigh the harms of the rights-bearers?³¹⁴ The principle of reasonableness in the Optional Protocol involves an obligatory consideration that should be conducted properly prior to the adoption of a government decision.³¹⁵ Such consideration should properly take into account all relevant factors and all of them should have been properly balanced.³¹⁶ The safeguards mentioned above should ideally be part of the assessment of proportionality and reasonableness of a legitimate human rights limitation involving an eviction. These safeguards and principles will be used to analyse the legality of Jakarta evictions in Chapter 8.

Moreover, in 2005 the UN Special Rapporteur on the Right to Adequate Housing has developed the Basic Principles and Guidelines on Development-Based Evictions and Displacement (Eviction Guidelines)³¹⁷ that are attached to its report to the UN General Council in 2007.³¹⁸ The Guidelines are not legally binding in nature. However, they can be beneficial to assist states in carrying out development-based evictions and at the same time protect human rights and reduce the adverse effects of evictions to the affected persons.³¹⁹ They emphasise the obligation of states to refrain from forced evictions and to protect affected persons if such activities occur.³²⁰

Similar to GC 7, the guidelines endorse the concept of “legal eviction.”³²¹ The requirements of legal eviction in GC 7 follow from Article 4 ICESCR, i.e. should be authorised by law, be consistent with international human rights standards, and be undertaken solely for the promotion of the general welfare. Any eviction should be reasonable and proportional, and should be regulated to ensure full and fair compensation and rehabilitation. Eventually, eviction

³¹³ Katherine G. Young, ‘Proportionality, Reasonableness and Economic and Social Rights’ in Vicki J. Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers New Challenges* (CUP 2017) 248-272.

³¹⁴ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 340-370.

³¹⁵ *ibid* 373, see also T. R. Hickman, ‘The Reasonableness Principle: Reassessing Its Place in the Public Sphere’ (2004) 63 Cambridge Law Journal 166; Robert Alexy, ‘The Reasonableness of Law’ in G. Bongiovanni, G. Sartor, and C. Valentini (eds), *Reasonableness and Law* (Springer 2009) 5. It would seem that in the drafting process of the Optional Protocol, the term of reasonableness was introduced shortly after the Grootboom decision which used the same principle. In the initial draft of the Optional Protocol, the term of reasonableness was not recognised. See ComHR, ‘Status of the International Covenants on Human Rights: Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (18 December 1996) UN Doc E/CN.4/1997/105. Following the discussion on the drafting process the term of reasonableness started to appear. See the report of the drafting process of the Optional Protocol in ComHR, ‘Report of the Open-ended Working Group to Consider Options regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its First Session’ (15 March 2004) UN Doc E/CN.4/2004/44, para 35; ComHR, ‘Report of the Open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its Second Session’ (10 February 2005) UN Doc E/CN.4/2005/52, para 41; HRC, ‘Report of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fourth Session’ (30 August 2007) UN Doc A/HRC/6/8, paras 92-95, 101-102, 149-150, 153.

³¹⁶ Alexy, *ibid*.

³¹⁷ Basic Principles and Guidelines on Evictions (n 179).

³¹⁸ HRC, ‘Implementation of General Assembly Resolution 60/251 of March 2006, entitled “Human Rights Council”’: Report of the Special Rapporteur on on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari’ (5 February 2007) UN Doc A/HRC/4/18.

³¹⁹ *ibid* para 22, see also Basic Principles and Guidelines on Evictions (n 179) para 10.

³²⁰ Basic Principles and Guidelines on Evictions (n 179) para 1.

³²¹ *ibid* para 21.

should be conducted in line with the Guidelines. The general welfare, refers to people's well-being,³²² particularly to the need to protect the well-being of the most vulnerable group in society.³²³ The general welfare requirement could presents a legitimate aim of a broad nature,³²⁴ such as national security, public order, public safety, public morals, public health, the protection of the rights and freedoms of others or the economic well-being of the country.³²⁵ States are also strongly advised to adjourn a planned eviction if at the date of execution individual cases are still under examination by national or international legal bodies.³²⁶

Furthermore, the Eviction Guidelines underscore several measures that should be adopted by states in the event of dismissal. The measures are divided into three stages, i.e. prior to the removal, during and after the displacement. The actions adopted prior to evictions are as follows: giving appropriate notices to affected communities and conferring an effective dissemination of the plan, including the strategy to protect the vulnerable groups. Moreover, the government should provide a reasonable time limit for public criticism, review or objection; holding public hearings; providing the community opportunities to challenge the plan before authorised institutions.³²⁷

During the eviction,³²⁸ states must ensure that their representatives and impartial observers are present to supervise that the eviction is carried out within the frame of the human rights principle. If states employ force, it should not be used excessively and should respect the principle of necessity and proportionality. Eviction must not be carried out in inhospitable weather or at other crucial events in the community; such as during religious days or during school examinations. During an eviction, states and their agents should ensure that no one is subjected to violence or abuses. In addition, states are not allowed to require the evacuees to demolish their dwellings or other structures. In the aftermath of the removal, states should provide just compensation and sufficient alternative accommodation, or restitution, when feasible. Such measures should be carried out without discrimination and immediately upon the eviction.³²⁹

Based on the international instruments mentioned above, forced evictions are generally prohibited as they may cause a human rights violation. Forced eviction may be necessary for the general welfare or wellbeing of those evicted or for a development project, yet it should be carried out with thorough consideration and preparation, as suggested in international human rights standards. As discussed in Sections 2.5 and 2.6, states have the immediate obligation to refrain from conducting evictions on its inhabitants. States may only carry out evictions if it is considered to be the last option and then they have to be conducted together with precautionary measures involving the principles of reasonableness and proportionality. The discussions in this section provides sufficient basis to analyse the Indonesian practice with regard to eviction in

³²² Paul Spicker, *The Welfare State: A General Theory* (Sage 2000) 72-73.

³²³ Basic Principles and Guidelines on Evictions (n 245), see in note d.

³²⁴ Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014)) 250.

³²⁵ See for example, arts. 8(2), 9(2) and 10(2) ECHR.

³²⁶ *ibid* para 36.

³²⁷ *ibid* para 37.

³²⁸ *ibid* paras 45-51.

³²⁹ For the detail obligation of states after the eviction see the guidelines, *ibid*, paras 52-58.

the name of development projects that frequently take place in Jakarta, which will be discussed further in Chapter 8.

2.7 THE RIGHT TO HOUSING IN PRACTICE UNDER SPECIALISED UN TREATY BODIES AND REGIONAL BODIES

The following subsections discuss the interpretation of the right to housing that relates to the rights of women, children and other groups as enshrined under the international treaties targeting these specific groups.

2.7.1 The interpretation of the right to housing by specialised UN treaty bodies

As discussed in Section 2.3.1.3, several other international treaties protect the right to housing for specific groups. These instruments recognise the challenges faced by these groups in the field of housing, such as discrimination and lack of housing access. Specific committees have been established to review the member states' implementation of the human rights enshrined in each convention. These committees also receive individual complaints and review states' mandatory periodic reports. Several committees have addressed issues related to the right to housing in their concluding observations or individual complaints that will be discussed in the following sections. However, this section does not intend to provide an exhaustive list of issues that have been brought before the UN treaty bodies. Instead it will provide examples demonstrating how the right to housing has also been addressed by these bodies. This shows that the right to housing cannot be separated from other human rights. Moreover, these committees may address issues that the CESCR has not been particularly clear on, such as accessibility and the cultural adequacy of housing.

2.7.1.1 The CEDAW Committee

A study conducted by the UN Special Rapporteur on the Right to Adequate Housing showed that women faced “de facto” discrimination and will probably continue to be marginalised in accessing housing, due to various legal and social factors, such as customs, traditions and poverty, denying their access to land and to housing.³³⁰ Moreover, such discrimination is also caused by lack of awareness or the persistence of gender bias in the formulation and implementation of national policies.³³¹

Notwithstanding the recognition of the right to housing for women in CEDAW, until 2015 the CEDAW Committee did not pay much attention to Article 14 (2) (h) and it stated its concern on the lack of data reported by states parties on this issue.³³² In 2016, the CEDAW Committee adopted General Recommendation 34 on improvement of the situation of women in rural areas.³³³ This documents clarifies states' obligations with regard to Article 14 of the Convention.

³³⁰ ComHR ‘Women and Adequate Housing’ (26 March 2003) UN Doc E/CN.4/2003/55, paras 10-19.

³³¹ *ibid.*, para. 21, 25, 42.

³³² Freeman (n 76) 376-377.

³³³ General Recommendation 34 (n 69).

With regard to housing for rural women, the Committee encourages states to adopt measures to protect rural women's rights to land, including the recognition of women's legal capacity, the recognition of the security of tenure and the elimination of discrimination against women in registration and titling of land possessed by women.³³⁴ All measures should be adopted in the light of a gender-responsive perspective.³³⁵

Understanding treaties' bodies and special mechanisms to tackle this issue in order to achieve equality for all women to access the right to adequate housing, the CEDAW Committee expected to adopt a general recommendation on the right of women to adequate housing and land.³³⁶ However, this recommendation has yet to be adopted.

2.7.1.2 Committee on the Rights of the Child (CtRC)

Due to the crucial element of housing conditions and its influence on children's development, as affirmed in the Convention (see Section 2.3.1.3.b *supra*), the CtRC requests state parties to comply with all obligations enshrined in it to fully realise children's right, including the right to adequate housing. One of the mandates of the Committee is to monitor the implementation of the Convention by all state parties.

The Committee also adopted General Comments consisting of recommendations or interpretations of the Convention, for example on the issue of street children³³⁷ or on public budgeting for the realisation of children rights.³³⁸ However, no general comments specifically addresses the right to adequate housing of children or the right to adequate living conditions. In its concluding observations, the CtRC has not yet established a principle or standard regarding this right but tended to recommend state parties to adopt actions to provide housing for street children,³³⁹ and to undertake further research on the effects of homelessness on children and its link to abuses, prostitution, pornography as well as trafficking.³⁴⁰

Although it broadly addressed the issue of poverty and its relation with the fulfilment of the right to housing for children, the Committee has not (yet) adopted a substantive element in the interpretation on the right to housing itself.³⁴¹ Further development and action from the Committee to prioritise this issue is needed to improve understanding and enhance the implementation of the right to adequate living conditions, especially adequate housing, guaranteed in the CRC.

³³⁴ *ibid* para 79.

³³⁵ *ibid*.

³³⁶ ComHR, 'Women and Adequate Housing' (27 February 2006) UN Doc E/CN.4/2006/118, para 81.

³³⁷ UN Committee of the Rights of the Child (CRC Committee), 'General Comment No. 21 (2017) on Children in Street Situations' (21 June 2017) UN Doc CRC/C/GC/21.

³³⁸ CRC Committee, 'General Comment No. 19 (2016) on Public Budgeting for the Realisation of Children's Rights (art. 4)' (20 July 2016) UN Doc CRC/C/GC/19.

³³⁹ CRC Committee, 'Concluding Observations on Guatemala' (9 July 2001) UN Doc CRC/C/15/Add.154, paras 54-55.

³⁴⁰ CRC Committee, 'Concluding Observations on Canada' (27 October 2003) UN Doc CRC/C/15/Add.215, paras 42 and 55.

³⁴¹ Hohmann (n 33) 43.

2.7.1.3 *Committee on the Elimination of All Forms of the Racial Discrimination (CERD Committee)*

While the two previous Committees (CEDAW and CRC Committees) have not had any jurisprudence on housing rights yet, the CERD has already adopted some decisions regarding violation of housing rights based on this convention through its individual complaints mechanism under Article 14.³⁴² Two cases which serve as an example of how the CERD Committee interpretations of the states parties' obligations with regard to the right to housing under the CERD: *F.A. v Norway*³⁴³ and *L.R. et al v Slovak Republic*.³⁴⁴

The first case is about a person (F.A.) who sought accommodation. He went to a housing agency and paid a fee in order to be able to access the vacant accommodation list. What he found in the list was that half of the housing advertisements indicated that persons from certain groups were not desired as tenants, such as "no foreigners desired", "whites only". F.A. had already employed all the mechanisms available in the country; however, the results did not show a positive sign from the state to stop or to prevent this discrimination. He then, lodged an individual communication to the CERD Committee, stating that Norway had violated Article 1 (1) of the Convention. Although the Committee decided the complaint was inadmissible, it raised, as an urgent matter, that the state party should take effective measures in ensuring that private housing agencies refrain from engaging in discriminatory practices and rejecting registration from private landlords who will commit racial discrimination.³⁴⁵ In addition, it emphasised its concern on the need to adequately protect individuals from discriminatory acts of third parties.³⁴⁶

The second case illustrates a revocation of a resolution on providing low-cost housing for the Roma inhabitants of the Dobsina Municipality, Slovakia. The Roma inhabitants have been living in very poor conditions, such as in houses made of cardboard, without access to drinking water, sanitation as well as drainage. There was already a plan to follow up the resolution in order to solve the Roma housing problems.³⁴⁷ However, there was a petition signed by 2,700 inhabitants from surrounding villages that opposed the plan because "it will lead to an influx of inadaptable citizens of Gipsy origin from the surrounding villages, even from other districts and regions."³⁴⁸ The council, then, cancelled the plan and explicitly referred to the petition as the reason of the cancellation.³⁴⁹

The Roma inhabitants, after employing all the available legal mechanisms, then filed a

³⁴² To enable individual complaints mechanism Article 14 of the CERD requires states parties to declare that they recognise the mandate of the CERD Committee in receiving and considering communications from individuals or groups of individuals within their jurisdiction claiming to be victims of a violation by state parties of any of the rights enshrined in the CERD. Without any recognition or declaration from state parties, it is impossible for individuals or groups to file a complaint before the Committee.

³⁴³ CERD Committee, *F.A. v Norway*, communication No. 18/2000 (21 March 2001) UN. Doc. CERD/C/58/D/18/2000.

³⁴⁴ CERD Committee, *L.R. et al v Slovak Republic*, communication No. 31/2003 (10 March 2005) UN. Doc. CERD/C//66/D/31/2003.

³⁴⁵ See CERD Committee, *F.A. v Norway* (n 343) para 8.

³⁴⁶ *ibid.*

³⁴⁷ CERD Committee, *L.R. et al v Slovak Republic* (n 344) para 2.1.

³⁴⁸ *ibid* para 2.2.

³⁴⁹ *ibid.*

complaint to the CERD Committee and argued that Slovakia has violated articles 2(1.a),³⁵⁰ 2(1.c),³⁵¹ 2(1.d),³⁵² 4 (a).³⁵³ and 5 (e. iii).³⁵⁴ Slovakia denied the violation and argued that the revocation of the plan was not based on the discriminatory petition. The Committee emphasised that an act of racial discrimination had occurred. Racial discrimination as defined article 1 should be broadly interpreted, and it includes both direct and indirect discrimination. The committee stated that the definition could “extend beyond measures which are explicitly discriminatory and which are not discriminatory at face value but are discriminatory in fact and in effect.”³⁵⁵ The revocation of the resolution, which the Committee referred to as “an important policy and practical steps towards realisation of right to housing,”³⁵⁶ indeed amounted to impairment of the enjoyment of this right. In its decision, the Committee concluded that the state party had breached its obligation to refrain from racial discrimination, as well as to ensure that public authorities are acting in line with the obligation (article 2 paragraph 1(a))³⁵⁷ and to guarantee the equal right of everyone in the enjoyment of the right to housing (article 5 paragraph d (3)).³⁵⁸ In addition, the Committee required Slovakia to provide an effective remedy for the victims and emphasised that it should ensure that no such discrimination will be occurring in the future.³⁵⁹

These cases illustrate discrimination on the right to housing and that the CERD Committee determined that discrimination, both direct and indirectly, can affect the enjoyment of rights. Moreover, the Committee also recognised the effect of private parties on interfering with people’s rights and it emphasised the need to protect human rights from third parties’ activities in the field of housing.

2.7.1.4 Committee against Torture (CAT Committee)

The Committee against Torture is established under the Convention against Torture and other

³⁵⁰ Article 2(1.a) states that “States Parties have to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”

³⁵¹ Article 2 (1.c) requires states parties to adopt “effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists”.

³⁵² Article 2 (1.d) obligate each state party to employ it’s all appropriate means in order to prohibit and bring to an end racial discrimination by any persons, group or organisation.

³⁵³ According to Article 4 (a) states are compelled to declare an offence or act is punishable by law, especially if it disseminates ideas which based on racial superiority or hatred, incites to racial discrimination, as well as violates or incites to such acts against any race or group of persons of another colour or ethnic origin, and also provides any assistance to racist activities, including financial assistance.

³⁵⁴ Article 5 (iii-e) obliges States Parties to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, in the enjoyment of the economic social rights including right to housing.

³⁵⁵ CERD Committee, *L.R v Slovakia* (n 344) para10.4.

³⁵⁶ *ibid* para 10.7.

³⁵⁷ With regard to this decision, Hohmann in her book stated that it shows the limited capacity of the Committee with regard to the right to housing as it did not conclude that the obligation to respect, protect and fulfil as well as facilitate have been breached, nevertheless it preferred to conclude the breach on the obligation to prohibit and eliminate racial discrimination, see the discussion on the right to housing under the CERD in Hohmann (n 33) 43-46.

³⁵⁸ CERD Committee, *L.R. et al v Slovak Republic* (n 344) para 10.8.

³⁵⁹ *ibid* para 10.12.

Cruel, Inhuman and Degrading Treatment or Punishment.³⁶⁰ Although the right to housing is not directly protected in this convention, the Committee against Torture has come across housing related issues.

For example, in the case of *Hajrizi Dzemajl et al v Serbia and Montenegro*,³⁶¹ the Committee has concluded that the destruction of the Roma's housing in Serbia and Montenegro amounted to a violation of article 16 of the Convention.

The case is about an attack on the Roma community following the rape of a non-Roma girl. At the time of this attack, most of the residents had left their home; however, Hajrizi Dzemajl and his family hid in a cellar while their home was burnt by a mass of people. The police did nothing to prevent or extinguish the fire. Although the family succeeded to escape, their home was completely destroyed. The fact that the destruction was motivated by hatred of a certain race, as well as that the police was present and did nothing, showed that state failed in preventing an attack and protecting a vulnerable group from violence. The facts that the vulnerable group had no place to live increased their vulnerability to another attack.³⁶² These facts were regarded as cruel, inhuman and degrading treatment and punishment.³⁶³

The Committee has shown how a forced expulsion and destruction of housing can amount to a violation of the CAT convention. The Committee applied this to the destruction of Palestinian housing by Israel. In its Concluding Observations, the Committee demonstrated its concern, that the continuation of Israeli policies in demolishing the Palestinians houses in as a punitive method, may constitute the breach of article 16 of the Convention.³⁶⁴

2.7.1.5 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)

The Committee (CMW) is a group of experts appointed to review the application of the Convention by state parties.³⁶⁵ The Committee has enacted General Comments with regard to the interpretation of the Convention. It has not touched the substantive issue of the right to housing, although it did state its concerns in its General Comment No. 1. This General Comment identifies that the right to housing for domestic migrant workers in the workplaces has been severely abused. Such abuses are described in the language of the General comment as “inadequate, unsanitary and degrading living accommodations.”³⁶⁶ However, the Committee does not provide further clarification on the meaning of the terms. Furthermore, in its General

³⁶⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 entered into force 26 June 1987) UNTS Vol 1465 (p 85).

³⁶¹ The Committee against Torture (CAT Committee), *Hajrizi Dzemajl et al v Serbia and Montenegro*, 161/2000, CAT/C/29/D/161/2000, 21 November 2002.

³⁶² In an individual opinion, two of the Committee members (Fernando Mario and Alejandro Gonzales Poblete) stated that the attack was not only amount to cruel, inhuman and degrading treatment and punishment but also amount to torture, see *ibid.* para. 10.

³⁶³ *ibid* para 9.2

³⁶⁴ CAT Committee, ‘Concluding Observations Periodic Report submitted by Israel’ (25 September 2002) UN Doc CAT/A/57/44, para 52 (j) and UN Doc CAT/C/ISR/CO/4 (23 June 2009) para 33.

³⁶⁵ ICMW (n 93) art 72 (1a).

³⁶⁶ Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (CMW), ‘General Comment No. 1 on Migrant Domestic Workers’ (23 February 2011) UN Doc CMW/C/GC/1, para 13 (h).

Comment No. 2, the Committee requests states to ensure that the living conditions for migrant workers deprived of their liberty should be in compliance with the “applicable international standards”.³⁶⁷ It apparently seems that the Committee prefers to follow the international standards of the adequacy of living conditions, which also should be applied to the migrant workers both in the workplace and in detention.

2.7.1.6 Committee on the Rights of Persons with Disabilities (CtRPD)

The Committee (CtRPD) was established to supervise member states’ implementation of the CRPD. It also has a mandate to receive individual complaints for the violation of rights enshrined in the Convention. So far, the Committee has not dealt with a violation under this Convention that relates to the right to housing in its decisions on individual complaints. However, in its numerous concluding observations, the Committee asserts its concern of the design of municipal or public housing and public services that hinder persons with disabilities entry, and the lack of measures to address such issues³⁶⁸ as well as the lack of monitoring and sanctions for non-compliance with accessibility standards.³⁶⁹

2.7.1.7 Summary of the practice of UN human rights treaty bodies addressing specific groups

The discussion on the UN human rights bodies, other than the CESCRC above, has shown the significant relationships between human rights. The fulfilment of the right to housing influences the fulfilment of other human rights and vice versa. Although these Committees do not address the right to housing directly, their approach has shown that human rights are interdependent and interrelated. For example, the discrimination experienced by women in accessing land will also influence the security of tenure of land or housing owned by women. Moreover, a violation under other conventions might also infringe the enjoyment of the right to housing. Serving as an example of this, is the hatred that is directed toward a particular group, which can also be a violation of the right to housing if such hatred leads to the destruction of housing. Moreover, these layers of protection evidence that the right to housing derived from the right to adequate standard of living is “of central importance of the enjoyment of all economic, social and cultural rights”³⁷⁰ and arguably for civil and political rights, such as the right to life and the right to privacy (non-interference). The fact the right to housing has been recognised in a variety of international human rights instruments should benefit the protection and the realisation of this right in the future.

³⁶⁷ CMW, ‘General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families’ (28 August 2013) UN Doc CMW/C/GC/2, 28 August 2013, para 36.

³⁶⁸ See for example CRPD Committee, ‘Concluding Observations on the Initial Report of Poland’ (29 October 2018) UN Doc CRPD/C/POL/CO/1, paras 15-16, 49-50; CRPD Committee, ‘Concluding Observations on the Initial Report of the Former Yugoslav Republic of Macedonia’ (29 October 2018) UN Doc CRPD/C/MKD/CO/1, paras 17-18; CRPD Committee, ‘Concluding Observations on the Initial Report of Malta’ (17 October 2018) UN Doc CRPD/C/MLT/CO/1, para 15.

³⁶⁹ CRPD Committee, Concluding Observation of Yugoslav Republic of Macedonia, *ibid*.

³⁷⁰ General Comment 4 (n 19) para 1.

2.7.2 The content of the right to housing as interpreted by regional bodies

As discussed in the previous section on the regional regulation of the right to housing, one can notice that the development of this right is based on either international instruments or regional instruments. Regional commissions as well as courts have been dealing with the issue of housing.

2.7.2.1 Council of Europe

In the context of the Council of Europe, the right to housing is not directly protected under the European Convention on Human Rights, but it is in the Revised European Social Charter. However, the European Court of Human Rights (ECtHR) seems to implicitly link the right to respect private and family life (Article 8) to the right to adequate housing. The Court has concluded, for example, that the failure of the government in stopping the destruction of Roma houses³⁷¹ and the forced evictions of the Roma communities constitute a violation of the right to respect private and family life.³⁷² In cases involving discrimination against the Roma community the Court emphasised that the applicants' living conditions in very poor, cramped, crowded housing arrangements, can be regarded as an infringement of the right to respect for family and private life, as well as their home.³⁷³

Furthermore, in light of the Roma's way of life, the Court emphasised that the states have positive obligations to ensure the equality of security of tenure as well as to facilitate their nomadic style as part of cultural identity.³⁷⁴ In the case about the eviction of the Roma community from the campsites, the Court found that such eviction violates Article 8 due to lack of procedural safeguards *i.e.* the requirement to establish proper justification for the serious interference with the claimant's rights.³⁷⁵ In addition, the Court ruled that the eviction "cannot be regarded as justified by a 'pressing social need' or proportionate to the legitimate aim being pursued."³⁷⁶

In this regard, in interpreting Article 8 ECHR particularly relating to housing issues, the Court has used language that is similar to the language found in Article 11 ICESCR and General Comment 4. As it can be observed, the Court's interpretation of Article 8 ECHR refers to elements of home as a place to live, which is also considered as a vital element of the right to housing, even though the Court does not address the right to housing directly. This interpretation suggests that the Court is of the opinion that housing as a place to live could be categorised, to a certain extent, as a home especially if it builds a sufficient link with its inhabitants.³⁷⁷

In addition to seemingly reading the right to housing into the right to respect an individual's

³⁷¹ European Court of Human Rights (ECtHR), *Moldovan and others v Romania (no.2)*, Application Nos. 41138/98 and 64320/01 (12 July 2005) paras 103, 104, 105.

³⁷² *Yordanova and others v Bulgaria* (n 23) para 104; see also ECtHR, *Connors v United Kingdom*, Application No. 66746/01 (27 May 2004) para 95.

³⁷³ See *Moldovan and others v Romania (no 2)* (n 371) para 108.

³⁷⁴ *Connors v United Kingdom* (n 372) paras 84, 94.

³⁷⁵ *ibid* para 95.

³⁷⁶ *ibid*.

³⁷⁷ See for example ECtHR, *Winterstein and Others v France* (n 23) para 14. See also in the decision of the ECtHR, *Buckley v the United Kingdom* (n 23) paras 52-54.

private and family life, his home and his correspondence, the Court appears to have linked the right to adequate housing to other civil and political rights, such as the right to protection against inhuman and degrading treatment. Examples on this specific approach can be seen in *Moldovan and others v Romania*, and *Selçuk and Asker v Turkey*. The destruction of houses in the Moldovan case caused the Roma community to live in degrading conditions, including living in a severely overcrowded and unsanitary environment, which the Court considered as having a “detrimental effect on the applicants’ health and well-being.”³⁷⁸ The Court further mentioned that living in such conditions for a period of 10 years combined with the general attitude of the authorities caused considerable mental suffering on the applicants.³⁷⁹ The Court concluded that living in such conditions diminished and humiliated the human dignity of the applicants,³⁸⁰ thus constituting degrading treatment prohibited in Article 3 ECHR.³⁸¹ In *Selçuk and Asker v Turkey*, the Court ruled that the destruction of houses and belongings by security forces in the presence of the house owners resulted in a deprivation of livelihood and forcing them to leave the village, and resulting the “suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3.”³⁸²

The jurisprudences of the European Court of Human Rights (the ECtHR) has shown that the word “home” has a broad meaning. The Court does not mean to oblige states to provide housing for their population or to solve all their housing problems. However, it seems to oblige states to adopt some measures, e.g. housing assistance, to protect the interests of people with special needs in order to protect their private life.³⁸³ The Court in certain cases also interpreted the term “home” under Article 8 is not limited only to the traditional meaning as a place to live which is “lawfully occupied or which have been lawfully established” under domestic law, but also depends on the existence of “sufficient and continuous” relation with the inhabitants.³⁸⁴

Although the Court never stated that the right to respect for an individual’s home under the ECHR is the same as the right to housing, it indeed explicitly recognised that these two are related; e.g. the destruction of a place to live or housing will violate the right to respect of one’s home and private life.³⁸⁵ This broad interpretation can give a better chance for the people whose right to housing is violated to claim their rights; thus it can also advance the protection of human rights at the European level.

Separate from the European Court of Human Rights, the Committee of Social Rights that

³⁷⁸ ECtHR, *Moldovan and Others v Romania* (no.2) (n 371) para 110.

³⁷⁹ *ibid.*

³⁸⁰ *ibid.*

³⁸¹ *ibid.*, para 113.

³⁸² ECtHR, *Selçuk and Asker v Turkey*, Application No 12/1997/796/998-999 (24 April 1998) paras 72, 74, 77, 78 and 80.

³⁸³ ECtHR, *Marzari v Italy*, Application No. 36448/97 (4 May 1999) at section The Law, para 1. In this case, although the Court established states’ obligations under Article 8, the Court ruled that the interference on the applicant’s right, i.e. eviction from accommodation, could be justified, due to the fact that the state had adopted the relevant positive obligations to protect the applicant’s special needs. Thus, the Court ruled that the application was manifestly ill-founded.

³⁸⁴ See *Winterstein and Others v France* and *Buckley v the United Kingdom* (n 23); see also ECtHR, *McCann v UK*, Application No. 19009/04 (13 May 2008) para 46; *Prokopovitch v Russia* (n 23) para 36; *Orlić v Croatia*, Application No. 48833/07 (21 June 2011) para 54; *Gillow v United Kingdom*, Application No. 9063/80 (24 November 1986) para 46. For the latter case, the Court emphasised that the sufficient and continuous links are still retained although the family had been absent for 19 years from their former home and the family did not have an intention to stay permanently in their new place.

³⁸⁵ Hohmann (n 33) 68.

supervises the member states' implementation of the RESC, has developed jurisprudence on the right to housing. The Committee has dealt with three primary housing-related issues, namely: the state's failure to address vulnerable groups, housing restitution, and discrimination experienced by Roma communities.³⁸⁶

The Committee introduced the meaning of adequate housing.³⁸⁷

“A dwelling which is safe from sanitary and health point of view, that is, possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity; is structurally secure; not overcrowded; and with secure tenure supported by the law.”

Furthermore, the Committee emphasises that the right to housing needs more than the only adoption of housing legislation; such legislation needs to be implemented.³⁸⁸ Although the wording of Article 31 of the Charter does not suggest an obligation of result, implementation will provide practical effects and effective protection to disadvantaged groups.³⁸⁹ Such an obligation of result may require member states of the RESC to:³⁹⁰ 1) take necessary measures: legal, financial or other measures; 2) maintain statistical data on needs, resources and results, 3) undertake periodic review, 4) provide timetables for clear targets of achievement, and 5) consider the possible effects of programmes on the most impoverished. These obligations do not merely apply to the right to housing, but also to all ESC rights set forth in the RESC.

In addition, the Committee found that the living conditions of the poorest in France who lived in overcrowded, substandard houses with lack of essential services, as well as the increasing number of homeless, did not meet the requirements laid down in the definition above and therefore ruled that France violated Article 31 of the RESC.³⁹¹ The definition on the right to adequate housing is further expanded. In the case of Roma people who were left without water supply, the Committee considered that the right to adequate housing under Article 31 RESC includes the right to access to freshwater resources.³⁹² Furthermore, In the FEANTSA case, the Committee also addressed affordability. Houses are affordable if households can afford to pay the initial costs, the current and added expenses, and can fulfil these two without harming minimum standards of living in their society.³⁹³

The Committee has rapidly developed jurisprudence in the light of the right to housing under the RESC. This development is achieved mainly by urging states to adopt positive obligations to put into effect their legislation in order to realise the right to adequate housing fully and to reduce the homelessness in the member states.³⁹⁴

³⁸⁶ See the discussion on cases relating to these three main issues in Hohmann (n 33) 54-67. The last two of the jurisprudence will not be discussed in this section.

³⁸⁷ *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*, ECSR Case No. 39/2006 (5 December 2007) para 76.

³⁸⁸ *International Movement ATD Fourth World v France*, ECSR Case No. 33/2006 (5 December 2007) paras 59 and 60.

³⁸⁹ *International Movement ATD Fourth World v France* (n 388) para 59; see also *FEANTSA v France* (n 387) para 55.

³⁹⁰ *FEANTSA v France* (n 387) para 56; see also Hohmann (n 33) 55.

³⁹¹ *FEANTSA v France* (n 387) paras 69-72

³⁹² *European Roma Rights Centre v Portugal*, ECSR Case No. 61/2010 (30 June 2011) para 36.

³⁹³ *FEANTSA v France* (n 387) para 124.

³⁹⁴ Hohmann (n 33) 67.

2.7.2.2 Organisation of American States (OAS) Human Rights Monitoring Bodies

Let us turn now to the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights and their approach to dealing with the (lack of an explicit) right to housing. As discussed previously, the Inter-American human rights instruments do not recognise the right to adequate housing as such. Both bodies implicitly recognised this type of right in the light of protection of other rights set forth in ACHR, such as the right to property (Article 21), the right to a dignified life (Article 4), and the right to freedom of movement and residence (Article 22). Interestingly, these two monitoring bodies have a similar approach towards linking other guaranteed rights in the human rights instruments to the right to housing.

In cases where states were sponsoring its agents to torture people and destroy their houses, to evict people, or to massively force people to flee to face massacre, the Commission and the Court stated that in addition to violation of the right to life, the violation of the right to property and the right to freedom of movement and residence have occurred.³⁹⁵ Moreover, these bodies introduced a regime of remedies for such situations. The remedies include ordering member states to provide fair compensation for relatives and to provide dwellings for the victims.

An example of the Commission's approach can be seen in the case of *Edward M. Damburg v Suriname*.³⁹⁶ Mr. Damburg was tortured and killed by members of the army of Suriname because he was falsely suspected of participating in a rebel group called Jungle Commando. His home was also destroyed and burnt which left his wife and their two children homeless. In this case, the Commission concluded that the acts constituted a violation of the right to life and the right to property under the American Declaration of the Rights and Duties of Man.³⁹⁷ The Commission also declared that the relatives of Mr. Damburg were entitled a fair compensation for the loss of his property.

In the case of eviction of landless workers and their families from their occupied land in Santa Elena ranch on August 1995, by the military policemen and gunmen sponsored by the state of Brazil, the Commission concluded that the state violated articles 4, 5, 25, and 8, of the American Convention.³⁹⁸ The offences had affected the landless workers' right to life as a result of the extrajudicial executions, inhumane treatment and the inhabitants had to leave their homes. The Commission also recommended that the state of Brazil provide adequate reparations for the victims.³⁹⁹ The Commission did not make clear on what type of reparations that the state should provide, instead it referred to "compensation as warranted for damages resulting from the violation" and, by citing previous jurisprudence of the Court, the Commission included the "obligation to investigate and punish any violation of the rights

³⁹⁵ See respectively in cases of the Inter American Commission on Human Rights (IACHR), *Edward M. Damburg v Suriname*, OEA/ser.L/V/II.76, 1989; IACHR, *Corumbiara v Brazil*, OEA/ser.L/V/II.95, 1998; Inter-American Court of Human Rights (IACtHR), *Moiwana Village v Suriname*, Ser C no. 145, 2005.

³⁹⁶ *Edward M. Damburg v Suriname*, *ibid*.

³⁹⁷ In this case, the Commission conducted its mandate to examine individual communications from member states of the OAS that have not ratified the Convention. Therefore, the examination uses the American Declaration and not the Convention itself. See for details in IACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion (14 July 1989) Ser A (no 4) (1989) paras 42-45.

³⁹⁸ *Corumbiara v Brazil* (n 395).

³⁹⁹ *ibid* paras 252, 307.

embodied in the Convention.”⁴⁰⁰

In the case of *Moiwana v Suriname*, where a village was burnt down and the people were massacred by the state’s armed forces, the Court found that the state violated the freedom of movement and residence (article 22 ACHR), as well as the right to enjoy the communal use and enjoyment of traditional property.⁴⁰¹ The Court emphasised the need of the survivors who had fled to neighbouring villages or countries to return to Moiwana, which was their ancestral land with which they have a “unique and enduring” bond.⁴⁰² Furthermore, the Court ordered the state to provide compensation in the form of a developmental fund so that the survivors can return and live in their homeland.⁴⁰³

The most prominent interpretation of the IACtHR in this respect is the effort to seemingly link the “minimum living conditions,” which arguably relates to the right to housing, as material conditions to support the enjoyment the right to life that considered as the crucial right in the Convention.⁴⁰⁴ The Court through its jurisprudence has recognised that the right to life includes the notion of a “dignified and decent existence,” which clearly is not only dealing with the civil and political rights of a person, but also that it encompasses ensuring basic economic, social and cultural rights.⁴⁰⁵

The Court also introduced another form of remedy when it ordered the state to provide housing for communities, because of the destruction of houses by the state, due to the violation of civil and political rights.⁴⁰⁶ This obligation stems from states’ responsibility to provide the material conditions necessary for a dignified life. The Court emphasises the existence of the connection between the right to life and the material conditions, such as housing, which fosters this achievement.⁴⁰⁷ The right to life, at the very least, includes “generating minimum living conditions which are compatible with the dignity of human person and of not creating conditions that hinder or impede it.”⁴⁰⁸ In relation to this connection, states have both negative and positive duties. Negative duties require the states to not to inhibit the access to the dignified conditions, while positive duties should be adopted by states if individuals cannot meet the

⁴⁰⁰ *ibid* para 252; see also cases that cited by the Commission in this regards: Inter-American Court of Human Rights (IACtHR), *Velásquez Rodríguez v Honduras*, Merits Judgement of 29 July 1988, Ser C No. 4, paras 166, 174; IACtHR, *Villagrán Morales et al v Guatemala*, Judgement of 19 November 1999, para 225.

⁴⁰¹ *Moiwana Village v Suriname* (n 395) paras 131, 133, 135.

⁴⁰² *ibid* paras 120, 128, 131.

⁴⁰³ *ibid* paras 214, 286. There were also other forms of restitution applied, such as public apology and building memorial monument.

⁴⁰⁴ See for example IACtHR, *Yakye Axa Indigenous Community v Paraguay*, judgement 17 June 2005, Series C no. 125, para 161.

⁴⁰⁵ See OAS, Pact of San Jose, (n 115) art 1 (1); Monica Feria Tinta, ‘Justicability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’ (2007) 29 Human Rights Quarterly 431; J M. Pasqualucci, ‘The Right to a Dignified Life (Vida Digna): the Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System’ (2008) 31 Hastings International and Comparative Law Review 1, 12.

⁴⁰⁶ See IACtHR, *Plan de Sanchez Massacre v Guatemala*, Reparations, Judgement 19 November 2004, para 125. In this case the Court found the violation on Right to Humane Treatment (Articles 5(1) and 5(2); Right to Fair Trial Article 8(1) ; Right to Privacy (11); Freedom of Conscience and Religion (12(2) and 12(3); Freedom of Thought and Expression (13(2) paragraph a and 13(5)); Freedom of Association (16(1)); Right to Property(21(1) and 21(2)); Right to Equal Protection (24); and Right to Judicial Protection (25) of the American Convention on Human Rights

⁴⁰⁷ Hohmann (n 33) 88.

⁴⁰⁸ *Yakye Axa Indigenous Community v Paraguay* (n 404) para 162.

conditions on their own.⁴⁰⁹ Such approaches express the relationship between the right to life, right to property and the right to freedom of movement, and the right to housing. These interpretations can highlight the importance of housing for the victim of arbitrary eviction or discrimination as one element to achieve the right to “dignified life.”

2.7.2.3 African Union Human Rights Bodies

On the African continent, where the right to housing is not explicitly mentioned in the African Charter on Human and People’s Rights, the African Commission on Human and People’s Rights (AComHPR) has also interpreted the “implied” right to adequate housing by integrating it in the three rights enshrined in the Charter; i.e. right to property (Article 14), right to enjoy the best attainable state of mental and physical health (Article 16), and the right to protection of the family (Article 18 (1)).

For example, the AComHPR confirmed that destruction of houses will adversely affect property, health and family life. Thus, According to the Committee “the combined effect of Article 14, 16 and 18 (1) can be read as a right to shelter or housing under the African Charter.”⁴¹⁰ It has also stressed that the right to shelter requires states, at a minimum level, “not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes.”⁴¹¹ Thus, “by destroying Ogoni houses and villages and through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes”, Nigeria had violated the minimum obligations and had constituted massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.⁴¹²

In the case of *Endorois Welfare Council v Kenya*, the Commission has interpreted that the right to housing is related to land which functions as “home” for the Endorois community; thus, the eviction of Endorois families from their ancestral land where they practiced worship constitutes a violation of the right to housing, as implied in article 14 on the right to property.⁴¹³ The rights of the indigenous people over traditionally owned land and their right to development under the African Charter are fully enforced in this case. The decision is also noteworthy because the Commission emphasised that the right to housing is also protected under the Charter and it enlarged the meaning of housing, which is not only to mean a dwelling with a roof but also to include a homeland.

One major step of the Commission, in examining the violation of the right to housing, is its reference to the international instruments and other regional courts’ decisions. For example, in the *SERAC v Nigeria* case, it cited General Comment No. 4 on the Right to Adequate Housing and General Comment No. 7 on Forced Eviction provided by the CESCR, especially the term

⁴⁰⁹Hohman (n 33) 88. She cited some cases brought before the court, such as IACtHR, *Sawhoyamaya Indigenous Community v Paraguay*, judgement 29 March 2006, para 9.

⁴¹⁰ African Commission on Human and Peoples’ Rights (AComHPR), *Social and Economic Rights Action Center/ Center for Economic and Social Rights (SERAC) v Nigeria*, 155/96, judgement 27 October 2001, para 60.

⁴¹¹ *ibid* para 61.

⁴¹² *SERAC v Nigeria* (n 410) para 62.

⁴¹³ AComHPR, *Social and Economic Rights, Center for Minority Right Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, 276/03, judgement 25 November 2009, para 191.

forced eviction and the important element of preventing arbitrarily forced eviction, i.e. providing legal security of tenure.⁴¹⁴ Interestingly, the Commission also cited the decision of the IACtHR and the ECtHR, in the cases of *Velásquez Rodríguez v Honduras*, and *X and Y v Netherlands*⁴¹⁵ respectively, which show its agreement with these two decisions in the light of the obligation of the state to protect the right of its citizens from infringements carried out by third parties.

The referral to the international instruments (in the SERAC case) is less controversial than the referral to the regional instruments, due to the fact that many of the African states are also parties to the ICESCR, yet not to the other regional instruments. The Court has the possibility to interpret and apply other international human rights treaties such as ICESCR, ICCPR, which the parties to the African Charter have also ratified.⁴¹⁶ Nevertheless, reference to other regional courts' decision can be perceived as controversial, since the African States are not bound to the cited regional instruments, which may lead the states to question the justification of said referrals.⁴¹⁷

The question which might be raised is whether the Commission is entitled to determine that a state violates a right which is not stipulated in the Charter?⁴¹⁸ Article 60 of the Charter allows the Commission, in considering cases, to draw inspiration from the international human rights law instruments. These instruments include the Charter of the United Nations, the UDHR, and other United Nations instruments to which the member states of the Charter are also parties.⁴¹⁹ In addition, the Guidelines for State Reports also require states to report on some rights which are not mentioned in the Charter, such as the right to an adequate standard of living and the right to social security.⁴²⁰ Thus, this "implied" interpretation on the right to housing can be done, and it is not against the Charter or other instruments under the Charter.

Moreover, in its determination the Commission did not order the states in question to build dwellings for the people affected by the evictions. It merely ordered the state to, for example, stop the attack on the indigenous people, to conduct a thorough investigation and to provide compensation for the victims.⁴²¹ It also did not introduce positive obligations on the right to housing that have to be taken by the states, such as to adopt housing legislation or to provide subsidies. Instead, it only recognised that states have negative obligations to respect and to refrain from the destruction of houses.⁴²² Therefore, the Commission did not go further than merely recognising the right to housing in relation to other rights protected in the Charter. So far, the Commission did not set forth new positive obligations for a right that is not stipulated under the Charter. In addition, such interpretation is in line with the Commission's Reporting

⁴¹⁴ *SERAC v Nigeria* (n 410) para 63.

⁴¹⁵ *ibid* para 57.

⁴¹⁶ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted in June 1998, entered into force 25 January 2004) art 3; see also Frans Viljoen (n 142) 435-438.

⁴¹⁷ Hohmann (n 33) 81-82.

⁴¹⁸ Further in the same decision the Commission also implies the right to food, which is also not directly protected in the charter.

⁴¹⁹ *SERAC v Nigeria* (n 410) para 63.

⁴²⁰ ACHPR, 'Guidelines for National Periodic Reports, adopted at the Fifth Ordinary Session of the Commission' April 1989, paragraphs II A, 31-33.

⁴²¹ *SERAC v Nigeria* (n 410) Holding (Commission's determination).

⁴²² *ibid* paras 61, 62.

Guidelines which require States to report on rights that are not explicitly mentioned in the Charter.⁴²³ The fact that no member state has challenged the Commission's interpretation proves that such interpretation has gained support and is consistent with international human rights law.⁴²⁴

This practice of the Commission is continued in subsequent cases on the right to land of indigenous peoples which then relates to evictions, for example, in the case of the *Center for Housing Rights and Eviction (COHRE) v Sudan*.⁴²⁵ Similar to the Ogoni case, the Commission reaffirmed that eviction combined with destructions of homes conducted by state-sponsored agents violates the right to property (Article 14) and other rights enshrined in the Charter, such as the right to be free from cruel and inhuman treatment (Article 5). In this case, the Commission focused on the actual cause: forced evictions that became the primary cause of human rights violation. The Commission, however, discussed the meaning and negative obligations of the right to housing less than it did in the two previous cases above.⁴²⁶

Later on, in 2012, the recognition of the right to housing under Articles 14, 16, and 18(1) of the African Charter was emphasised, when the Commission adopted Resolution No. 231 on the right to adequate housing and protection from forced evictions.⁴²⁷ This Resolution requires states to take appropriate steps to ensure respect, protection and realisation of the right to adequate housing, in particular:

- a) To put an end to all forms of forced evictions, especially evictions with development purposes, and to ensure that evictions are only carried out as a last resort and comply with international and regional standards;
- b) To adopt legislative and other measures to ensure that legal procedures are complied with prior to any eviction and remedies are available for the victims;
- c) To take concrete measures to confer security of tenure to all affected people; and
- d) To ensure that any alternative housing provided to people complies with international and regional standards on the right to adequate housing.

The interpretation of the “implied” protected right by the Commission seem to be continuing in the future, and no member state has challenged the legality of the Commission's approach. Although the interpretation of the Commission can be seen as an advanced interpretation, which is “illuminating the connection between the right to housing and other rights and serving as a legal basis of the social and communal aspects of housing,”⁴²⁸ some

⁴²³ Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988–1989, ACHPR/RPT/2nd, Annex XII. These rights include, for example, the right to adequate housing and the right to social security.

⁴²⁴ Manisuli Ssenyonjo, ‘Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter’ (2011) 29 *Netherlands Quarterly of Human Rights* 358; see also Manisuli Ssenyonjo, ‘Responding to Human Rights Violations in Africa Assessing the Role of the African Commission and Court on Human and Peoples’ Rights (1987–2018)’ (2018) 7 *International Human Rights Law Review* 1.

⁴²⁵ ACHPR, *Center for Housing Rights and Eviction (COHRE) v Sudan*, Communication No. 279/03 - 296/05, judgment 27 May 2009.

⁴²⁶ Hohmann (n 33) 79–81.

⁴²⁷ ACHPR, ‘Resolution No. 231 on the Right to Adequate Housing and Protection from Forced Evictions’ adopted at the 52nd Ordinary Session of the African Commission on Human and Peoples’ Rights held in Yamoussoukro, Côte d’Ivoire.

⁴²⁸ Hohmann (n 33) 82.

experts⁴²⁹ have suggested that these practices create a discrepancy between the actual text and practices, which could lead to inconsistencies and create an atmosphere that the Charter is outdated; yet a proposal for revising the Charter to ensure its clarity has not yet been considered.

2.7.2.4 Summary of the practice of regional human rights monitoring bodies

Based on the discussion above, the practices of the regional courts and human rights bodies in interpreting the right to housing has been very dynamic. Only a few of these bodies did not depend on the interpretation provided by the CESC, but also step further beyond that. These bodies have expanded the meaning of housing, which is more suitable for the way of life of the communities in their member states. Housing is not only interpreted as a dwelling or a place to live, but also as a home which has a relationship with and is continuously linked to its dwellers, and even as a homeland where a community carries out all of its traditional activities or in a social relationship with other communities. In addition, these regional human rights adjudicatory bodies have proven the indivisibility of human rights. These bodies have attempted to relate the right to housing to other economic and social rights, such as the right to property, the right to health, as well as to civil and political rights, such as the right to respect private life and the right to life. These evidences indeed bring an optimistic avenue that in the future the right to housing will achieve more attention.

2.8 PRELIMINARY REFLECTIONS

This chapter has provided an overview of the framework of the protection of the right to housing both at the international and regional level. As discussed in the section dealing with international human rights instruments, the right to housing is recognised in a number of these instruments both in the general conventions and in the more specific conventions. These instruments have also established monitoring committees to oversee the implementation by the member states. However, until now only the Committee of Economic, Social and Cultural Rights has enacted an interpretation of the content of the right to housing. The other committees have not directly touched on the substantive contents of this right, although they acknowledged the importance of this right for everybody. These committees also found that discrimination in accessing housing for particular groups such as women, children, and minority groups is still occurring, showing that more efforts are needed by the international community to improve the equal enjoyment of the right to housing.

The practices of the committees of the specific conventions showed that the scope of the protection is broad. This means that the scope of protection also relates to other human rights enshrined outside these conventions, for example the right to adequate housing. This broader scope has created an additional coverage of the right to housing. Such broad protection has shown that the right to housing is not merely the protection of a house as a building, but also to a home and the relation between families and their community. Furthermore, it relates to

⁴²⁹ Ssenyonjo (n 142) 83, see also C. Heyns, 'The African Regional Human Rights System: The African Charter' (2003-2004) 108 *Pennsylvania State Law Review* 679, 691.

protection from particular offences such as discrimination or inhuman treatment, which could hinder the enjoyment of the right to housing.

Such practices contribute to the development of a body of jurisprudence which could be followed by the other committees. Another contribution is the development form of remedies adopted by the CERD Committee in the case of Roma people. Remedies should be provided by every state in situations in which human rights violations are occurring.

Pertaining to the substantive interpretation of the right to housing, the CESCR has developed seven essential elements of housing adequacy in General Comment 4. These elements are: i) legal security of tenure; ii) availability of service, materials, facilities and infrastructure; iii) affordability; iv) habitability; v) accessibility; vi) location; and vii) cultural adequacy. The CESCR has addressed the meaning of such elements in General Comment 4 itself and in or through its Concluding Observations on the states' reports. Nevertheless, the reference to the meaning of availability of service, materials, facilities and infrastructure as well as cultural adequacy elements still need to be developed. These elements are set at the minimum level which states have to progressively achieve, by employing their maximum available resources.

The ICESCR and General Comment 4 establish international obligations for the member states related to the right to housing. The states' obligations are of a progressive and immediate nature. The obligation of taking "steps" means that states can adopt a variety of measures such as legislative, social, financial or other measures. Many of the obligations can be performed gradually, while numerous obligations are should be performed immediately. These immediate obligations include: (1) recognising the right to housing in national legislation, (2) adopting national housing policies and strategies, particularly on security of tenure and housing for the poor, (3) adopting monitoring procedures, (4) not to adopt retrogressive measures, (5) refraining from carrying out evictions and (in the case of inevitable eviction) providing genuine consultation, effective complaint mechanisms, remedy as well as compensation for the affected communities. Last but not least, all the obligations above should be implemented in a non-discriminatory approach with no distinction based on race, religion, political belief, origin, gender, or any other basis, such as place of residence.

The international obligations mentioned above will be used as a basis to analyse the practice of Indonesian local governments in fulfilling the right to adequate housing in Indonesia. The analysis focuses more on the implementation of immediate obligations, in particular, that relate to security of tenure, non-discriminatory practices and evictions. However, prior to entering into the analysis the next chapter, Chapter 3, will address how international law applies in Indonesia and whether the international human rights norms are applicable in the Indonesian legal system. Thereafter, Chapter 4 will explore how Indonesian law recognises the right to adequate housing that derived from international standards at the national level.

CHAPTER 3

THE POSITION OF INTERNATIONAL HUMAN RIGHTS LAW IN INDONESIA

3.1 INTRODUCTION

In general, international treaties bind states following their consent to be bound by a treaty, which can be expressed by signature, acceptance, ratification or other means.¹ However, a domestic ratification process does not guarantee that international treaties are directly applicable in the domestic legal system. The domestic ratification of international law raises several issues, including the binding nature of international obligations on a state and its organs, in addition to treaties' application before national courts. Moreover, in several cases international law is in conflict with national law. In these situations, which one will prevail? This is not a simple matter. Some countries, such as the Netherlands and the USA, have a clear rule in case such a conflict occurs.² While other countries, including Indonesia, do not have precise guidance in determining both the national application and the hierarchical relationship between the two laws.

This chapter discusses the domestic position and the invocation of international law, including international human rights law, in the Indonesian legal system. The purpose of this chapter is to address questions such as (1) Whether international human rights treaties are applicable in Indonesia (2) Can they be invoked by citizens in domestic courts? (3) In the case of conflicting laws and norms between international and national systems, which should prevail?

The question of how international treaties can be incorporated and implemented in Indonesia remains unresolved, with the Indonesian approach demonstrating uncertainty with regard to monist or dualist schools of thought. This chapter will examine the Indonesian legislation in relation to international treaties and the court's practices on the domestication of international law.

The first section starts with scholars' approaches to the general applicability of international law. The two conventional approaches, monism and dualism, to some extent do not fully satisfy, or solve, the question of applicability of international law. This dissatisfaction encourages the development of other variants of these binary approaches, i.e. the formal and ideological variants. These binary approaches will be used to analyse the Indonesian practices with regard to the application of international human rights treaties in its domestic system.

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS 1155 (p.331) (VCLT), art 11.

² See Andre Nollkaemper, 'The Netherlands' in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP 2009); see also David Sloss, 'United States' in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP 2009).

3.2 THE TEXTBOOK APPROACH: INCORPORATION OF INTERNATIONAL LAW AT THE NATIONAL LEVEL

In general, the application of international law in domestic law falls under the doctrine of state sovereignty. States are free to decide the hierarchy and the status of international law, including legal obligations and rights derived from it, and how they are incorporated in the domestic legal system.³ The hierarchy is also very much dependent on the sources of international law, such as treaties, customary international law or judgments of international tribunal/courts.⁴ States have adopted a variety of practices related to the application of international law within domestic law,⁵ such as direct implementation, incorporation, or a combination of the two.⁶ Literature on international law describes the prevailing theories on the relation between international law and national law as monism and dualism.⁷

The monist perspective suggests that international law and national law constitute one legal system. In this theory, international law can be directly incorporated into domestic law without any transformation. Under the dualist perspective, international law and national law are completely different functioning orders,⁸ which have no relation or hierarchy between each other; therefore, one cannot overrule the other. In order to have an effect in domestic law, international law needs to experience a transformation process under domestic law so that it can have a binding power over national institutions, including domestic courts and their judges.⁹

Neither of these theories offer a satisfactory understanding of states' practices in relation to their acceptance of international law.¹⁰ Therefore, variations of the two theories appeared, for example a formal variant of monism and dualism emerged. This formal variant emphasises that the authority of international law rest on whether a state's constitution rules that international law is subject to a constitutional order or to the will of parliament.¹¹ Another variant of monism and dualism is the ideological approach. It asserts the indeterminateness of constitutions' values by requiring judges to delve into, or to extend, the values of the constitution. In other words, this approach relies on judges to decide how international law can be authorised within the domestic legal order.¹² These two variants are often associated with the two major theories and are seen as a continuation of the former rather than a solution for the debate.¹³

³ Antonio Casese, *International Law in the Divided World* (Clarendon Press, 1986); see also Dinah Shelton, 'Introduction' in Shelton Dinah (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011); Simon Butt, 'The Position of International Law Within the Indonesian Legal System' (2014) 18 *Emory International Law* 1.

⁴ Shelton, *ibid* 5.

⁵ Butt (n 4) 2-3.

⁶ Shelton (n 4) 3-5.

⁷ Janne Nijman and Andre Nollkaemper, 'Introduction' in Janne Nijman and Andre Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007).

⁸ Malcolm N. Shaw, *International Law* (6th edn, CUP 2008) 131.

⁹ Basak Çali, 'Beyond Monism and Dualism' in Basak Çali (ed), *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015) 138-139.

¹⁰ Çali (n 9) 143.

¹¹ *ibid* 140-141.

¹² *ibid* 143-144.

¹³ Damos Dumoli Agusman, *Treaties under Indonesian Law: A Comparative Studies* (Remaja Rosdayakarya 2014).

Contemporary states' practices do not really follow either of the two approaches in a strict sense.¹⁴ The two theories and their variants do not satisfy scholars as well as states that use these approaches due to several shortcomings. For example, the dualist approach, which was introduced a century ago, claims that states enjoy exclusive sovereignty over its territory and the role of international law remains restricted to inter-state relations.¹⁵ However, this is not the case anymore, particularly after the developments of the contemporary international law post-World War II, i.e. human rights law,¹⁶ in which several human rights issues came to be regarded as not merely an issue of the internal affairs of a state. Moreover, the emergence of international organisations also led to restrictions on sovereignty.¹⁷

Neither of the two variants are perfect in explaining the relation between international and domestic law. The formal variant has the primary challenge of interpreting a national constitution to seek the real intention and meaning of the constitution.¹⁸ The ideological variant can be considered as a continuation of dualism which requires domestication of international law at the national level and favours national law instead of its international counterpart in cases of conflicting norms.¹⁹ According to Basak Cali, the binary relationship of monism and dualism, and their variants, fail to explain how international law can be invoked before domestic judges.²⁰

As discussed before, states' practices show a variety of approaches and no state strictly follows either monism or dualism. It is up to states to decide which approach they prefer. Although a discussion on states' approaches, with reference to the position of international law in domestic legal systems, might be not significant anymore, understanding the position of international law is still relevant. This understanding is pivotal, particularly in responding to the conflicting rules and the strategies of domestic courts in handling such conflicts. This understanding will also be relevant in holding the national and local governments accountable for their actions, either based on national or international obligations, which infringe upon human rights.

¹⁴ France for example, although this country is monist, treaty law does not automatically applicable. See details in Emmanuel Decaux, 'France' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011).

¹⁵ Takele Sokaka Bulto, 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia' (2009) 23 *Journal of Ethiopian Law* 132.

¹⁶ A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397 <<https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mon015>>.

¹⁷ J Samuel Barkin, *International Organization: Theories and Institutions* (Palgrave Macmillan 2006) 6-8.

¹⁸ Çali (n 9) 141-142.

¹⁹ Çali (n 9) 164.

²⁰ *ibid* 146.

3.3 THE INDONESIAN APPROACH WITH REGARD TO THE INCORPORATION OF INTERNATIONAL LAW INTO DOMESTIC LAW²¹

3.3.1 What does the legislation state?

With regard to Indonesia's position on the acceptance of international agreements, Article 11 of the Constitution²² states that the President, with the approval from the House of People's Representatives, can conclude treaties with other countries. The approval from the national parliament is especially needed if the international agreements (1) generate consequences that are broad and fundamental to the life of the people, (2) impose high financial burdens on the State and/or (3) require amendments to legislation or the enactment of new legislation. Furthermore, the Constitution orders that a detailed regulation on adopting international agreements is needed. Therefore, the Government adopted law No. 24/2000 on International Agreements, which will be discussed further in this section

Requirements on the specific nature of international agreements which need approval by parliament were added in the first amendment to the Constitution in 1999. Before the first amendment, Indonesia did not have any specific regulation with regard to treaty making. However, following the amendment of the Constitution, the position of international law in the Indonesian legal system remained unclear.

The specific regulation related to international agreements, required by the Constitution, was adopted in 2000. The Law on International Agreements No. 24 of 2000 regulates the mandates to negotiate and sign treaties on behalf of the Indonesian Government. In addition, it stipulates the procedure of treaty validation (*pengesahan*) / (ratification) under Indonesian law.²³

Article 10 of this law states that treaties can be adopted either through the passing of a statutory law or through a presidential regulation, depending on treaties' content. A statutory law will be required if the content of the treaties relates to topics on:²⁴ (1) political issues, peace, and defence and security of the state; (2) territorial changes or determination of the state's border; (3) the state's sovereignty; (4) human rights and environment; (5) establishment of new norms; and (6) foreign loans/grants. For other than the listed issues, a presidential regulation will be required to accept an international agreement. The six topics mentioned in the International Agreements law correspond to the mandate of the Constitution by stating that approval from the parliament is crucial for certain treaties. A statutory law needs parliament's consent. Thus, only treaties that are considered to be important and affect the life of the people will need the adoption of a law by parliament.

²¹ All national regulations used in this chapter are in Bahasa Indonesia and all their translation belong to the author except as stated otherwise.

²² The Constitution of the Republic of Indonesia 1945, authorised translation available at <http://peraturan.go.id/uud/nomor-tahun-1945.html>.

²³ Butt 2014 (n 3).

²⁴ Law No. 24 of 2000 on International Agreements (*Undang-Undang No. 24/2000 tentang Perjanjian Internasional*) SG 185/2000, art 10.

With regard to parliament's consent, the Constitutional Court in a recent judgment on the judicial review of the International Agreements law²⁵ stated that the consent of parliament is crucial if the government wishes to ratify international agreements. The Court further concluded that the consent is not limited only to the six agreements listed in Article 10.²⁶ This decision expands the types of international agreements that need a statutory law as the form of ratification instrument at the domestic level.²⁷ However, the Court did not further elaborate on the possible types of international agreements that can be included in the list.

To understand the position of international law in a national system, one can examine the hierarchy of legislation in a state in question. A statutory law ranks the second highest in the Indonesian national hierarchy, following the Constitution. The hierarchy of national legislation is stipulated in Law No. 12 Year 2011 on the Formation of Legislation. The Constitution is the highest norm followed by decrees of the People's Consultative Assembly, statutory laws, government regulations in lieu of law, government regulations, presidential regulations and regional regulations.²⁸ Statutory law ranks third in the hierarchy of legislations in Indonesia, due to their content and coverage in which laws are applicable in all of Indonesia's territory. A statutory law is usually considered to be an implementation of a certain article of the Constitution, as well as a ratification instrument of a treaty. Although the ratification instruments of a treaty can be in a form of a statutory law, the law on Formation of Legislation does not recognise international treaties *per se* in the hierarchy of Indonesian legislation. Therefore, international treaties cannot be considered as formal sources of law in Indonesia,²⁹ yet the ratification instruments can. However, the governmental practice shows an ambiguity.

The practice of approval by parliament and the president in accepting international agreements raised a debate among Indonesian international law scholars.³⁰ Questions include whether the adoption of ratification instruments constitute formal expressions of parliamentary and presidential approval, or have a legislative character of proper legislation that transforms international law into national law.

Article 13 of Law No. 24/2000 on International Agreements articulates that any ratification instrument (both a statutory law and a presidential regulation) should be published in a state gazette. This article suggests that the ratification instruments have a legislative character and therefore need to be properly made public under the state gazette. Furthermore, the General Note³¹ of this law explains that the placement of such legislation in the state gazette

²⁵ Indonesian Constitutional Court, Judicial Review of Law No. 24/2000 on International Agreements, Case No. 13/PUU-XVI/2018, Judgement 19 November 2018.

²⁶ *ibid* p 266.

²⁷ *ibid*.

²⁸ Law No. 12/2011 on the Formation of Legislation (*Undang-Undang No 12/2011 tentang Pembentukan Peraturan Perundang-undangan*) SG 82/2011, art 7 (1).

²⁹ This perspective is also practised and perceived by judges who hold the perspective that treaties are not more important than laws. Such evidence can be found in Agusman's works in which he interviewed several judges. See details in Damos Dumoli Agusman, 'The Courts and Treaties: Indonesia's Perspective' (2017) 1 *Padjajaran Journal of International Law* 1.

³⁰ Damos Dumoli Agusman, 'The Law Approving Treaties ("UU Pengesahan"): What Does It Signify?' (2016) 1 *Jurnal Bina Mulia Hukum* 73.

³¹ General Note is an explanation on the meaning of provisions enshrined in Indonesian legislation. This Note is provided by the drafters of a law and attached to the legislation itself but it is separated from Appendix. This Note is also often called as "Elucidation" by other Indonesian authors.

will have an impact on the legally binding nature of legislations to all Indonesian institutions and citizens.³² This approach is closest to the monism approach whereby ratification, under this law, acts as an external statement of a state's consent to be bound by an international agreement.³³ Ratification is one of the potential acceptance methods that can be utilised for international acceptance. While the acceptance method depends on treaties' provisions, states may decide which of the acceptance methods are suitable for them.³⁴ The Indonesian Constitutional Court, in its judgement in relation to the ratification of the ASEAN Charter by the Indonesian government, followed the approach whereby ratification is a statement of the state to be bound to a treaty at the international level; to be bound internally there should be another mechanism that follows.³⁵

A ratification instrument of an international treaty discussed above should be announced in the state gazette, in order to be applicable in Indonesia. In this regard, a statutory law on ratification, which mostly consists of the translation of a treaty, can be considered as a national law which domestically binds government institutions at all levels. This practise constitutes the dualism approach.

Both the Constitution and the Law on International Agreements tend to regulate methods, or techniques, on how the government can participate in establishing treaties, rather than to regulate the transformation process and applicability of international treaties in domestic law. In other words, the Constitution and the Law on International Agreements lay down the technical aspects of adopting a treaty, such as the parties who can represent the government in the international treaty making, negotiation process, acceptance, signature, exchange of documents, ratification, accession and reservation. Nonetheless, these laws do not stipulate further on how a newly ratified treaty can be accepted as national legislation and applicable before the court.

Relating to international treaties on human rights, Indonesia treats them differently than the other treaties. Therefore, it is important to discuss the related pieces of legislation in this section. With regard to the position of international human rights treaties, Article 7 of the Human Rights Law No. 39/1999³⁶ states that all international human rights norms accepted by the government become national law. Thus, all international human rights treaties that have been accepted by the government are legally binding and thus are applicable in Indonesia. This provision reflects the monist approach. This law proves that Indonesia, once again, has not decided which approach it prefers. Based on this article, it can be assumed that Indonesia follows both a dualist and monist approach. While for human rights treaties, a monist approach seems to be more applicable than a dualist one, yet in other treaties the latter will likely be more relevant.

³² Law No. 24/2000 (n 24) art 13 and the General Note section.

³³ VCLT (n 1) arts 2 (1), 11-15.

³⁴ *ibid* art 27.

³⁵ Indonesian Constitutional Court, *Perkumpulan Institut Keadilan Global et.al*, judgement No. 33/PUU-IX/2011 on Law No.38/2008 on the Indonesian Ratification of the ASEAN Charter, para 3.23. This case brought before the court by several NGOs claiming that the Charter ratified by the Indonesian government against several provisions in the Constitution, such as article 27 (2) – the right to work and the right to adequate living and article 33 on the principle of Indonesian economy.

³⁶ Law No. 39 of 1999 on Human Rights (*Undang-Undang No. 39/1999 tentang Hak Asasi Manusia*) SG 165/1999.

This opinion is slightly different from that of scholars, such as Damos Agusman and Simon Butt. While Agusman mentions that the provision shows a sign of monism,³⁷ Butt states that the provision in the human rights laws reflects dualist practices. Butt mentions that monist states do not need a provision asserting that “an international treaty that has been accepted by the government become national law,” as such a provision is “superfluous.”³⁸

The word accepted is translated from an Indonesian word “*diterima*,” which can be broadly interpreted as “accepted”. In the field of international agreements, particularly in treaties, a state’s acceptance of a treaty can be done in several ways, i.e. through signature, acceptance, accession, and ratification. To be clear, the treaty itself will regulate the requirement on how a state may, or may not, accept it. Thus, the acceptance process depends on provisions concluded in a treaty. In that sense, the acceptance by the Indonesian government, particularly of human rights treaties, does not always need a ratification. As long as the government accepts, the treaty becomes legally binding as positive law in Indonesia. In this regard, the provisions enshrined in human rights law lean more towards monism than dualism.

Due to the lack of clarity on the position of international law in the Indonesian legal system, until present, no consensus among Indonesian international law scholars has been reached.³⁹ The Indonesian government, in its responses to the UN human rights bodies, also show ambiguity in this regard, for example the Indonesia’s periodic reports to the UN Committee on the Elimination of Racial Discrimination (CERD) in 2006 and Committee on the Rights of the Child (CtRC) in 2002, which will be discussed in the next sub-section. Without such clarity, domestic courts can play a role in creating a clear interpretation on this issue. However, the practice of the courts also shows a degree of variation. This variation can be seen in referring to international law in their judgements, interpreting as to whether instruments of ratification is considered to be a means to bind institutions or not, and deciding if two laws are in conflict. The subsection below will provide a brief discussion on the government as well as court practices.

3.3.2 The government’s practices

The government practice concerning to treaty implementation in Indonesia has never been consistent. The government holds the view that legislation approving treaties (both in the form of statutory laws and presidential regulations) possess regulatory power; therefore, they have the same normative content as other legislation.⁴⁰ Thus, legislation ratifying treaties transform international norms into domestic law. However, the government’s practices do not always reflect this perspective.

Examples of such practices, particularly in transformation of human rights treaties, were seen in the Indonesia’s periodic reports to the UN Committee on the Elimination of Racial

³⁷ Damos Dumoli Agusman, ‘Status Hukum Perjanjian Internasional Dalam Hukum Nasional Indonesia’ (2008) 5 Indonesian Journal of International Law 488.

³⁸ Butt 2014 (n 3).

³⁹ Damos Dumoli Agusman, ‘The Dynamic Development on Indonesia’s Attitude Toward International Law’ (2015) 13 Jurnal Hukum Internasional 1, 14-15.

⁴⁰ Dumoli Agusman, ‘The Law Approving Treaties (“UU Pengesahan”): What Does It Signify?’ (n 30).

Discrimination (CERD) in 2006⁴¹ and the Committee on the Rights of the Child (CtRC) in 2002.⁴² In both of these reports the Government indicated that treaties cannot be directly implemented,⁴³ thus, they should be integrated in the relevant national legislations by adopting several measures for such integration i.e. harmonisation of laws.⁴⁴ In case of a conflicting norm, national laws should prevail.⁴⁵ At the national level this conflict has never been solved, although the hierarchy of legislation states such a position.⁴⁶

In its 2012 report to the Human Rights Committee, with regard to the implementation of the International Covenant on Civil and Political Rights, Indonesia did not provide a clear explanation on the position of treaties under national law.⁴⁷ In its response to the government report, the Committee requested a detailed explanation on the status of the Covenant in Indonesian law.⁴⁸ Surprisingly, without any adequate reasoning Indonesia replied with a totally different approach from the previous reports by stating that the provisions of the Covenant are directly applicable and can be invoked or referred to by judges.⁴⁹ The government provided a legal reasoning by citing the provision in Article 7 of the Human Rights Law, discussed in the previous subsection, which states that international human rights that have been ratified by Indonesia, will become national laws. At the same time, the government also acknowledged that the direct use of the provisions was not yet a common practice that can be traced in national courts' judgements.⁵⁰ There were no clear arguments on this choice, particularly to provide a reasoning of why the different approach had been reported to the other human rights bodies. The fact that the human rights law was adopted in 1999 and the other two reports were submitted in 2003 and 2012 respectively has created a "legal anomaly"⁵¹ as to whether the statutory laws ratifying the treaties still needed other national legislation to be properly implemented domestically.

With regard to these inconsistencies, human rights bodies provided varied observations in their concluding observations. While recognising the national applicability of treaties, the Human Rights Committee noted that the ICCPR "does not take precedence over the provisions of national legislation that are deemed inconsistent with the Covenant."⁵² On the other hand, the CERD Committee acknowledged and was concerned that the CERD convention is not self-executing in Indonesia and that the government had provided no explanation about to what extent is the covenant has been integrated at the domestic level.⁵³

⁴¹ Committee on the Elimination of Racial Discrimination (CERD), 'Report Submitted by State Parties under Article 9 of the Convention, Third periodic report of INDONESIA' (4 April 2006) UN Doc No. CERD/C/IDN/3.

⁴² Committee on the Rights of the Child (CtRC), 'Consideration of Reports Submitted by State Parties under Article 44 of the Convention, Second Periodic Report of Indonesia' (7 July 2003) UN Doc No. CRC/C/65/Add.23.

⁴³ CtRC, *ibid* (n 42) para 25.

⁴⁴ CERD (n 41) paras 79-86.

⁴⁵ CtRC (n 42).

⁴⁶ See section 1.3.1.

⁴⁷ Human Rights Committee (HRC), 'Initial Reports of Indonesia' (19 March 2012) UN Doc No. CCPR/C/IDN/1.

⁴⁸ HRC, 'List of Issues in Relation to the Initial Report of Indonesia' (CCPR/C/IDN/1), adopted by the Committee at its 107th session (11-28 March 2013), (29 April 2013) UN Doc No. CCPR/C/IDN/Q/1, para 1.

⁴⁹ HRC, 'Replies of Indonesia to the List of Issues' (10 July 2013) UN Doc No. CCPR/C/IDN/Q/1/Add.1, 10 July 2013 paras 1-2.

⁵⁰ *ibid*.

⁵¹ Dumoli Agusman, 'The Law Approving Treaties ("UU Pengesahan"): What Does It Signify?' (n 30).

⁵² HRC, 'Concluding Observations on the Initial Report of Indonesia' (21 August 2013) UN Doc No. CCPR/C/IDN/CO/1, para 5.

⁵³ United Nations General Assembly, 'Report of the Committee Report of the Committee on the Elimination

It is worth noting the existence of an Indonesian practice in which non-human rights treaties can also be implemented without any implementing or transforming legislation.⁵⁴ For example, the Vienna Conventions on Diplomatic Relations 1961 and on Consular Relations 1963, were ratified by the enactment of Law No. 1 of 1982. However, again, this condition is not absolute. In the case of the Indonesian ratification of the United Nations Convention on the Law of the Sea (UNCLOS) in 1985, through Law No 17, the government felt obliged to enact a newer law i.e. Law No. 6 of 1996 on Indonesian Waters, which partly translates the provisions of the UNCLOS 1982, particularly the Indonesian obligations.⁵⁵

Such inconsistency in the governmental practice shows that certainly there is no guidance that can be found in the Constitution or other domestic laws to solve this issue. The government should adopt a clear position. If not, many of the treaties and the statutory ratifying laws would be categorized as dormant documents, meaning that they cannot be well implemented and invoked before the national courts.⁵⁶ The next section will discuss the practices of national courts on the invocation of international norms.

3.3.3 Domestic courts and treaties

As discussed in the previous section, the Indonesian Constitution and other laws do not provide a clear-cut position on international law in the domestic legal system. In this situation, national judges play a role in interpreting how international law interacts with domestic law and in harmonising the acts of government officials domestically, and as a part of the international society.⁵⁷ This section will examine the Indonesian courts' practices with regard to treaties' invocation and referral in domestic cases.

Agusman's work on Indonesian judges' reactions to treaties identifies three types of approaches in interpreting the position of international law in the domestic law.⁵⁸ First, a small group of judges only accept international law that has been transformed into national law as binding law. Second, another group of judges do not see international law as a source of law in Indonesia. These judges follow a dualist argument that the law on the Formation of Legislation does not recognise international law as such. The third category is judges who recognise the binding force of treaties, but they only refer to international treaties if the national laws do not provide a clear-cut answer on a certain issue.

Although there are a variety of approaches taken by judges as described by Agusman, many judges, apparently, will not cite international law except for a clarification. Nonetheless, the development of judgments, on cases related to international human rights norms, show a different pattern in judges' approaches to citing international norms. Due to globalisation and

of Racial Discrimination in Seventieth Session (19 February-9 March 2007) and Seventy-first Session (30 July-17 August 2007)' UN Doc No. A/62/18 para 365.

⁵⁴ See details at Dumoli Agusman, 'The Law Approving Treaties ("UU Pengesahan"): What Does It Signify?' (n 30).

⁵⁵ *ibid* 79.

⁵⁶ Butt 2014 (n 3).

⁵⁷ Basak Çali, 'Introduction' in Basak Çali (ed), *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015) 10.

⁵⁸ Dumoli Agusman, 'The Courts and Treaties: Indonesia's Perspective' (n 29) 3-4.

the influence of the international human rights regime, Indonesian courts, particularly the Supreme Court and the Constitutional Court, have started to adjudicate cases related to norms enshrined in international law, and human rights specifically. The main approach of the judges of both Courts is that a reference to treaties will be given only if the domestic courts are not sufficiently clear and the judges need to seek a clarification for domestic concepts.⁵⁹ Another approach that Agusman did not mention, is that the Constitutional Court also cite international treaties to support norms enshrined in national laws. For example, in the case of judicial review on the law on water resources, the Constitutional Court deliberated that the right to access water guaranteed in the Constitution is also supported by article 12 (1) ICESCR on the right to health and its General Comment No. 14.⁶⁰ Furthermore, the Court ruled that the international community, through the interpretation in the General Comment No 12 on the Right to Health, has accepted that the right to health does not only concern health service facilities, but also other elements including access to safe drinking water.⁶¹ Nonetheless, in all cases related to water resources, the Court did not refer its judgments to General Comment No 15 that specifically addresses the interpretation on the right to water.⁶²

Previous research suggests that national courts have not been consistent in this regard, for example, in answering the debate on the nature of treaties, whether treaties are self-executing or non-self-executing, or whether the instruments of ratification can be applied directly. Most of the time these questions were left unanswered.⁶³ On several occasions, the Constitutional Court has made a clear and strong choice with regard to the position of international law and the Constitution. Some of the decisions concluded that the Indonesian Constitution holds the highest position in the hierarchy of legislation and mention that international law's binding nature does not surpass that of the Constitution's.⁶⁴ As a consequence of such judgements, if an inconsistency occurs between international law and the norms enshrined in the Constitution, the latter will prevail.

However, the question of which laws should prevail when international norms contradict other forms of legislation, such as acts or government regulations, remains unsolved. The Constitutional Court does not have a mandate to conduct judicial review on this matter, but the Supreme Court (including the court of first and second instances) does. Nonetheless, according to Agusman, no cases were brought on this issue before the Court.⁶⁵

⁵⁹ *ibid.*, 4 ; see also Butt (n 3) p 13.

⁶⁰ Indonesian Constitutional Court, judgement no. 85/PUU-XI/2013 on the judicial review on the law of water resources No. 7/2004, 18 February 2015, para 3.25. The Court in this case cited decisions in similar judicial review on the same law brought before it, which are cases Nos. 058- 059-060-063/PUU-II/2004 and No. 008/PUU-III/2005, that stated the right to water in several international treaties, including UDHR, ICESCR and its general comments as well as Convention on the Right of the Child (see the merit in para II A pp 486-487).

⁶¹ Indonesian Constitutional Court, judgement nos. 058- 059-060-063/PUU-II/2004 and No. 008/PUU-III/2005, *ibid.*, p 486.

⁶² United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (20 January 2003) UN Doc E/C.12/2002/11.

⁶³ See Wisnu Aryo Dewanto, 'Penerapan Perjanjian Internasional Dalam Pengadilan Nasional' (2014) 1 *Padjajaran Jurnal Ilmu Hukum* 57.; see also Kama Sukarno, 'Penerapan Perjanjian Internasional Di Pengadilan Nasional Indonesia: Studi Terhadap Putusan-Putusan Mahkamah Konstitusi' (2016) 3 *Padjajaran Journal Ilmu Hukum* 587.

⁶⁴ See for example in the judgements of the Court No. 065/PUU-II/2004 on the judicial review of Law No. 26 of 2000 on Human rights Court, pp 54-60; No. 012/PUU-I/2003 on judicial review of Law No.13 of 2003 on Labour Force, p. 113; No. 1/PUU-VIII/2010 on Judicial Review of Children Court Act, p 151; and No. 140/PUU-VII/2009 on Judicial Review of Act No.1/PNPS/1965 on the Prevention of Blasphemy, para 3.34.9.

⁶⁵ Dumoli Agusman, 'The Courts and Treaties: Indonesia's Perspective' (n 29) 4.

In spite of this unclear position of international law in the Indonesian legal system, the Constitutional Court's judgment on the constitutionality of a statutory law, with regard to the ratification of the ASEAN Charter (Law No. 38/2008),⁶⁶ has brought new insight on the issue of treaty ratification. Although, in general, the Court rejected the claim that the ASEAN Charter runs against the Constitution, it did accept its competence to examine the unconstitutionality of a ratification instrument.⁶⁷ The majority of judges, seven out of nine, agreed on this position. This judgement is quite unique. The acceptance of judicial review on the statutory law of a ratification instrument resulted in the consequence that a ratification instrument is seen as binding national law, which holds a similar position and power to other statutory legislation adopted by the parliament. Thus, a ratification instrument is a national law that demonstrates the applicability of an international treaty in Indonesia and thus allows a treaty to be examined directly by domestic courts.

As discussed before, there is no consensus in this regard, as to whether a ratification instrument is an instrument that incorporates the effects of international norms at the domestic level. The decision of the Constitutional Court on the ASEAN case can be used to end such ambiguity and confusion. Although judges in Indonesia do not have an obligation to follow precedents, this decision can serve as guidance in determining the domestic applicability of international law in Indonesia.

3.4 THE INDONESIAN POSITION WITH REGARD TO HUMAN RIGHTS TREATIES AND ITS INTERNATIONAL OBLIGATIONS THEREIN

Until the present, Indonesia has ratified and become a party to eight human rights treaties, including the ICCPR, ICESCR, CEDAW, and CRC.⁶⁸ Human rights treaties impose several international obligations on state parties. As Indonesia does not clearly define how international norms are applicable under domestic law, this obscurity will also influence the implementation of international obligations under human rights treaties.

Similar to other international treaties, several experts have suggested that without transformation into national law, human rights treaties cannot be enforced directly before the court due to non-justiciability.⁶⁹ On the other hand, some experts believe that human rights treaties can be directly enforced after the government has ratified through a statutory law, unless the treaties are contrary to the Constitution.⁷⁰

As mentioned previously in section 3.3.1, international treaties on human rights have a special recognition in Indonesian legislation. Article 7 of the Human Rights Law states that all international human rights norms accepted by the government by definition become national legislation. This article reflects the fact that Indonesia follows a monist approach, in which

⁶⁶ Constitutional Court of Republic of Indonesia (n 35).

⁶⁷ *ibid* para 4.1.

⁶⁸ OHCHR, Status of ratification <<http://indicators.ohchr.org/>> accessed date 10 June 2018.

⁶⁹ See for example Dewanto (n 63) 59. See also Melda Kamil Ariadno, 'Kedudukan Hukum Internasional Dalam Sistem Hukum Nasional' (2008) 5 Indonesian Journal of International Law 505.

⁷⁰ Hikmahanto Juwana, 'The Obligation to Ensure the Conformity of International Treaties with the Constitution' (2011) 8 Indonesian Journal of International Law 434.

human rights treaties can become national law and, thus, bind all government institutions and judges. However, in practice, once more, judges will not always invoke human rights treaties in their judgements. Hikmahanto Juwana mentioned that the “lack of publication of human rights treaties ratified by the Indonesian government” might be one of the culprits behind this non-invocation.⁷¹ Another reason that may cause the lack of invocation of international human rights norms, is that Indonesian judges seem to follow a passive principle, which infers that judges only need to consider the claims and legal basis that the parties bring before the court. The burden to prove the claims is not on the judges, but on the parties to a dispute.⁷² This principle is important for claimants, particularly in drafting their claims. As judges will only consider issues and legal basis that parties raise, claimants have to be very precise in drafting their documents and include all of the legal basis that might be relevant to their cases. This consideration applies to all complaints, including those related to human rights.

The next question that may arise is whether international human rights norms can be invoked directly before national courts, given the fact that there is no clear rule about their application. There were some cases in the past wherein citizens invoked international human rights norms before district courts, particularly in the form of class action, citizen lawsuits, and regular civil claims.⁷³

Recent cases involving international human rights norms are, for example, eviction cases in Jakarta,⁷⁴ Kulon Progo and Yogyakarta,⁷⁵ and a citizen lawsuit case on the violation of the right to vote.⁷⁶ In all of these cases, international human rights norms were invoked by the claimants. The norms that were cited vary, such as the ICCPR⁷⁷ and the ICESCR, particularly relating to the right to an adequate standard of living, as well as the right to land and the right to work.⁷⁸ However, the claimants did not mainly invoke international norms ratified by the Indonesian government, they primarily based their claim on national laws applicable in Indonesia.⁷⁹

The judges, however, did not consider the international norms as legal sources. Instead they primarily looked at the national laws. For example, in the Yogyakarta Airport Case, the judges found that

⁷¹ Hikmahanto Juwana, ‘Human Rights in Indonesia’ (2006) 4 Indonesian Journal of International Law 27.

⁷² Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (4th edn, Liberty 1994) 12; Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama* (4th edn, Kencana Prenada Media Grup 2006) 202-204.

⁷³ Abdul Fatah, ‘Gugatan Warga Negara Sebagai Mekanisme Pemenuhan Hak Asasi Manusia Dan Hak Konstitusional Warga Negara’ (2013) 28 Yuridika 293.

⁷⁴ See for example, *Galuh Radiah et al v Governor of DKI Jakarta*, Judgement of the Jakarta Administrative Court No. 59/G/2016/PTUN JKT jo No/267K/TUN/2016.

⁷⁵ *Sumadi et al v Governor of Yogyakarta Special Province*, Judgement of the Yogyakarta Administrative Court No. 07/G/2015/PTUN. YK (New Yogyakarta International Airport-NYIA Case).

⁷⁶ *Standaarkia et al v the State of Republic of Indonesia c.q General Election Commission (KPU case)*, judgement The Indonesian Supreme Court Judgment No. 2801K/PDT/2009. This case was rejected because it did not fulfil the requirement of a time limit to bring a claim before the court, therefore, the element of human rights violations both based on national and international law were not put into the consideration of the merit.

⁷⁷ *KPU case* (n 76) pp 17-18; *Galuh Radiah et al* (n 74) p 17.

⁷⁸ For example in *Yogyakarta NIA case* (n 75) paras 68, 133.

⁷⁹ *Yogyakarta NIA case* (n 75) pp 193-196.

“... the land procurement for the airport was not against the national law (Law No. 39/1999⁸⁰ and Law No. 2/2012⁸¹ as the government had fulfilled all the requirements mentioned in the law; therefore, the government did not violate human rights law as well as did not violate the international law ratified by Indonesia (ICESCR), particularly on forced evictions.”⁸²

This consideration did not further elaborate on what the elements of forced evictions, based on international norms, are and did not provide reasoning on why the government did not violate international norms. Instead, the judges were of the opinion that if the government did not violate national law, then the government also did not violate international law.

In another case, *Galuh Radiah et al v Governor of DKI Jakarta*, the judges did not consider the fact that if the government continued to implement its decision to build a water tunnel that connects Ciliwung River to Banjir Timur Canal in that location, it would lead to the violation of international norms, such as the right to housing. The judges merely examined the legality of the procedure of land procurement for development, as well as the timing of the claim brought before the court.⁸³ Although in the merits, the judges urged the Jakarta Governor to withdraw their decision;⁸⁴ their considerations were based on the fact that Jakarta’s decision did not fulfil the requirements enshrined in the national law, and the ruling was not based on the reason that the continuation of the policy would infringe people’s human rights.

These two judgments suggest that the judges paid more attention to national laws than to international law. This finding is also supported by previous research conducted by Agusman, which revealed that Indonesian judges only referred to international norms if national laws did not provide a clear justification on a particular issue.⁸⁵

Based on the findings mentioned above, and the applicable norm in Indonesia (article 7 of the Human Rights law), the international human rights norms that have been accepted by the government, through the legal procedure, can be invoked directly before the court. However, the reference to international norms to be shown in the judgements depends on the consideration and the interpretation by each individual judge. Moreover, based on all cases observed for this thesis, there are almost no cases brought before the court that use international norms as the ultimate legal basis in bringing cases to the courts. Therefore, it is challenging to see the real practice of the courts; yet, normatively, direct invocation of international human rights norms seems possible. However, national judges tend to give priority to national law.

Although practices in the application of international treaties in the domestic courts result in a mixed picture, Indonesia is bound by the international treaties, particularly in regard to human rights, to implement the international obligations enshrined in the treaties. The general

⁸⁰ Law No. 39/1999 (n 36).

⁸¹ Law No. 2/2012 on Land Acquisition for Development in the Public Interest (*Undang-Undang No 2/2012 tentang Pengadaan Tanah untuk Pembangunan bagi Kepentingan Umum*) SG 22/2012. The English version available at <<http://extwprlegs1.fao.org/docs/pdf/ins142768.pdf>> accessed 24 April 2019.

⁸² Yogyakarta NIA case (n 75)

⁸³ *Galuh Radiah et al* (n 74) pp 108-153.

⁸⁴ *Galuh Radiah et al* (n 73) p 153. Later in the appeal stage, this decision was annulled by the Supreme Court with its judgement No. 267K/TUN/2016 which resulted the continuation of the water tunnel project and evicted people from their homes.

⁸⁵ Dumoli Agusman, ‘The Courts and Treaties: Indonesia’s Perspective’ (n 29).

principle of good faith and *pacta sunt servanda* should be respected once a state commits itself to an international agreement. In addition, the Indonesian Constitution and the Human Rights Law also guarantee and recognise human rights as freedoms and an entitlement of human beings. Under domestic law, Indonesia is obliged to implement human rights under its national law. Moreover, international human rights treaties, in this regard, act as an additional means to control and supervise the government in the case of non-fulfilment of human rights obligations. International fora, such as the state report procedure, can be employed by individuals or groups to scrutinise the government and to ensure better performance in the implementation of human rights. Therefore, the lack of clarity of Indonesia's position and approach with respect to international norms cannot be used as an excuse to not execute international obligations at the domestic level.

3.5 PRELIMINARY REFLECTIONS

This chapter has provided a brief discussion and analysis on the legal position of international treaties in the Indonesian domestic legal order. As discussed in the previous section, Indonesia does not take a clear position on the relation between International and national law. It has never been decided in the Constitution, or in the law on International Treaties, whether Indonesia follows a monist or dualist approach or a combination of the two, with reference to incorporating international law into domestic law.

Furthermore, the national hierarchy of legislation does not recognise international treaties. No consensus has been reached on how uniformed statutory laws, as instruments of ratification, can serve as national laws which bind the state to implement international treaties at the domestic level. However, the latest judgement of the Constitutional Court, which ruled to accept reviewing the constitutionality of the law on ratification of the ASEAN charter, has brought a little clarity. Through this decision, the Court has implied that instruments of ratification possess the same legally binding power as any other domestic legislation adopted by the parliaments; thus, their constitutionality can be examined by the Court. Although a debate about this issue is still ongoing, the present author recalls that upon the adoption a statutory law as an instrument of ratification, there is no need to enact new legislation to give an international treaty effect at the domestic level.

Despite the unclear position of international law in the Constitution, national courts have demonstrated that in the case of a conflict between Constitution and international norms, the Constitution will prevail. So far, the domestic courts' decisions on conflicting international norms with national legislation, other than the Constitution, have not been found. Therefore, there is almost no evidence to clarify the position of international norms and legislation that is subordinate to the Constitution.

Moreover, the position of international human rights treaties in Indonesia is unique when compared to the position of other treaties. Article 7 of the Indonesian human rights law provides an exception for the anomaly mentioned above. It allows all human rights treaties to become national law upon their acceptance by the government. Thus, normatively, international human right norms are justiciable at the national level. However, as described in several cases in the previous section, both judges and citizens rarely invoke international human rights norms.

If they do, they do not invoke the international norms as the main reasoning of their claim and consideration. The usage of international norms is only to support the claim and are not always well argued. Therefore, there is a need to research this matter in the future, especially with the development of the domestication of human rights norms before the national courts. Regardless of the clarity of such approach in the legal system, Indonesia is legally bound by international human rights treaties to fulfil their international obligations as best as possible.

This chapter, on the position of international law in the Indonesian domestic legal system, will be used to assess how human rights treaties' obligations, and specific obligations with regard to the human right to housing, have been transformed into Indonesia's legislation. The examination of the implementation of international obligations relating to the right to housing will be presented in Chapters 4 and 5. These two chapters will analyse the implementation of international obligations that have been discussed in Chapter 2, both at national and local level. In these chapters, the combination of analysis between the nature of Indonesia's legal obligations in relation to human rights treaties, and the nature of the international right to housing, will benefit the further examination of the implementation of such obligations at the domestic level.

CHAPTER 4

THE RIGHT TO HOUSING IN INDONESIAN LEGISLATION AND POLICIES¹

4.1 INTRODUCTION

As observed in Chapter 2, the recognition of the right to adequate housing has become increasingly robust since its adoption in the Universal Declaration of Human Rights in 1948. This right is considered crucial, as it is part of the right to an adequate standard of living, which could never be achieved without the right to housing. In addition to the Universal Declaration of Human Rights, various subsequent international instruments have recognised the right to adequate housing, including the International Covenant on Economic, Social and Cultural Rights (the ICESCR), adopted in 1966.² As with other economic and social rights, the right to housing is subjected to a progressive realisation, meaning that states must continuously aim to fulfil this right. Numerous other human rights instruments have also recognised this right;³ therefore, international recognition of the right to housing is indisputable.

However, a crucial aspect of how serious international human right norms are being taken is in their domestic application. With regard to the right to housing, states should adopt national regulations to ensure effective implementation of the right without any discrimination, and prioritise the most vulnerable groups living in “unfavourable conditions.”⁴ Having discussed in the previous chapter the recognition of the right to adequate housing at the international and regional level, including its meaning, as well as the relevant obligations pertaining to it, and how this right is being dealt with by regional human rights courts, this chapter explores the implementation of the right to housing in Indonesia in light of its international obligations.

As the fourth most-populous country in the world, Indonesia faces an enormous housing problem. By the end of 2015, the country's total population was estimated to be 251 million

¹ Another version of this chapter has been published as a book chapter, Erna Dyah Kusumawati, ‘The Recurring Dream of Affordable Housing in Indonesia: A Human Rights Perspective’ in Michel Vols and Juan Sidoli (eds), *People and Buildings: Comparative Housing Law (Vol 2, Eleven International Publishing 2018)*.

² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS 993 (ICESCR).

³ These human rights instruments target specific groups such as women, children, migrant workers, refugees, and minority groups. These conventions are: 1) Convention on the Elimination of all Forms of Discriminations Against Women (CEDAW), 2) Convention on the Rights of the Child (CRC) 3) Convention on the Elimination of All forms of Racial Discrimination (CERD), 4) Convention Relating to the Status of Refugees, 5) Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), 6) Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), and 7) Convention on the Rights of People with Disabilities (CRPD).

⁴ UN Committee on Economic, Social and Culture Rights (CESCR), ‘General Comment No. 3: The Nature of State Parties’ Obligations (Art. 2 Para. 1 of the Covenant)’ (14 December 1990) UN Doc E/1991/23, para 3 (General Comment 3); CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23, paras 9, 10 and 11.

people,⁵ and is predicted to reach 306 million people by 2035.⁶ 50 percent of the population is projected to live in urban areas.⁷ As urbanisation already takes place, housing problems are also increasing. Furthermore, Indonesia's population is concentrated on Java Island, as it has a better supporting infrastructure than other islands. Currently, Java is the most populous island in Indonesia, with an estimated 145 million inhabitants at the end of 2015.⁸ Java is home to 60 percent of the Indonesian population;⁹ as such, there is continuous pressure on the island to provide adequate housing, public transportation, and a healthy environment for its inhabitants. These problems can also be found throughout all Indonesian territories. Data provided by the Indonesian Ministry of National Development Planning confirms a housing backlog affecting approximately 15 million families. This housing backlog will continue to grow by 0.7–1 million households per annum.¹⁰ Furthermore, the proportion of households living in inadequate housing has increased over the past five years, reaching 32 million families in 2013.¹¹ These figures show a growing housing problem for Indonesia in the near future.

This chapter answers the sub research questions regarding the extent to which the right to adequate housing, as enshrined at the international level, is adopted and regulated in Indonesia, and to what extent Indonesian policies on housing mirror its international obligations.

To answer these questions, section 4.2 provides an overview of the legal framework of the right to housing in Indonesia. The section starts with the general recognition of human rights in the Indonesian Constitution and moves on to examine the legal framework of the right to housing both at national and local level. Sections 4.3 and section 4.4 analyse the development of Indonesia's national housing policies. As the government cannot work alone in providing housing for its citizens, section 4.5 discusses the various actors involved in the delivery of housing. Section 4.6 reflects on the strengths and weaknesses of the Indonesian legal framework and policies in fulfilling the right to housing at the national level. Nonetheless, the adoption of legislation and policies is not the only measure for fulfilling the right to adequate housing. Obligations include taking various measures to ensure that the adopted legislation works effectively. One of the measures is the presence of accountability as a process and its elements, which will be discussed further in Chapters 9, 10 and 11. Section 4.7 concludes with a discussion on the gaps between the protections provided for in national legislation and various factors that indicate that the low-income population still struggle to find a place to live. This section also provides a connection between Chapter 4 and Chapters 5 to 8, through its examination of Indonesian housing policies at the municipal level. These chapters cannot be

⁵ The UN Habitat website <http://urbandata.unhabitat.org/explore-data/?countries=ID&indicators=slum_proportion_living_urban_population,urban_population_cities> accessed 20 October 2015. Based on the 2010 national census, the National Statistics Bureau also predicted that the total Indonesian population had reached 255 million in 2015 <www.bps.go.id> accessed 20 October 2015.

⁶ National Statistics Bureau, www.bps.go.id.

⁷ *ibid.*

⁸ National Statistics Bureau, 'Proyeksi Penduduk Menurut Provinsi, 2010-2035' (*Badan Pusat Statistik*) <www.bps.go.id/linkTabelStatistik/view/id/1274> accessed 20 October 2015.

⁹ D. Widyoko, 'Good Governance and Provision of Affordable Housing in DKI Jakarta-Indonesia: Case Study', in M. Sohail (ed.), *Partnering to Combat Corruption Series*, (WEDC Loughborough University 2007) 1-68.

¹⁰ Widyoko (n 9).

¹¹ N. Tri. Utomo, 'Affordable Housing Finance Policies on Indonesia' (*World Bank*, 28–29 May 2014) <<http://siteresources.worldbank.org>> accessed 20 October 2015.

separated from this current chapter, as practices of both national and local governments constitute either compliance or incompatibility with the international standards.

4.2 THE FRAMEWORK OF THE RIGHT TO ADEQUATE HOUSING UNDER THE INDONESIAN LEGAL SYSTEM

Although the preamble of the 1945 Constitution (*Undang-Undang Dasar 1945*) recognises the freedom of people and emphasises the state's obligations to promote general welfare and to educate citizens, little attention had been given to implementing these obligations. The recognition of human rights in Indonesia has only gained ground recently, since the 1990s.

Before the second constitutional amendments were passed in 2000, human rights were only recognised in a limited number of articles, including the right to be equal before the law and government (Article 27 (1)), the right to work (Article 27 (2)) and the right to freely associate, assemble and express an opinion (Article 28). However, under the New Order Regime (1966-1998), human rights were merely a slogan; no institution had the power to hear claims on whether the government had breached the Constitution.¹² Therefore, the 1945 Constitution did not fully guarantee the rights of the people, as human rights had only been prescribed in the Constitution but lacked any real implementation.¹³

The original version of the 1945 Constitution has been amended by the Parliament. The amendment process of the Constitution was conducted in four stages: in 1999, 2000, 2001 and 2002. The amended Constitution adds several provisions on human rights and adds new provisions on the changes to the state's institutional bodies. The amendment, however, did not change the preamble of the Constitution. Therefore, all provisions cited in this chapter refer to the amended version which is entitled the 1945 Constitution of the State of the Republic of Indonesia, hereinafter referred to as the Indonesian Constitution.

The Indonesian national legal system has recognised human rights related to housing in several regulations, including: the Indonesian Constitution,¹⁴ Law No. 39/1999 on Human Rights,¹⁵ Law No. 1/2011 on Housing and Settlement,¹⁶ Law No. 20/2011 on Tower Blocks,¹⁷ the ratification of international instruments, and regulations adopted by the ministries in charge of public works, housing, and social affairs.

Due to the decentralised system adhered to by Indonesia since 2004, the central government has delegated some of its affairs to local governments. One of the areas allocated to local governments is housing (both public and commercial) and settlements. With this

¹² Simon Butt and Tim Lindsay, *The Constitution of Indonesia; A Contextual Analysis, Constitutional Systems of the World Series* (Hart Publishing 2012) chapters 1, 4 and 5.

¹³ T.M. Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990*, (Gramedia Pustaka Utama and SPES Foundation 1993).

¹⁴ Secretariat General of the Constitutional Court of Republic of Indonesia, *The 1945 Constitution of the Republic of Indonesia* (Jakarta 2003). The authorised translation to English of the Constitution can be found in the website of the government of Indonesia <<http://peraturan.go.id/inc/view/11e58ce2b70ac2c094ce313132313436.html>> accessed 3 November 2018.

¹⁵ Law No. 39/1999 on Human Rights (*Undang-Undang No. 39/1999 tentang Hak Asasi Manusia*) SG 165/1999. The English (unauthorised translation) version can be found online at <<http://www.refworld.org/docid/4da2ce862.html>>.

¹⁶ Law No. 1/2011 on Housing and Settlement Areas (*Undang-Undang No. 1/2011 tentang Perumahan dan Kawasan Pemukiman*) SG No. 7/2011.

¹⁷ Law No. 20/2011 on Tower Blocks (*Undang-Undang No. 20/2011 tentang Rumah Susun*) SG No. 108/2011.

delegation, the local governments are expected to adopt their own regulations in line with local culture and values, yet such regulations should not contradict national law.

This section will provide a legal basis of human rights to housing as well as the policies with regard to housing in Indonesia. Both national and local frameworks will be discussed.

4.2.1 The legal framework of the right to adequate housing at the national level

Under the Indonesian legal system, a hierarchy of legal norms is recognised and regulated in the Law No. 12/2011 on the Formation of Legislation.¹⁸ As also discussed in Chapter 3, the hierarchy of legal norms in Indonesia consists of the 1945 Indonesian Constitution that is followed by decrees of the People's Consultative Assembly, statutory laws/government regulations in lieu-of-law; government regulations, presidential regulations; regional (provincial, districts or municipalities) regulations.

All Indonesian legislation should be based on a fundamental norm, which is known as *Pancasila*. It is also known as “the sole foundation”.¹⁹ As a collection of value principles, Pancasila, as promulgated by Indonesia's founding fathers in 1945, serves as the philosophical and the state ideological foundation of Indonesia.²⁰ It consists of five principles: the absolute lordship;²¹ just and civilised humanitarianism; the unity of Indonesia; a people led or governed by wise policies arrived at through a process of consultation and consensus; and a commitment to social justice for all the Indonesian people. Pancasila serves as the highest norms for all legislation.²² Therefore, law and regulations at all levels cannot be contrary to these principles. As with some others living norms and noble principles, Pancasila cannot be easily amended,²³ and should be applied in every aspect of the Indonesian lives.²⁴

¹⁸ Law No. 12/2011 on the Formation of Legislation (*Undang-Undang No. 12/2011 tentang Pembentukan Peraturan Perundang-undangan*) SG 82/2011.

¹⁹ Sjafruddin Prawiranegara, ‘Pancasila as the Sole Foundation’ 1984 (Oct) (38) Indonesia 74.

²⁰ See the Speech of President Soekarno 1 June 1945. The text of the speech appears in ‘20 Tahun Merdeka’ - Twenty Years of Independence (Department of Information Republic of Indonesia 1965), see also Michael Morfit, ‘Pancasila: The Indonesian State Ideology According to the New Order Government’ (1981) 21 Asian Survey 838, 840-841.

²¹ Eka Darmaputera, *Pancasila: The Search of Identity and Modernity in Indonesian Societies, a Cultural and Ethical Analysis* (E.J. Brill 1988) 153; see also Benjamin Fleming Intan, *Public Religion and the Pancasila-Based State of Indonesia: an Ethical and Sociological Analysis* (Peter Lang Publishing 2008) 72-73.

The original phrases of this principle is “*Ketuhanan Yang Maha Esa*”. It has been translated or interpreted to many English versions, such as “a belief in one supreme being” or “belief in God”.

²² Law No. 10/2004 (n 18) art 2.

²³ As Pancasila serves as the ideology and foundation of Indonesia, it becomes the primary legal sources for all Indonesian legislation. It is problematic to change an ideology, as it might need a revolution. The documents that underline the position of Pancasila as the ideology of state are: the Speech of President Sukarno 1 June 1945 (n 20), Decree of the Provisional People's Consultative Assembly (TAP MPRS) No. XX/MPRS/1966 on *Memorandum DPR-GR Mengenai Sumber Tertib Hukum Republik Indonesia Dan Tata Urutan Peraturan Perundangan Republik Indonesia* (5 July 1966), and Decree of the People's Consultative Assembly (TAP MPR) No. II/MPR1983 on *Garis-Garis Besar Haluan Negara* (National Policies Guidelines) (9 March 1983). Although the latter two decrees have been heavily criticised as political products of the Indonesian in its early years of independence which politicised the Pancasila, the government never seems to revoke them. See the politicisation of Pancasila in Prawiranegara (n 19).

²⁴ Al Halim, ‘Posisi Ideologi Pancasila dalam Sistem Ketatanegaraan: Suatu Kajian Filsafat’ 2016 (2) Seminar Nasional Hukum 517; see also Pranoto Iskandar, ‘Pancasila Delusion’ 2016 (46) Journal of Contemporary Asia 723.

In the preamble of the Indonesian Constitution, the Pancasila principles are mentioned, showing the importance of the principles for achieving the state's aims i.e. to protect the whole nation, to promote social welfare, to elevate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice.²⁵ All of the principles of Pancasila relate to human rights issues, ranging from the right to religion or beliefs/faith, freedom of expression, right to social security, right to be living in an adequate environment, including the right to adequate housing. However, between 1966 and 1998 not all principles were translated into human rights provisions under the Indonesian Constitution.

In 2002, a more complex human rights recognition was included in the second amendment of the Constitution. The second amendment introduced an equal human rights guarantee for all Indonesians. Since then the Indonesian Constitution seemingly grants broader constitutional protections on human rights than any other countries.²⁶ One of the human rights recognised is the right to adequate housing.

Article 28 H para 1 of the Indonesian Constitution²⁷ stipulates that Indonesian citizens are entitled to live in physical and spiritual prosperity, to have a home, to enjoy a good and healthy environment, and have the right to obtain medical care.²⁸ This article does not state a right to housing per se, but nevertheless stipulates '*hak untuk bertempat tinggal*,' the literal translation into English of which means the right to a place to live.

As discussed in Chapter 2, the right to housing should involve more than simple access to four walls and a roof. It includes the right to live somewhere in peace and dignity.²⁹ As such, housing should be adequate,³⁰ in order to encourage the human dignity of the people who reside in it. This statement is supported by David Clapham who advocates that, a house is more than a shelter or a place to live, because it involves social emotions, relations, and behaviour.³¹ A house as a place to live and to establish a sufficient and continuous link between the people and their home to maintain their identities and traditions, regardless the lawfulness of the occupation or ownership is called 'home'.³² Home involves houses as buildings, as properties, and the relation between houses and their inhabitants, as well between inhabitants and their society.³³ Also, a home offers privacy, which falls under civil rights. Home as a place to live, thus, encompasses three types of rights: economic, social and civil rights.

²⁵ Indonesian Constitution (n 14) para. 4.

²⁶ Timothy Lindsey, 'Constitutional Reform in Indonesia: Muddling towards Democracy' in Timothy Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 29; see also Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) chp 13, 244-279.

²⁷ This article stated "*Setiap orang berhak hidup sejahtera lahir dan batin, bertempat tinggal dan mendapatkan lingkungan hidup yang baik dan sehat serta berhak memperoleh pelayanan kesehatan.*"

²⁸ Indonesian Constitution (n 14) art 28 H (1). This article was adopted in the Constitution during the second amendment in 2002.

²⁹ CESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (13 December 1991) UN Doc E/1992/23 (General Comment 4), para 7; see also Report of the Special Rapporteur on the Right to Adequate Housing to the 57th Commission on Human Rights, E/CN.4/2001/51, 25 January 2001, para 8.

³⁰ CESCR, General Comment 4, *ibid*.

³¹ David Clapham, '*The Meaning of Housing: A Pathways Approach* (The Policy Press 2005) 7-35.

³² European Court of Justice, *Winstertein and Others v France*, Application No. 27013/07, Judgement of October 17, 2013, paras 69, 70. See also the previous judgments of the Court in *Buckeley v The United Kingdom*, 1996, paras 52-54, *Prokopovitch v Rusia*, 2004, para 36, also in *Yordanova and Others v Bulgaria*, 2012, para 103.

³³ Lorna Fox, *Conceptualizing Home: Theories, Laws and Policies* (Hart Publishing 2007) 145-146; see also Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29 (4) *Journal of Law and Society* 580-610.

The definition of the concepts of house and home is relevant in the Indonesian context of the right to housing as guaranteed in the Constitution. However, the preparatory works of the People's Consultative Assembly of the Republic of Indonesia (*Majelis Permusyawaratan Rakyat*-MPR), with regard to the Amendment, do not mention the meaning of the 'place to live'.³⁴ Therefore, in order to understand the meaning of the "place to live" either as house or home, it may be necessary to interpret the article by looking at other provisions that correspond to Article 28 H para 1, in particular the protection of family and property in Article 28 G para 1³⁵ and Article 28 H para 4 respectively.³⁶

Article 28 G para 1 recognises the right for protection of oneself, their family, honour and dignity, and property rights, as well as the right to a feeling of security and to a protection from any threats to do or to refrain something that protected by human rights. Furthermore, Article 28 H para 4 provides a stronger protection for the right to property by mentioning that property cannot be arbitrarily expropriated (or forcibly taken over) by someone else. These two articles show that the Constitution protects persons and their belongings, against unjust threats of dispossession.

Similar to Article 28 (H) para 1, the *travaux préparatoires* are silent on reasoning behind these two articles. Indeed, the *travaux préparatoires* of the amendment assert the importance of adding human rights provisions as independent articles in the Constitution, given the fact that human rights as basic human freedoms embody the spirit of the Constitution.³⁷ In adding human rights provisions, the MPR included human rights principles enshrined in the UDHR, ICCPR and ICESCR, and the 1993 Vienna Declaration and Programme of Action.³⁸ The MPR also noted the importance of including welfare rights provision, including the right of adequate welfare and a healthy environment.³⁹ Based on these considerations, one may conclude that the principles used in adopting the human rights provisions of the Constitution are similar to those of the international human rights instruments. This is mirrored in the formulation of economic, social and cultural rights articles and the human rights formulations of the UDHR and ICESCR.

³⁴ Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia (MKRI) - (The Constitutional Court of the Republic of Indonesia), *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan 1999-2002, Buku VII Warga Negara dan Penduduk dan Hak Asasi Manusia*, Edisi Revisi, MKRI, Jakarta, 2010, Chapter IV, pp. 213-364.

³⁵ "Setiap orang berhak atas perlindungan diri pribadi, keluarga, kehormatan, martabat dan harta benda yang di bawah kekuasaannya, serta berhak atas rasa aman dan perlindungan dari ancaman ketakutan untuk berbuat atau tidak berbuat sesuatu yang merupakan hak asasi."

³⁶ "Setiap orang berhak mempunyai hak milik pribadi dan hak milik tersebut tidak boleh diambil secara sewenang-wenang oleh siapapun."

³⁷ Mahkamah Konstitusi Republik Indonesia (MKRI), *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan 1999-2002, Buku VIII tentang Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama* (Sekretariat Jenderal dan Kepaniteraan MKRI, 2010) Chapter IV at 167, 213. The idea to expand human rights protection have been started since the first amendment phase in 1999. See Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun Sidang 1999* (Jakarta: Sekretariat Jenderal MPR-RI, 2008) 22, 24, 142.

³⁸ MKRI *ibid* 169.

³⁹ MKRI *ibid*, see also Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun Sidang 2000 Buku Dua* (Jakarta: Sekretariat Jenderal MPR-RI, 2008) 242-243, 262; Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun Sidang 2000 Buku Lima* (Jakarta: Sekretariat Jenderal MPR-RI, 2008), 320-321.

Thus, the term of the right to a place to live may be regarded as referring to the right to adequate housing enshrined in the international human rights treaties.

Therefore, these three articles show that the right to housing enshrined in the Indonesian Constitution does not merely protect housing as buildings or a place to live, but also housing as a home to establish a relation between people, with or without a family, and the surrounding communities as well as the environment. This link shows the significance of right to housing for inhabitants and how the right to housing influences their lives. Therefore, this important meaning of a house for individuals or family should be carefully considered in establishing housing policies.⁴⁰ In this regard, this thesis prefers to use the terms the right to housing or right to home, which are broader in conceptually, yet still within the scope of ‘the right to a place to live’ as guaranteed in the Constitution.

In addition to the Constitution, Law No. 39/ 1999 on Human Rights also protects the right to housing. Article 40 of the law recognises the right to a place to live and the right to a decent life.⁴¹ Similar to the Constitution, the right to property⁴² and protection from interference of the home/place of residence⁴³ as well as the protection to himself, family and property⁴⁴ are also recognised. The right to a place to live and the right to protection of the property falls under the recognition of welfare rights, while the protection to home, family and residence are protected under the right to security.

Furthermore, Indonesia is, as already observed, party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which recognise the right to adequate housing as part of the right to an adequate standard of living, which also includes adequate food, clothing, and housing (Article 11(2)). In addition, Indonesia is party to several international human rights instruments recognising the right to adequate housing, such as Convention on the Elimination of all Forms of Discriminations against Women (CEDAW), the Convention on the Rights of the Child (CRC). The Indonesian status of the ratification of international human rights treaties recognising the right to housing is presented in Table 4.1. However, this chapter will only analyse Indonesia’s obligations based on the ICESCR, thus, the other international conventions stipulating the right to housing, which have been ratified by Indonesia, will not be discussed in this chapter.

⁴⁰ Fox 2007 (n 33)116-118.

⁴¹ Law 39/1999 (n 15) art 40 “*Setiap orang berhak untuk bertempat tinggal serta berkehidupan yang layak.*”

⁴² *ibid* art 36.

⁴³ *ibid* art 31. The explanatory note of this law mentions that the protection in this article refers to the protection of the right to privacy inside the homes.

⁴⁴ *ibid* art 29 (1).

Table 4.1 The status of major international human rights instruments stipulating the right to adequate housing in Indonesia.⁴⁵

International Instruments (entry into force)	Signature	Ratification	Instrument of ratification at the domestic level
CEDAW (1981)	1980	1984	Law No. 7/1984, SG 29/1984
CRC (1990)	1990	1990	Presidential Decree No. 36/1990, SG 57/1990
ICERD (1969)	NA	1999	Law No. 29/1999, SG 83/1999
ICCPR (1976)	NA	2006	Law No. 12/2005, SG 119/2005
ICESCR (1976)	NA	2006	Law No. 11/2005, SG 118/2005
CRPD (2008)	2007	2011	Law No. 19/2011, SG 107/2011
ICRMW (2003)	2004	2012	Law No. 6/2012, SG 115/2012

As discussed in Chapter 2, the right to housing as well as other ESC rights enshrined in ICESCR are subjected to progressive realisation (Article 2(1)), meaning that states are obliged to adopt measures, including financial or legislative ones, within their territories to realise the right to housing. If a state is unable to adopt such measures, due to financial constraints or limited available resources, it can seek economic and technical assistance from other countries.

Following its commitment to protect the right to housing, in 2011, the government has enacted two regulations related to housing. These legislations are Law No. 1/2011 on Housing and Settlements and Law No. 20/2011 on Tower Blocks. These two laws affirm that the State bears the responsibility to adopt measures in protecting its citizens, especially in the implementation and coordination of the housing and settlement programmes to facilitate all persons in its territory to have adequate and affordable accommodations in healthy, secure, harmonious and sustainable settlements.⁴⁶

The housing legislation stipulates three mandated roles for the Government in organising public housing, i.e. as a (1) regulator, (2) facilitator and (3) as an operator,⁴⁷ including as a monitoring body.⁴⁸ The first role as a regulator obliges the state to enact regulations related to public housing from the national to local levels.⁴⁹ Secondly, the state is also mandated to be facilitator, meaning that the government must facilitate housing availability for the people, particularly for low-incomes groups, and facilitate policies and strategies for housing policies at the national level.⁵⁰ The third function is as operator in which the state is expected to organise and coordinate the implementation of the national policy on housing availability as well as to provide development funds to realise the programme on housing the poor.⁵¹ The monitoring function requires the state to supervise and evaluate the implementation of national housing

⁴⁵ This data was taken from both the UN Treaty System Website <https://treaties.un.org/pages/Content.aspx?path=DB/UNTS/pageIntro_en.xml> and the Database of Indonesian legislation website <<http://peraturan.go.id/>> accessed 5 January 2019.

⁴⁶ Law No. 1/2011 (n 16) Consideration part, para b.

⁴⁷ Pusat Perencanaan Pembangunan Hukum Nasional, Badan Pembinaan Hukum Nasional, *Analisis dan Evaluasi Peraturan Perundang-Undangan tentang Perumahan Rakyat*, Kementerian Hukum dan Hak Asasi Manusia (BPHN 2013) 8.

⁴⁸ Law No. 1/2011 (n 16) art 13 (d).

⁴⁹ *ibid* art 13 paras a & b.

⁵⁰ *ibid* art 13 paras g & h.

⁵¹ *ibid* art 13 e.

strategy.⁵² Such evaluation is beneficial for the research and development of housing strategies and policies in the future.⁵³

Moreover, the Law on Tower Blocks No. 20/2011 emphasises the state's responsibility to fulfil the need of affordable housing, particularly with tower blocks, for people with low incomes. Following the housing laws of 2011, several government regulations (*PP - peraturan pemerintah*) have been adopted to guide the implementation of the law. Such regulations include PP 14/2016 on Organising Housing and Settlements, and PP 83/2015 on State-owned National Housing Development Company (*Perusahaan Umum Pembangunan Perumahan Nasional*).

The national legal frameworks determine that the responsibility for housing policies in Indonesia is not only held by the central government, but also by local governments, both provincial and regencies, due to the decentralisation policy.⁵⁴ Law No. 1/2011 on Housing and Settlements stresses that the responsibility for providing housing and for addressing the housing backlog is the joint responsibility of all parties involved.⁵⁵

4.2.2 The legal framework of the right to adequate housing at the local level

Article 18 of the Indonesian Constitution provides the legal basis for the distribution of power between the central and local governments. The current law that regulates the local governments and their relation to the central government is Law No. 32/2014. Article 9 outlines three types of government affairs that can or cannot be distributed to the regional governments, i.e. absolute affairs, concurrent affairs and general affairs. The explanation on these three affairs is provided in the textbox below:

Textbox 4.1: Government's affairs in Indonesia based on the Law 32/2014 on Local Governments.

The division of government's affairs based on Local Government law:

1. Absolute Affairs:

The absolute affairs (article 10 para 1) cannot be devolved to the locals' autonomy as they fall absolutely under the central government decision. These include fiscal and monetary affairs, foreign policy, security, justice, religious affairs, and national planning and administration. In certain situations, these responsibilities can be delegated to the regional government under the deconcentration principle.

2. Concurrent Affairs (article 11)

The concurrent affairs are the affairs that can be divided between the central, provincial or municipality (*Kabupaten* and *Kota*) government. These affairs are divided into two types i.e. mandatory and optional affairs. The mandatory affairs are categorised into affairs related to the basic services, such as education, health care, and public housing and settlements (article 12 para 1) and those that are not related to basic services, such as workforces, environment and people empowerment. The optional affairs include tourism, farming and many others affairs that basically can be chosen by local governments depending on the needs and condition of their territory (article 12 para 3).

3. General Affairs

The last type, the general affairs are also affairs granted to the central government that in certain exceptions can also be delegated to the local governments. These include the advancement of the unity and integrity of the state, the advancement of harmony and unity among the religions.

⁵² *ibid* art 13 paras d and i.

⁵³ *ibid* art 13 para i.

⁵⁴ Law No. 23/2014 on Local Government (*Undang-Undang No. 23/2014 tentang Pemerintahan Daerah*) SG 244/2014 art 9.

⁵⁵ Law No. 1/2011 (n 16) arts 5 & 131.

Public housing and settlement affairs are categorised as mandatory concurrent affairs, as the affairs relate to basic services. Therefore, such affairs can be delegated to the local governments. In this regard, the three levels of government (central, provincial and municipality) should be involved in deciding regulations and policies on housing and settlements.

On this basis, local governments also have the authority to create their own regulations and policies suitable for their territory, as long as they are in conformity with the national policy. The municipal authorities have more responsibilities, since they function as the closest government to the society. Consequently, they are expected to have a better understanding of the needs of the people living in their region. Surprisingly, although the local authorities' roles have been clearly stated in the national legislation, not all of them are fulfilling their legal obligations. For example, not all local governments have adopted local regulations on housing and settlements as required by the new housing law.⁵⁶ The local government (municipalities) that are being examined in this study, have their own legal frameworks as a basis for their practice to implement the national housing law with regard to the delivery of public housing. The local governments that have not yet adopted local regulations on housing will depend on national regulation. Although national regulations are applicable in all territories, nevertheless, the housing situation may differ from one island to another or from one city to another. Therefore, cities may need specific regulations implementing the new housing laws in their territories.

In addition to the non-existence of housing and settlements regulations, most local governments have not yet adopted vertical housing regulations at the local level.⁵⁷ To date, only 15 of 98 cities⁵⁸ have adopted such regulations.⁵⁹ While land availability is limited, the development of vertical housing raises hope for potentially tackling the housing backlog and for ensuring the security of tenure of the houses.

The previous paragraphs have shown that the legal framework related to the implementation of the right to housing have been established in Indonesia, particularly at national level. The legal framework ranges from the highest norm, Pancasila that highlights and emphasises the idea of equality and social welfare, to the 1945 Constitution and other specific regulations on housing. Hence, it can be said that the national government guarantees and protects the right to housing for its inhabitants in its legislation.

⁵⁶ This statement is based on the desk-research conducted by the author by investigating the provincial regulations database websites. However, it is impossible to check all regulations available in all cities. The reason is that not all cities having their website on regulations or due to a limitation of the websites (either errors or cannot be remotely accessed).

⁵⁷ Ridwan Aji Pitoko, 'Ini Alasan Daerah Belum Memiliki Perda Rusun' (Kompas.com, 26 April 2017) <<http://regional.kompas.com/read/2017/04/26/083316321/ini.alasan.daerah.belum.memiliki.perda.rusun>> accessed 6 June 2017; ----, 'Tak Ada Perda Rusun, Pengembang Kesulitan Bangun Hunian Vertikal (okezone.com, 9 May 2017 <<http://economy.okezone.com/read/2017/05/09/320/1687062/tak-ada-perda-rusun-pengembang-kesulitan-bangun-hunian-vertikal>> accessed 6 June 2017; similar news also posted in perumnas.co.id <<http://www.perumnas.co.id/tak-ada-perda-rusun-pengembang-kesulitan-bangun-hunian-vertikal/>> accessed 6 June 2017.

⁵⁸ The data of the total number of Indonesian cities can be found in the Ministry of Home affairs of Republic of Indonesia, 'Pembentukan Daerah-Daerah Otonom di Indonesia sampai Tahun 2014' <http://otda.kemendagri.go.id/CMS/Images/SubMenu/total_daerah_otonom.pdf> accessed 7 January 2019.

⁵⁹ Ridwan Aji Pitoko, 'Daerah Darurat Perda Rusun' *Kompas* (Jakarta, 15 April 2017) <<http://nasional.kompas.com/read/2017/04/25/193000621/daerah.darurat.perda.rusun>> accessed 6 June 2017.

Although the national frameworks are well established, this is certainly not the case for the local frameworks. Since not all local governments, particularly municipalities, have established local regulations, it is clear that the role of the local governments in framing their regulations can be improved. That being said, each local government will definitely need a specific regulation on housing to better ensure the governance of housing delivery as well as ensure the accountability of the delivery process. In addition, as stipulated in the national legislation, local governments should play a larger role i.e. as regulator, facilitator and operator of the housing delivery for their people.

The following sections will discuss and analyse how Indonesia implements policies with regard to housing which are derived from the Pancasila, the Constitution, Human Rights law, as well as the National Housing law that have been discussed in the previous sections.

4.3 THE DEVELOPMENT OF THE INDONESIAN HOUSING POLICIES

Similar to other developing countries, Indonesia has a long-standing problem with affordable housing. This problem appears to be even worse when combined with a lack of land dedicated towards the settlement of humans. The housing policies and problems in Indonesia will be discussed in the paragraphs below.

If the landscapes of some metropolitan cities in Indonesia are captured by satellites, the view will show irregular structures.⁶⁰ This situation is quite unlike that in developed states such as the Netherlands, where the view will show very regular structures. This condition is caused by improper urban planning and the absence of regulations to control and organise human settlements.⁶¹ Urbanisation is considered one of the reasons for this problematic situation. People migrate to large cities in search of better lives. Most times they fail to achieve this, while at the same time they cannot return to their places of origin. As a result, countless informal or illegal settlements are built in urban areas.

Settlements in Indonesia can be categorised into two types, formal and informal.⁶² The main difference between these categories is the actors who built the housing, e.g. developer, government, or individuals. Formal settlements include organised and individual settlements, while informal settlements include legal and illegal settlements. These differences will be further elaborated upon in the next chapter. For the purpose of this chapter, the types of settlement will be presented in the diagram below:

⁶⁰ Tjuk Kuswantojo, *Perumahan dan Pemukiman di Indonesia: Upaya Membuat Perkembangan Kehidupan yang Berkelanjutan* (ITB University Press 2005) 105.

⁶¹ *ibid* 105.

⁶² *ibid* 108; also in Widyoko (n 9) 7.

Figure 4.1: The types of settlement in Indonesia⁶³

The formal-organised settlements are usually established by the government or by developers appointed by the government. The development of these settlements follows the city planning policies and the rules adopted by the government. Families or individuals can also build houses on their own land; this policy produces formal-individual settlements. Similar to the first subtype, such settlements respect and obey city planning rules as well as the infrastructure provided by the government (usually the local government where the settlement is developed). These are, by definition, legal settlements.

Another type of settlement is the informal-legal, meaning that individuals build their houses on their legally owned land, but do not follow construction and planning regulations. Thus, this type of settlement is generally not equipped with infrastructure or government-provided public services. The last subtype of settlement is informal-illegal, which is usually built on state-owned land such as river banks, unused railway tracks, or under the bridges of highways. As these settlements, often referred to as shanty towns, are not in compliance with construction rules, they lack access to public services, sanitation, and safe drinking water and are also vulnerable to forced eviction. Moreover, they are often regarded as a cause of flooding of cities.⁶⁴

Illegal and informal settlements have become prominent in Indonesian big cities. For example, in 2009, shanty towns covered 20 per cent of 425 km² of settlements⁶⁵ in Jakarta which has in total 662 km² of territory.⁶⁶ These informal settlers live in these settlements

⁶³ Kuswartojo *et al* (n 60) 108.

⁶⁴ R. van Voorst & J. Hellman, 'One Risk Replaces Another: Floods, Evictions and Policies on Jakarta's Riverbanks' (2015) 43 *Asian Journal of Social Science* 786, 794-796.

⁶⁵ This data is provided in the news uploaded in the Ministry of Home Affairs, available online at <<http://www.kemendagri.go.id/news/2009/05/11/20-persen-wilayah-jakarta-permukiman-kumuh>> accessed 20 November 2018; however, the accurate number of the shanty towns cannot be retrieved as it is stated by the Ministry of Public Works and Housing Affair in its publication on '*Penanganan Kawasan Permukiman Kumuh*' (Ministry of Public Works and Housing, 2015) p.9, <ciptakarya.pu.go.id/dok/ebook/konsinyasi/Volume%201.%20Penanganan%20Kawasan%20Permukiman%20Kumuh.pdf> accessed 20 November 2018.

⁶⁶ Badan Pusat Statistik, 'Luas Daerah Administrasi Menurut Kabupaten/Kota Administrasi, 2009-2013' *BPS*

because of the difficulty in accessing affordable housing in big cities and they are in need of housing in the cities to gain a living. Therefore, they have no other choice than living in such places. Considering that Indonesia has ratified the ICESCR as well as adopted housing laws, access to affordable and adequate housing is still a luxury rather than a basic service. Therefore, a question that can be raised is how can the national government, in a collaboration with local governments, fulfil their international and national obligations to provide access to affordable housing for its inhabitants?

The Indonesian government began to develop a comprehensive national housing policy in the 1970s.⁶⁷ This policy was directed at organising the development of settlements. One of their approaches was institutionalisation, which included urging private parties to develop housing. In 1974, the government established the National Housing Public Company, a legal entity/state housing enterprise known in Indonesian as *Perum Perumnas (Perusahaan Umum Pembangunan Perumahan Nasional)*, as well as a bank, *Bank Tabungan Negara (BTN)*, which served to facilitate housing development. *Perum Perumnas* is mandated with fostering the development of low-income housing, including the infrastructure needed for such enhancements. With branches located in almost every region of Indonesia, by 2002 it had succeeded in building 431,233 houses.⁶⁸ These numbers have evidently not been sufficient to accommodate Indonesia's large population. In Indonesia, housing complexes are not only built by *Perum Perumnas*; some private developers have also been involved in providing housing. However, the prices of houses built by private developers increase annually, due to the high demand and lack of available land.

Previous regulations concerning Housing and Settlements, Law No. 4 of 1992, Decree of 23 June 1992 on Balancing Housing Development between the Settlement Concept of 1:3:6 and the Principle of Cross-Subsidies (*Pembangunan perumahan berimbang dengan konsep hunian berimbang 1:3:6 dengan prinsip subsidi silang*) required developers to build houses following a specific formula, i.e. 1:3:6.⁶⁹ This meant that, for every one luxury settlement built, developers also had to build three modest houses and six simple or very simple houses (*RS: Rumah Sederhana, RSS: rumah sangat sederhana*) for people in low-income brackets. With the new law on Housing and Resettlements Area of 2011, the government has changed this concept to use a 1:2:3 formula, meaning that for every luxury settlement built, developers are obliged

<<https://jakarta.bps.go.id/statictable/2015/04/20/58/luas-daerah-administrasi-menurut-kabupaten-kota-administrasi-2009-2013.html>> accessed 20 November 2018.

⁶⁷ Although the housing policy in Indonesia can be traced to the country's Old Order Regime, or the President Soekarno regime, the target of the country's housing policy is different. The Old Order targeted rapid growth of urban areas due to the population explosion and massive migration. The New Order continued the policies enacted by the old regime; however, the enormous flow of migration combined with the limited availability of public housing led to informal settlements mushrooming in urban areas. The housing policy in this era was targeted at improving housing and environmental conditions in urban living (known as *kampung*). This policy was implemented through the National Five-Year Strategic Planning Programme. Later on, the programme not only improved the physical elements of urban settlements, but also their inhabitants' social and economic development. The decentralisation period also helped improve housing matters. Previously, housing was only the responsibility of the central government; after decentralisation, housing affairs were delegated to local governments. Detailed information regarding the development of housing policy in Indonesia can be found in D. Tunas & L. T. Darmoyono, 'Self-Help Housing in Indonesia', in Bredenoord, van Lindert & Smets (eds), *Affordable Housing in the Urban Global South: Seeking Sustainable Solutions* (Routledge Taylor and Francis Group 2014) 166–180.

⁶⁸ Kuswartojo *et al* (n 60) 110.

⁶⁹ This decree was passed by three ministries: the Ministry of Internal Affairs, the Ministry of Public Works, and the Ministry of Public Housing, respectively.

to build two modest houses and three simple or very simple houses.⁷⁰ These houses can be built on different plots of land, but should be developed in the same municipality. This change would increase the development of luxury and modest houses and reduce the development of simple houses. Thus, it logically will impact the availability of land for the development of simple houses. This change of concept seems contradictory with the spirit of the housing laws, as the development of luxury houses will only be more beneficial for housing developers. However, at the same time, the housing laws show the intention of the government to facilitate simple houses for low-income groups.

In 2007, the government launched the National Programme for 1,000 Block Towers to increase housing in metropolitan cities, taking the form of low-cost rental tower blocks (*Rusunawa*) and high-rise, owned low-cost apartments (*Rusunami*).⁷¹ For developers willing to build such housing, the central government helped facilitate such builds, including tax incentives, ease of permits, and infrastructural support to reduce development costs. These facilities thus reduced the rental cost or market price of the flats. Local governments provided the land for the construction of these flats. These 1,000 block towers were expected to be built throughout Indonesia.⁷² However, some private developers took advantage of the facilities and subsidies provided by the state to instead build apartments for middle- and high-income groups. Ultimately, only a few apartment buildings for poor households were built; the rest were luxury apartments.⁷³ Although the government tried to focus on providing housing, it did not control demand; therefore, the upper-middle class occupied these types of apartments rather than low-income groups.⁷⁴ The programme ceased in 2010 due to a lack of budget; however, the government did not cease its efforts to house the poor.

The central government has tended to emphasise that local governments hold the primary responsibility for providing housing to the poor. The government also provides facilities such as subsidies and an easier land-use development permit process for developers who commit to building houses for low-income groups.⁷⁵ These developers can then market the houses at a lower price. However, in a few smaller cities, such as Bogor, the demand for such housing has been low due to their locations, which are far from economic centres and with a lack of infrastructure to connect subsidised housing to public transportation. Apparently, this problem also occurred in big cities. For example, at the end of 2010, Jakarta had 5,600 rental units available, but 3,000 units remained empty, despite their low costs – roughly 120 to 350

⁷⁰ Regulation of the Ministry of Public Housing No. 10/2012 on Balanced Settlement (*Peraturan Menteri Perumahan Rakyat No. 10/2012 tentang Penyelenggaraan Perumahan dan Kawasan Permukiman dengan Hunian Berimbang*), see also Regulation of the Ministry of Public Housing No. 7/2013 on the Revision of Regulation of the Ministry of Public Housing No. 10/2012 on Balanced Settlement (*Peraturan Menteri Perumahan Rakyat No. 7/2013 tentang Perubahan Peraturan Menteri Perumahan Rakyat No. 10/2012 tentang Penyelenggaraan Perumahan dan Kawasan Permukiman dengan Hunian Berimbang*).

⁷¹ A. Kusno, *Politik Ekonomi Perumahan Rakyat Utopia Jakarta*, (Ombak 2012) xx–xxi.

⁷² The Permanent Mission of the Republic of Indonesia to the United Nations, ‘Indonesian Reply to the Special Rapporteur’s Questionnaire on Housing Finance’ No. 113/POL2/V/2012, p 5, <<https://www.ohchr.org/Documents/Issues/Housing/Housingfinancing/Indonesia.pdf>> accessed 8 January 2019.

⁷³ A. Kusno, ‘Housing the Margin: Perumahan Rakyat and the Future Urban Form of Jakarta’ 2012 (94) *Indonesia* 23, 47–48.

⁷⁴ *ibid* p 48.

⁷⁵ For example, in 2005, ‘the government provided around IDR 600 billion to build 225,000 simple houses’ (bisnisindonesia.com, March 2005).

thousand rupiah (twelve to thirty-five dollars) per month.⁷⁶ Although such rental prices are not high, living in block towers changes a residents' way of life and creates greater financial burdens for them. For example, residents must spend more money on transportation as their workplaces are far from the block towers. Moreover, an additional need of increased spending on clean water can be a barrier for rental.

Another problem is the bureaucratic barrier in accessing such accommodation. Prospective tenants must meet the following requirements:⁷⁷ be a victim of eviction, either as an illegal squatter or development-based eviction or be a victim of disaster. Prospective tenants who do not meet these requirements can still apply if they have low wages. Furthermore, all inhabitants wishing to live in these facilities must provide identification that shows that they legally reside in a particular city.⁷⁸ Most of the people affected by eviction are migrants from other cities; as the majority of the migrants do not possess the requisite identification, they cannot access the *Rusunawa*. In cases of eviction, inhabitants without an identity card are left without any solution except for returning to their hometowns or staying in the city without any alternative accommodation. As a result, they tend to seek other locations to build informal houses.

For the low-income groups, the government also provides some funds to assist them in accessing housing through mortgages (*Fasilitas Likuiditas Pembiayaan Perumahan - FLPP*).⁷⁹ The budget for this programme stems from the national budget and is distributed through banks. However, would-be tenants found that the requirements for receiving a housing mortgage were very troublesome.⁸⁰ As such, they preferred to build informal houses rather than taking on a mortgage.

As a result of previous described initiatives' successes and failures, by 2015, the housing availability backlog had reached 15 million households. This backlog is predicted to increase in the future, as housing needs are predicted to grow by up to 2.6 million per year, while the housing developed in Indonesia provides only 300,000–400,000 new houses every year. This fact has made the government's task, in providing affordable housing for its inhabitants, increasingly challenging.

In response to the increasing housing backlog, in 2015, the government adopted the 'construction of one million houses' (*Pembangunan Satu Juta Rumah*) programme. Under this programme, the government is supposed to provide assistance with housing access for low-income groups and to strengthen housing regulations.

⁷⁶ Kusno (n 73) 48.

⁷⁷ See, for example, Jakarta: Governor Regulation No. 111/2014 on The Occupancy Mechanism of Rented Modest Multi-Storey Housing (*Peraturan Gubernur DKI Jakarta No. 111/2014 tentang Mekanisme Penghunian Rumah Susun Sederhana Sewa*) arts 2 and 3.

⁷⁸ *ibid* art 4. Similar provisions also can be found in other cities' regulations, such as Yogyakarta and Surakarta, both of which limit their *Rusunawa* to their residents.

⁷⁹ The FLPP was adopted in 2010 and will remain in effect until the housing backlog can be reduced. The central government, which possesses the necessary financial capital, will establish cooperation with banks and developers. These latter parties will decide to whom this assistance will be given. In addition to the FLPP, the government provides housing assistance by helping subsidise mortgage interest. Flat interest rates, within mortgage terms, and down payment assistance are expected to attract residents to buy houses on the private market.

⁸⁰ One requirement to receive a mortgage is that would-be mortgagors have a written statement from their employers stating the salary received every month. This latter functions to guarantee that the mortgagors will be able to pay the monthly payments. Since seventy-five percent of low-income groups work in the informal sector and do not have fixed salaries, this requirement creates a barrier and limits their access to mortgages.

This new national policy aims to facilitate the housing needs of low- and middle-income groups, both in regard to simple terraced houses and flats with an ownership tenure.⁸¹ The new KPR FLPP (*Kredit Pemilikan Rumah Fasilitas Likuiditas Pembiayaan Perumahan*) was launched in 2016. Around 600,000 houses will be financed from the national budget scheme in the form of subsidised mortgages.⁸² This new KPR FLPP introduced a lower interest rate than general mortgages in the private market (the subsidy on interest rate programme).⁸³ In addition, the government also provide one percent in down payment subsidies (the down payment subsidy programme). Furthermore, this new policy will not only develop new houses with ownership rights, but it will also provide rental tower blocks. This multi-storey housing was built in a collaboration between local and national governments. Thus, households that do not have houses, or cannot afford to buy a house, can temporarily live in rental houses provided by the government.

4.4 THE CURRENT NATIONAL POLICIES RELATING TO THE IMPLEMENTATION OF THE RIGHT TO ADEQUATE HOUSING

The commitment to realise the right to adequate housing and to address discrimination in access to housing has been restated by the government in the National Long-Term Development Plan 2005–2025 (*RPJPN*)⁸⁴ and the National Medium-Term Development Plan (*RPJMN*).⁸⁵ This long-term plan serves as a continuation and renewal of earlier phases of the state's development planning. The RPJPN endeavours to achieve the development goals mandated in the Preamble to the Constitution of 1945. The targets of the current RPJPN involve restructuring institutions, while simultaneously trying to keep the nation in pace with other countries.

The medium-term plans are established every 5 years. Currently, Indonesia is in the third phase of the *RPJPN* 2005-2025, i.e. *RPJMN* for the period 2015-2019.⁸⁶ Moreover, *RPJMN*s are translated into concrete targets for development annually, called the Annual National Development Plan (*Rencana Kerja Pemerintah – RKP*). In relation to housing issues, under the RPJN 2005-2025, the government emphasised its commitment in tackling the access

⁸¹ Interview with Directorate General of Housing Finance, Ministry of Public Works and Public Housing, Jakarta 14 September 2016.

⁸² Tim Kiprah, 'Sejuta Rumah untuk Rakyat' *Majalah Kiprah*, Vol. 67, Year XV, April–May 2015, 12–15.

⁸³ When the first FLPP was launched, the government introduced an interest rate at around 8.5 per cent. In 2012, the interest was reduced at 7.2 per cent and in 2016, the interest rates was at 5 per cent.

⁸⁴ Law No. 17 /2007 on the National Long-Term Development Plan 2005-2025 (*Undang-Undang No. 17/2007 tentang Rencana Pembangunan Jangka Panjang Nasional 2005-2025*) SG 33/2007. It affirms that there is a need to develop housing due to the rapid increase of population and in 2020, the housing need will reach more than 30 million units in order to house people who do not stay in or have a decent housing (see under D. Sarana dan Prasarana, para 5). Further, it states some challenges which should be tackled e.g. fulfilling the housing need of the citizens and eliminating slums in urban area, by tax reform, requesting private developers to be involved in providing housing etc.

⁸⁵ The "*Rencana Pembangunan Jangka Menengah*" is also stipulated in the Law No. 17/2007, and currently Indonesia commences the third RPJM until the end of 2019.

⁸⁶ Presidential Regulation No. 2/2015 on National Medium-Term Development Plan 20015-2019 (*Peraturan Presiden No. 2/2015 tentang Rencana Pembangunan Jangka Menengah Nasional Tahun 2015-2019*) 8 January 2015.

to housing for the low-income households. Furthermore, the government's commitment to housing the poor is translated into the medium plan in its focus on increasing the level of welfare of the citizen as well as to enhance the availability of infrastructure which encourages the establishment of cities without slums.⁸⁷

In addition to the development plan, the government adopted a National Action Plan of Human Rights (*Rencana Aksi Nasional Hak Asasi Manusia –RANHAM*) every five years. The current RANHAM 2015-2019 was adopted through the Presidential Regulation No. 73/2015. Similar to the RPJN, the RANHAM is a continuation of the previous action plans on human rights. Hence, the RANHAM provides information on the government targets, in the field of human rights guaranteed by the national laws, including the Constitution and the human rights law.

However, the current RANHAM makes no attempt to address the problems of housing that currently is experiencing a massive drawback. Houses become unaffordable, particularly for the people living in urban areas, therefore they cannot live in adequate houses. The only field of the RANHAM that can be indirectly related to the right to housing are the welfare rights. The RANHAM recognises the lack of infrastructures and superstructures, for vulnerable groups to enjoy an adequate standard of living, and, therefore, the RANHAM's aims to adopt measures to improve facilities that will enable people enjoying an adequate standard of living.⁸⁸ Furthermore, it aims to eradicate poverty by improving workplaces and their access and social security for the vulnerable groups.⁸⁹ Hence, RANHAM makes no direct reference to improve the implementation of the right to housing as such, which can be interpreted as a signal that right to housing is currently not a priority in the national action plan on human rights.

Other documents related to housing have also been adopted by the ministry dealing with public housing,⁹⁰ such as Decision No. 54/PRT/1991⁹¹ on the Guidelines for the Development of Low-income Housing and Decision No. 403/KPTS/M/2002 on the Regulation of Low-income Healthy Housing.⁹² The Ministry of Public Housing also enacts a strategic housing plan every five years.⁹³ The most recent ministerial regulation adopted in September 2015 is regulation No. 42/PRT/M/2015 on Down Payment Aid for the Low-income Households to Increase the Accessibility to Subsidised Housing.⁹⁴ In 2016, the Ministry of Works and Public Housing adopted a regulation that launched a subsidy programme to assist the low income groups to own a house.⁹⁵ This regulation aims to augment the number of poor people that have access to a home. Superficially, it provides hope that housing in Indonesia

⁸⁷ See details in Law No. 17/2007 (n 84) Annex IV.2.3 RPJM ke-3 (2015 – 2019), 80-82.

⁸⁸ Presidential Regulation No. 2/2015 (n 86) Annex pp 21-23.

⁸⁹ *ibid* p 22.

⁹⁰ The name of the ministry was changing depending on the cabinet arranged by the President, however most of the time, the public housing sector is under the coordination of Ministry of Public Work.

⁹¹ Keputusan Menteri Pekerjaan Umum Nomor 54/PRT/1991 tentang Pedoman Teknis Pembangunan Perumahan Sangat Sederhana.

⁹² Keputusan Menteri Pemukiman dan Prasarana Wilayah No. 403/KPTS/M/2002 tentang Pedoman Teknis Rumah Sederhana Sehat.

⁹³ Peraturan Menteri Negara Perumahan Rakyat No. 13 Tahun 2011 tentang Rencana Strategis Kementerian Perumahan Rakyat Tahun 2010-2014.

⁹⁴ Peraturan Menteri Pekerjaan Umum dan Perumahan Rakyat No. 42/PRT/M/2015 tentang Bantuan Uang Muka Bagi Masyarakat Berpenghasilan Rendah untuk meningkatkan aksesibilitas MBR atas Rumah bersubsidi.

⁹⁵ Peraturan Menteri Pekerjaan Umum dan Perumahan Rakyat No 21/PRT/M/2016 jo No 26/PRT/M/2016 tentang Kemudahan dan/atau Bantuan Perolehan Perumahan bagi Masyarakat Berpenghasilan Rendah.

will be more accessible for the poor; however, due to the new nature of this regulation, its effectiveness in guaranteeing access cannot be appraised yet. By adopting these rules, the government has shown its intention to provide assistance for its marginalised peoples.

In 2015, the government adopted a programme called “One Million Houses”, which intended to provide one million houses per year in order to address the 15 million house backlog. Assuming that the price of a house with a size of 36 m² is 120 million IDR,⁹⁶ the budget needed for this programme is around at least 120 trillion Rupiah per year. In five years, the budget needed will be around 600 trillion Rupiah. The government predicted that the government could provide a potential 86.5 trillion rupiah per year for financing the programme,⁹⁷ which is still far from the estimated budget. These funds are derived from the state budget, foreign loans, and state enterprises, such as the BTN.

The state budget of the Ministry to support the low-cost housing programme in the third medium-term development plan (for 2015–2019) is 33.09 trillion Indonesian rupiah.⁹⁸ As for 2015, 7.7 trillion was allocated for the low cost housing programme and in 2019, 7.8 trillion is available for housing development.⁹⁹ Compared to the budget required for the One Million Houses Programme, a total of 120 trillion rupiah per annum, the budget for the low-cost housing programme is still much less than the budget needed. Although the budget of the Ministry has been raised in the last four years by around 427 percent,¹⁰⁰ the budget for housing development still relatively low compared to the budget dedicated for other infrastructure. Therefore, to realise its low-cost housing programme, the government must seek other financial sources.

In addition, if the cost of low-cost houses reaches 120 million rupiah, these so-called “affordable houses” will be still unaffordable for persons with variable incomes. Although the government provides down payment assistance for mortgages, the remainder of the housing price still becomes the tenants’ responsibility, which is still a burden for those with an irregular income.

Based on the discussion in the previous paragraphs, it can be concluded that Indonesia has recognised and guaranteed the right to housing in its domestic legislation. However, the effectiveness of these regulations remains doubtful, especially since many shortcomings in the implementation of the human right to housing have been identified. The fact that many people still live under bridges, on river banks, and in slum areas, denotes that the authorities must increase their efforts. The state’s obligations do not stop at only enacting regulations, but also include embracing measures to fully implement, as well as supervise, the implementation of the

⁹⁶ This price is stemming from a prediction of the price of an average house. For the purpose of providing scale, 1 US \$ is equivalent to 14,000 IDR.

⁹⁷ Tim Kiprah (n 82).

⁹⁸ H. Febrianto, ‘Anggaran Pembangunan Rumah Rakyat Miskin Rp33 Triliun’ *Koran Sindo* (Jakarta, 16 April 2015) <<http://ekbis.sindonews.com/read/990215/34/anggaran-pembangunan-rumah-rakyat-miskin-rp33-triliun-1429178802>> accessed 20 September 2015.

⁹⁹ —, ‘Anggaran Infrastruktur di Kementerian PUPR Tahun 2019 Sebesar Rp 110.7 Triliun’ *Kementerian PUPERA Website* <<https://www.pu.go.id/berita/view/16312/anggaran-infrastruktur-di-kementerian-pupr-tahun-2019-sebesar-rp-110-7-triliun>> accessed 27 May 2019.

¹⁰⁰ Pusat Data dan Tehnologi Informasi (PUSDATIN), ‘Buku Informasi Statistik 2017’ (Kementerian Pekerjaan Umum dan Perumahan Rakyat 2017) 23 <<https://eppid.pu.go.id/assets/vendors/ckfinder/userfiles/files/01.Buku%20Statistik%20PUPR/BIS%202017.pdf>> accessed 15 January 2019; see also ‘Anggaran Perumahan Rakyat Naik Hingga 427 Persen’ (The Ministry of Finance) <<http://www.anggaran.depkeu.go.id/dja/edef-konten-view.asp?id=739>> accessed 20 September 2015.

right. For example, the need to monitor the distribution of both rental public houses, and the low-cost apartments with ownership status. In some cases, these houses were bought by the middle or higher incomes groups as investments.¹⁰¹ There are also some cases of the affected communities who received an alternative accommodation in rented public housing but did not stay in the houses. These people lease the units to migrants for a higher price while they return to the slums.¹⁰² These two cases illustrate the need of strict monitoring to guide to ensure that the low cost housing program can achieve the targeted population and can facilitate the realisation of the right to housing in Indonesia.

Having discussed and analysed the current national housing policies, the role of various actors involved in policymaking and their implementation will be addressed. The next section will provide a brief description of each party involving in housing delivery and discuss the possible improvement of each party's role in respecting, protecting and fulfilling the right to housing of the Indonesian people.

4.5 THE ACTORS INVOLVED IN THE REALISATION OF THE RIGHT TO ADEQUATE HOUSING IN INDONESIA

The regulation on housing and settlements in Indonesia is enshrined in the Housing and Settlements Law No. 1/2011. It lays down the State's responsibility in protecting all citizens, by managing housing and settlements, so that all members of society are able to stay in a decent house in a healthy, secure, harmonious and sustainable settlement.¹⁰³ Furthermore, the law also regulates the roles of governance at any level, from central, provincial and district governments.

All these levels of local governments have a different role, depending on the level at which they are operating, such as provincial government or municipalities. The central government will lay down the general policy on housing and settlement and provide national funding, such as funding the construction of public housing located in municipalities.¹⁰⁴ The provincial governments have to provide guidance for the implementation of national policies at the municipal level, who will then execute the policy.¹⁰⁵ The local governments also have the

¹⁰¹ Dimas Jarot Bayu, 'Terbukti, Rusunami Kalibata City Bukan untuk Orang Miskin!' (*Kompas.com*, 23 January 2015)

<<https://properti.kompas.com/read/2015/01/23/203531921/Terbukti.Rusunami.Kalibata.City.Bukan.untuk.Orang.Miskin.>> accessed 15 January 2019; ____ 'Tak Mau Kasus Kalibata City Terulang, Ahok Teken MoU Rusunami dengan Perumnas' (*Detik news.com*, 28 April 2015) <<https://news.detik.com/berita/2900143/tak-mau-kasus-kalibata-city-terulang-ahok-teken-mou-rusunami-dengan-perumnas>> accessed 15 January 2019.

¹⁰² ____ 'Pemkot Depok 50 Orang Penyewa Rusun' (*Jawa Pos.com*, 5 February 2018)

<<https://radarsurabaya.jawapos.com/read/2018/02/05/46309/pemkot-depak-50-orang-penyewa-rusun>> accessed 15 January 2019; see also Tiara Sutari, 'Pengelola Rusun Jatinegara Usir Oknum Sewakan ke Pihak Ketiga' (*CNN Indonesia*, 5 September 2017) <<https://www.cnnindonesia.com/nasional/20170905223908-20-239705/pengelola-rusun-jatinegara-usir-oknum-sewakan-ke-pihak-ketiga>> accessed 15 January 2019; see also 'Disewakan ke Pihak Lain, 43 Unit Rusun Cakung Barat Disegel' (*Wartakota.live*, 20 February 2014). <<http://wartakota.tribunnews.com/2014/02/20/disewakan-ke-pihak-lain-43-unit-rusun-cakung-barat-disegel>> accesses 15 January 2019.

¹⁰³ Law No. 1/2011 (n 16) Consideration, para b.

¹⁰⁴ *ibid* arts13 & 16.

¹⁰⁵ This is also in line with the law on local governments mentioning that the national authority will decide the norms, standards, procedures, and criteria in implementing the concurrent affair and the local governments should follow the guidelines provided by the national government, see Law No. 23/2014 (n 54) art 16.

authority to create their own policies suitable for their territories, as long as these are in line with national policies. The municipal authorities have more responsibilities, as they are the authorities closest to the society. Consequently, they are supposed to comprehend the needs of the people living in their region. In addition, the local governments are allowed to raise their own funding in order to provide housing for its inhabitants, for example, for third parties, such as private companies or developers. However, not many local governments undertake this. In fact, of all of the municipalities studied in this research, only Jakarta used private funding to build public housing, improve housing condition as well as build public spaces such as parks or playgrounds.¹⁰⁶

In addition to governments both at the national and local level, several private actors also are involved in delivering housing to the people. The regulations urge the governments to play a stronger role in providing housing. Such role can be interpreted to mean that the regulations encourage local government to cooperate with other actors, particularly to contribute to tackling the housing backlog problem.

Based on the national regulations and the government's practices in implementing housing policies, it is clear that there are two types of actors which are involved in the Indonesian housing policies and the implementation, *i.e.* public and private. Both of these actors will be discussed below. Although the role of private actors will be briefly discussed here and maybe also be found in other chapters, such as Chapter 6, the main focus of this study is on the role of public authorities in realising the right to adequate housing.

4.5.1 The role of public authorities in providing access to housing

As a result of the decentralisation principle, public authorities dealing with housing delivery are located both at national and local levels. As stipulated in Article 15 of Law 23/2014 and its annex,¹⁰⁷ the central government will handle the programme to provide houses for the low income groups, develop the financial support system to enable access to housing for the poor, provide and rehabilitate houses for the victims of national disasters, and enable public facilities for the people affected by national policies.¹⁰⁸ Meanwhile, local governments are responsible for providing and rehabilitating houses at the provincial-level and district-level for victims of disaster and providing public facilities for the people affected by local policies.¹⁰⁹ The district governments are also in charge of issuing the permits for houses' or buildings' construction.¹¹⁰

Furthermore, the Housing and Settlements Law No. 1/2011 lays down the responsibilities of the local authorities at the provincial and district levels. The three roles, *i.e.* as a regulator, facilitator, and an operator mandated by the housing law, are also applicable to local governments. The main difference in the roles between the national and local governments is at the level of operation.

¹⁰⁶ Data gathered from the Department of Housing and Buildings Development of Jakarta.

¹⁰⁷ Law No. 23/2014 (n 54) Annex on the Distribution of Concurrent Affairs between the Central Governments, Provincial Regions and Municipalities.

¹⁰⁸ *ibid* paras C (6) and D (1, 2, and 3).

¹⁰⁹ Law 23/2014 (n 54) paras D (1, 2, and 3).

¹¹⁰ *ibid*.

At the national level, the responsibility of the housing delivery falls under the responsibility of the Ministry of Public Works and Public Housing as well as other related ministries such as the Ministry of Agrarian Affairs and Spatial Planning and the Ministry of Social Works and the Ministry of Finance. However, only the former ministry will design the housing and settlements policy, particularly in regard to the poor.

In the Ministry of Public Works and Public Housing, two directorate generals are established dedicated to housing affairs, *i.e.* Directorate General on Housing Provision and Directorate General on Housing Finance. The first directorate is responsible for policy making in the field of housing provision and as an executor in facilitating housing provision,¹¹¹ such as vertical housing, general housing and particular housing.¹¹² Under its administration, the Directorate is also in charge to adopt guidance in norms, standards and procedures in developing all types of houses.¹¹³ Similar to the housing provision department, the second directorate is assigned to design the policy and implementation of the housing finance programme. Furthermore, it has a responsibility to facilitate housing finance programmes for low income brackets. These two directorates work together with the public works departments, particularly in establishing multi storey housing for the poor.

As already mentioned, the central government cannot stand alone in delivering housing service; it has to cooperate with local governments. The Law of 2011 also emphasises that local authorities need to play a more active role in providing and enabling access to housing as well as providing assistance for people based on registered residents within the regions and the principle of self-help.¹¹⁴ There are several obligations mandated to local governments in enabling access to housing for the lower income groups. Such obligations include adopting housing subsidy, providing incentives: for self-help houses, tax incentives, incentives on building permits, ensuring availability of land, certificate of land ownership, and public facilities.¹¹⁵

To fulfil these mandates, local authorities must conduct so-called ‘need assessments’ in their territories in order to design programmes suitable for their inhabitants. For example, for

¹¹¹ Websites of Ministry of Public Works and Public Housing <<http://pu.go.id/organisasi/ditjen-penyediaan-perumahan>> accessed 20 November 2018.

¹¹² The law on housing divides housing based on actors who built and people who will stay in such houses. Further, it differentiates the type of housing into: commercial houses, self-help houses, general houses, particular houses and government houses. Commercial houses are built for receiving benefit. Self-help houses are those which are built by people based on their resources. General houses are houses that are directed and targeted for the low income groups. While particular houses are developed for specific needs, such as resettlement for victims of disasters, elderly housing and national migration resettlement programme, government houses are built for fulfilling the need of settlement for government’s employees. See for details in Law No.1/2011 (n 16) arts 1 (paras 8-12) & 21.

Article 1 (1) of Law No. 20/2011 mentions vertical (multi-storey) houses (flats) are multilevel buildings which are constructed in an environment and divided into functionally structured sections, both horizontally and vertically. Although each flat can be owned and used separately, especially for private house, the whole building are equipped with shared parts, common objects and plot of land. The law also divides flats as commercial and public. The tenure of flats can be in the form with ownership titles or lease/rental titles.

¹¹³ Ministry of Public Works and Public Housing (n 111).

¹¹⁴ The principle of self-help (*gotong royong*) is acknowledged in every area of Indonesia that influenced by Javanese culture meaning that all members of societies have duties to participate or to take a part in every activity. For example if a house were to be built, all adults members should involve in construction and the women will provide food. See in Audrey Kahin, *Historical Dictionary of Indonesia* (Third Edition, Rowman and Littlefield 2015) 174.

¹¹⁵ Law No. 1/2011 (n 16) art 54.

the building process of a low-income housing, local governments need to provide for the minimal 3000 square meters of land on which a multi-storey public housing will be built. One multi-storey housing can hold hundreds of small and simple housing units. In this regard, local authorities should also keep a land register in their areas. The data on land registration can be obtained in the National Land Agency located in each municipality. However due to an incomplete land registration process in Indonesia, the data on land may be incomplete and create further problems in providing land for low cost housing.¹¹⁶ This challenge will be further discussed in Chapter 6, where the crucial role of land availability for settlements is considered.

In smaller municipalities, such as Yogyakarta, it is challenging to provide the land plots required by the regulation. In addition, a vast majority of land plots are possessed by private individuals or are under private companies' control. Once the local governments acquire the required land, local governments can request assistance from the central government to build multi-storey housing. Most local governments still rely on funding and other assistance from the national government in providing public housing due to their budgetary limitations. Since the national government also experiences financial restraints in enabling access to housing, such reliance will influence the condition of housing supply at the local level if local authorities only depend on the central government's fund.

In addition to development of public housing, local authorities established housing improvement programmes, as well as settlement relocation. While the latter is only applicable in certain cities, the former category of programmes can be found in almost every region, as it is also supported by the central government through the Ministry of Social Work's programs. Since local programmes related to housing heavily depend on the resources possessed by local authorities, such policies vary from one city to another. The cities' programmes related to access to adequate housing will be discussed in Chapter 5 which explores local regulations and policies in four of Indonesia's local governments.

This section on the public authorities clarified the vital roles of the different levels of governance in adopting policies related to housing. Not only must the central government be involved in adopting national policies and regulations, but the local governments' roles are vital in the implementation of national policies. However, due to several limitations, a large number of local governments are not yet able to adopt their own local regulations on housing. In this regard, national regulations will apply for housing situations in such municipalities. Although local governments have a similar role to the national governments, local authorities must function in a more active role when enabling policies at the local level. Instead of the reliance on national assistance, local governments also need to explore alternatives to fund local housing programmes.

The following paragraphs will discuss the possibilities of private parties' involvement in providing, or facilitating access, to housing. Several actors will be presented to explore the interplay between public and private parties in the field of housing.

¹¹⁶ Adriaan Bedner, 'Indonesian Land Law: Integration at Last? And for Whom?' in John F McCarthy and Kathryn Robinson (eds), *Land and Development in Indonesia: Searching for the People's Sovereignty* (ISEAS-Yusuf Ishak Institute 2016).

4.5.2 The actors involved in providing housing in Indonesia

Although the governments, both national and local, are responsible for housing and settlement affairs, they cannot act alone when providing housing for all people; private parties also play a crucial role. Along with the governments, several other actors are also involved in housing delivery, i.e. state enterprises, and private parties. The state enterprises involved in housing delivery services are *Perum Perumnas* and *Bank Tabungan Negara (BTN)*. Private parties include private developers, banks and other financial institutions, and individuals. The role of each party will be briefly discussed in the following paragraphs.

a. Perum Perumnas

In 1974, the government established the National Housing Company, a legal entity/state housing enterprise known in Indonesian as *Perum Perumnas (Perusahaan Umum Perumahan Nasional)* to facilitate the development of housing, settlements as well as vertical housing. *Perum Perumnas* is mandated with fostering the development of low-income housing, including the infrastructure needed for such enhancements. With branches located in almost every region of Indonesia, by 2002 it had succeeded in building 431,233 houses.¹¹⁷ These numbers, however, have evidently not been sufficient due owing to Indonesia's large population and high degree of urbanisation.

In 2015, the government enacted new regulations to support the legal basis of *Perum Perumnas*' works. These regulations are Government Regulation (PP) No. 83/2015 and PP No. 90/2015. As a legal entity, *Perum Perumnas* also has a right to land in which it can buy or manage plots of land to be dedicated towards the development of settlements.¹¹⁸ The funds needed to enable its work derives from both national and local budgets, depending on which level of governance requests the development of settlements.¹¹⁹ PP No. 90/2015 provides an additional capital of one trillion (IDR) to assist *Perum Perumnas* in realising its tasks. As a part of the executor in the One Million Houses Programme, in 2017 the company targeted to build 33,500 houses in several cities in Indonesia.¹²⁰

b. Bank Tabungan Negara (BTN)

Another state enterprise involved in providing access to housing is *Bank Tabungan Negara (BTN)* - The National Mortgage Bank. The BTN was appointed as the first bank to provide mortgages for middle- and low-income groups. From 1976 until 2014, as a mortgage provider it has succeeded in financing 3,371,958 houses, consisting of 2,562,043 (76%) subsidised housing units and of 809,915 (24%) non-subsidised housing units.¹²¹

¹¹⁷ Kuswantojo et al (n 60) 110.

¹¹⁸ Government Regulation No. 83/2015 on Government Added Capital for the Perum Perumnas, Article 9. These rights are limited only for the construction right, usage right and long-lease right.

¹¹⁹ *ibid* art 8.

¹²⁰ Websites perumnas.co.id <www.perumnas.co.id/perum-perumnas-tetap-bangun-rumah-murah/> accessed 20 November 2018.

¹²¹ ____ 'BTN Siap Dukung Perumahan Nasional' (Pikiran Rakyat, 14 December 2014) <<http://www.pikiran-rakyat.com/ekonomi/2014/12/10/307921/btn-siap-dukung-perumahan-nasional>> accessed 6 June 2017.

However, 59% of Indonesians work in informal sectors¹²² and are, as “non-bankable” groups, experiencing difficulties in accessing the financial housing market system since they do not have sufficient income or regular income to access credit provided by banks. In 2014, the government requested BTN to provide more mortgages for the non-bankable groups so that they can access the housing provided by the government or the private market.¹²³ In 2016, the bank started to provide mortgages for the informal workers.¹²⁴

c. Private developers

Private developers have also been involved in providing housing for the people. In urban areas, most new houses were built by contractors. As the majority of the supply of land for housing in urban areas is held by the private developers, land for commercial uses likely cannot enter the market at an affordable price.¹²⁵ The prices of housing built by private developers increases annually, following the high demand and lack of available land. Moreover, affordable housing for the majority of households are not as profitable as high income housing, therefore only a few developers concentrate on the development of affordable houses.

The private developers’ large role in the housing policy cannot be separated from the history of Indonesia. In the era of President Suharto, the government did not pay much attention to adopting a national public housing policy, but rather focused on private or informal sectors and largely ignored direct public participation in the decision making processes.¹²⁶ As most private developers only built housing for the middle and high income cliques, the low income groups had no option than to build their own house incrementally and informally.¹²⁷

Currently, members of the private developers’ organisation, the Association of Indonesian Real Estate Developers (REI), also receive subsidies from the governments to build houses for low income groups. Upon receiving subsidies and facilities, the private developers should build the settlements based on the 1:2:3 formula. This formula means that for every luxury settlement is built, the developers should also build two modest houses and three simple or very simple houses (*RS: Rumah sederhana, RSS: rumah sangat sederhana*) for people in low-income brackets.¹²⁸ However, the REI-built houses are intended for higher prices than the PERUMNAS-built houses and mostly target middle- and high-income brackets. There is still

¹²² National Survey on Workforce in 2014 held by the National Statistical Agency in *Survei Angkatan Kerja Nasional* (Badan Pusat Statistik 2014).

¹²³ ____, ‘Bank BTN Diberi Peran Sentral Dalam Program Rumah Nasional’ (Bank Tabungan Negara Website, 15 December 2014) <<http://www.btn.co.id/content/BTN-Info/Info/Berita-BTN/Bank-BTN-Diberi-Peran-Sentral-Dalam-Program-Rumah>> accessed 6 June 2017.

¹²⁴ ____, ‘Hore...BTN Bakal Luncurkan KPR Bagi Pekerja Informal’ (Indonesian Undustry.com, 9 June 2016) <<http://indonesianindustry.com/hore-btn-bakal-luncurkan-kpr-bagi-pekerja-informal/>> accessed 6 June 2017.

¹²⁵ United Nations Human Settlements Programme, *Housing Finance Mechanisms in Indonesia* (UN Habitat 2000) p. 35 <<https://unhabitat.org/books/housing-finance-mechanisms-in-indonesia/>> accessed 6 June 2017.

¹²⁶ Fashbir Noor Sidin, ‘Indonesia’ in Agus, Razali; Doling, John; and Lee, Dong-Sung (eds) *Housing Policy Systems in South and East Asia* (Palgrave Macmillan 2002) 164.

¹²⁷ *ibid* 65.

¹²⁸ Regulation of the Ministry of Public Housing No. 10/2012 on Balanced Settlement (*Peraturan Menteri Perumahan Rakyat No. 10/2012 tentang Penyelenggaraan Perumahan dan Kawasan Permukiman dengan Hunian Berimbang*) see also Regulation of the Ministry of Public Housing No. 7 of 2013 on the Amendment of Regulation of the Ministry of Public Housing No. 10 on 2012 on Balanced Settlement (*Peraturan Menteri Perumahan Rakyat No. 7/2013 tentang Perubahan Peraturan Menteri Perumahan Rakyat No. 10 Tahun 2012 tentang Penyelenggaraan Perumahan dan Kawasan Permukiman dengan Hunian Berimbang*).

an urgent need to monitor as to whether private developers abide by the formula in order to fulfil their obligation.

d. Private Banks

Banks are either state owned, regional or private, and hold a crucial role in providing mortgage for those who need financial assistance. Currently, banks offer mortgage loans for resale housing or for home improvement.¹²⁹ The terms of the mortgage vary from 8, 10, 15, to 30 years. A few banks, such as Bank Rakyat Indonesia and BTN, offer a fixed rate mortgage for 20 years, with subsidies from the central bank. However, mortgage loans have a strict set of requirements. This has created difficulties for certain groups to access loans, for example, people with no fixed income, a poor family who does not have a warranty for loans or whose income is not qualified for a mortgage loan. In such cases, these groups can only rent from the informal market, or build a self-financed house.

e. Microfinance institutions (cooperatives, non-bank rural credit institutions and pawnshops)

Indonesia is well-known for its cooperative system of credit unions to support its economy.¹³⁰ Around the country, these types of financial institutions exist and are accessible for all types of households. These types of financial loans charge friendlier interests than regular banks. However, due to the limited amount of money that can distribute, the money cannot be used to buy a new house, but nonetheless is suitable for home improvement.

f. Individuals, particularly in informal market sectors.

It is debatable whether to include individuals as actors that play a role in the delivery of housing. None of the laws or regulations mentions individual in the housing services. As discussed earlier in the chapter, most low income groups cannot access the houses provided by both PERUMNAS and REI, as they work in informal sectors with no fixed salaries, which makes them difficult to access the financial scheme. These groups tend to build their own houses or to look for rented houses provided by individuals. The first option brings two types of self-help mechanisms. First, for those low income groups who are fortunate enough to own land, they may result to build an informal structure on their land. If not, they will build houses illegally on state land or on a piece of land that is not directed for settlement. The latter cannot be counted as a “role” in providing housing, and this effort can develop slums in urban areas, and therefore will not be discussed further.

In building houses, national and local building codes should be followed. This certainly only can be done by the middle- and higher-income groups, but not by the lower income groups. The same goes for the few groups that build informal structures on their land, but they will not use the houses for themselves, rather they will lease or sell them to migrants. While this is not

¹²⁹ United Nations Human Settlements Programme (n 125) 20.

¹³⁰ *ibid* 13-15.

at an intensely large scale, there are many so-called “slumlords” in Indonesia, especially in urban areas.

Although this can be observed as an advantage in providing housing, to some extent it can also generate problems. Such a “private market” decides its own prices and there are no controls from the governments (both local and national) regarding the price and the rule of the lease. In addition, it will also bring some difficulties in the case of eviction, particularly in delivering the compensation or in providing a new house; should it be provided to the owner of the houses or to the tenants? This problem was identified in a recent eviction in Jakarta.¹³¹ Another problem is accountability. If any acts against the law are committed by the owner, for example, he/she builds the houses on land that is not directed for settlements, and then the government evicts the tenants, to whom will the tenants claim their loss stemmed from the eviction? Therefore, the government should regulate such market to ensure the legal tenure for such market.

In summary, all of the private parties mentioned above played a significant role in assisting the government in delivering housing to the people. Although not all groups in society can use the services offered by private parties, the discussion in previous paragraphs demonstrates that the government has tried to urge private parties to accommodate more low-income groups. To this end, the government, as the coordinator of all parties involved in the housing field, must strictly monitor the practices of private parties.

Having discussed the parties which are involved in housing policies and having briefly examined their roles, it is needed to explore access to land and land availability in Indonesia and the way it relates to the right to housing. It cannot be denied that the availability of land will influence the work of all parties in providing and delivering housing to the people.

4.6 REFLECTIONS: INDONESIAN GOVERNMENT AND ITS EFFORT TO REALISE THE RIGHT TO HOUSING FOR THE LOW-INCOME GROUPS

As a party to the ICESCR, Indonesia is under international obligations to realise the human rights enshrined in the Covenant. Supported by Article 7 (2) of the Indonesian Human Rights Law stating that International human rights instrument ratified by the government become the country’s national law (see Chapter 3), Indonesia has to abide by the tripartite human rights obligations: to respect, to protect, and to fulfil.

The Indonesian government at the national level has shown its effort to realise the right to housing. This fact can be seen from the adoption of the right into the Constitution and other national legislation. In addition, the government also adopted several housing policies that enable low incomes groups to enjoy such right by providing subsidised rental public housing and mortgage facilities. Taking these developments into account, it can be concluded that the Indonesian government has, to a certain extent, abided by, in any case, the obligation to fulfil the right to adequate housing. The government has endeavoured to implement its obligations

¹³¹ LBH Jakarta, *Kami Terusir, Laporan Penggusuran Paksa di Wilayah DKI Jakarta Januari-Agustus 2015* (LBH Jakarta 2015) 9.

based on its available resources to progressively achieve the right to adequate housing, although few challenges have been identified.

To address the backlog of 15 million houses, Indonesia would require one million houses per year for 15 years. In these 15 years, housing needs will also increase. The “One Million Houses” policy is a concrete action undertaken to realise the government's obligation to provide housing to its citizens. Although this programme only began in 2015, several obstacles have been identified of which financial matters and land availability are dominant.

Besides the financing of housing development, a second major problem is the lack of available land for settlements. The scarcity of land is a classical problem in housing provision. The central government should collaborate with local governments to obtain the land needed for settlements. Most plots of land are possessed by private developers or private companies; only a small amount of land is owned by the central government or local governments. These companies purchase land from individuals, then apply to the National Land Office ‘*Badan Pertanahan Nasional-BPN*’ to convert the land zoning from agricultural to residential or other purposes, such as hotels, luxury apartments, or shopping malls.¹³² As a result, the price of houses which are built by private developers is often rocketing and becomes inaccessible and unaffordable for middle- and low-income groups.

Land owned by municipalities is limited, particularly in regions with existing palaces (sultanates), for example in Jogjakarta and Surakarta. These palaces, due to their sovereignty and property rights gained far before Indonesia's independence, possess a great deal of land in certain municipalities.¹³³ This situation has caused even greater difficulty for the government's provision of land for public services, such as schools, health care facilities, or public housing. When large areas of land have been acquired by private parties, political will from the government is necessary to retain said lands for the public interest.¹³⁴

Vacant land, particularly in urban areas, is rare and unaffordable. The government must manage and plan locations for public housing. Thus, careful spatial planning is crucial. Similar to other developing countries, Indonesia has a severe lack of databases and information on land affairs for planning, decision making, and public services.¹³⁵ Learning from this weakness, the government, both central and local, should preserve the availability of land to implement its housing policies thoroughly.

The above facts suggest that a shortage of land, combined with the increasing costs of housing and plots of land, hinders middle- and low-income groups’ ability to access housing.

¹³² T. Firman, ‘Major Issues in Indonesia’s Urban Land Development’ (2004) 21 (4) Land Use Policy 347–355.

¹³³ This situation occurs in the Special Administrative Region of Yogyakarta, which has two palaces, *i.e.* *Kasultanan* and *Pakualaman*. If the government has a programme to promote public interests, such as housing, highways, or airports, the municipal or provincial government should request a licence from the palaces to use the land. Worst, most of this land has been occupied by the residents with an agreement between the occupiers and the palaces. This complicates the process of land conversion and in some cases can lead to evictions. Similar conditions exist in the city of Surakarta, which also has two palaces (*Kasunanan Surakarta* and *Keraton Mangkunegaran*).

¹³⁴ Land acquisition for public infrastructure development is regulated under Law No. 2 of 2012, which states that land acquisition should be conducted through direct deliberation and voluntary-based consensus between the government and other parties. Public interest, in this regard, includes the development of roads, hospitals, schools, primary health care, etc. The process involves land-owners and their heirs as well as the local legislative councils (DPRD) at the provincial, district, and/or municipal level. Owners receive compensation in the form of money, substituted land, resettlement, and/or another form agreed by the parties.

¹³⁵ Firman, 2004 (n 132) 353.

Thus, these groups cannot afford to live in adequate shelter; informal settlements have thus been expanding.¹³⁶ To tackle this, the government needs to invest more in rented public housing rather than houses for sale. This is particularly true if the price of a low-cost housing unit is estimated to exceed 200 million rupiah (US\$14,286). Urban populations, with an average income per capita of only around US\$ 4,000–6,000 per year, will not be able to afford to purchase housing from the formal housing market.¹³⁷ Rented public housing is more viable than owned housing, since low-income groups can stay in affordable accommodations for a certain period. Furthermore, by saving money on rent, middle- and low-income groups will be able to afford a simple house with ownership rights to which they can relocate in the future.

The previous paragraphs showed the main challenges of the government in realising the right to housing. As discussed in Chapter 2, the obligations related to the right to housing do not end in adopting legislation and policies but also in establishing effective monitoring and mechanisms to ensure access to justice. Since the obligation to fulfil also requires the government to collaborate with stakeholders including private actors, for example banks or private developers, in implementing housing policies, the government should strive to abide by obligation to protect the human rights to housing from any infringement caused by private actors' activities. In this regard, the government of Indonesia seems to face obstacles to prevent infringements by private actors, which also may be partially caused by lack of monitoring procedures (Section 4.4). As for the government's compliance with obligation to respect, this will be examined in Chapters 7 and 8.

4.7 PRELIMINARY REFLECTIONS

This chapter has presented the Indonesian legal framework for the recognition and the implementation of the right to housing in Indonesia, at both national and local level. Such recognition stemming from the highest norms, Pancasila and the Indonesian Constitution, to (international) Human Rights law as well as other legislation enacted to regulate housing and human settlements. It is clear from the discussion that the adopted regulations set out obligations for each level of government in order to realise and fulfil the right to housing as one of the basic human needs.

This chapter also reveals that the Indonesian government has tried to adopt national housing policies. Despite weaknesses of such policies due to inefficient monitoring and lack of enforcement measures, the government has not stopped adopting them, regardless of its financial constraints. By including housing policies in the National Development Plan, the government provides clear targets and an ambition for progress that should be achieved within a reasonable period of time.

This chapter has also shown that the government is not the only actor involved in facilitating housing for the people. Although the state plays a major role, several other actors

¹³⁶ Ministry of Public Housing Strategic Plan 2010–2014, p 7; Indonesia, 'Country Report', 14.

¹³⁷ This analysis was conducted by the UN Special Rapporteur of the right to adequate housing during her 2013 visit to Indonesia. Details of her report can be found in UNGA, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living and the Right to Freedom from Discrimination, Raquel Rolnik' (26 December 2013) UN Doc UN Document A/HRC/25/54/Add.1.

are involved, including state enterprises, private developers, banks including microfinance institutions, and individuals. The practices of these actors show an interplay between each party's role, resulting in both advantages and drawbacks. Advantages include offers of assistance, which create more options for people. Disadvantages include no clear mechanisms to monitor and regulate private parties, particularly private developers and individuals, resulting in unfair practices which can harm the rights of the people.

Additionally, this chapter has identified a number of downsides emanating from the Indonesian housing policies and government practices. The first pitfall is that not every local government has adopted local housing regulations. This practice will possibly hinder the implementation of national policies if the respective region has a distinctive culture or regional customary laws. The second pitfall is the financial restraints experienced by the government at both national and local level. This problem forces the government to be creative in searching for alternative funds to finance their policies. The third drawback is the fact that a great portion of land is possessed by private parties, which negatively influences the availability of land and affordability. Moreover, unclear regulations for all parties involved complicates the housing situation. All of these pitfalls need to be addressed by the government in order to avoid greater problems in the future. Although it can be concluded that the Indonesian government has adopted a set of regulations guaranteeing the right to housing to its people without discrimination, it seems that certain groups of people still have to struggle to access adequate housing.

Chapter 5 will explore the housing regulations and policies of four municipalities in Indonesia. The analysis will also extend to the practice of the local governments in providing access to housing for their inhabitants.

PART II
Exploring and Analysing the Indonesian Local Governments’
Regulations, Policies and Practices Relating to
the Right to Adequate Housing

CHAPTER 5

THE HOUSING POLICIES AND REGULATIONS OF PARTICULAR CITIES IN INDONESIA

5.1 INTRODUCTION

This chapter will focus on implementation of the right to housing at local level in the cities that have been chosen for the purpose of this study: Surakarta, Yogyakarta, Surabaya and Jakarta. This includes looking at how Indonesian local governments deal with the protection and promotion of the right of inhabitants to adequate housing. The methodology used in this chapter combines doctrinal and empirical research methods. The data provided in this chapter is based on field research and interviews conducted with housing officials in the four cities (Jakarta, Surabaya, Yogyakarta and Surakarta) during two periods: August-November 2016 and March-April 2018.¹ In addition, literature and other secondary data from previous researchers are used.

This chapter answers the sub-research question on the challenges faced by local governments, and whether their practice complies with international obligations ratified by the national government. Section 5.2 will provide a short description of the housing market in Indonesia, as it closely relates to housing stocks and their tenure. Furthermore, this chapter will provide data on the variation between local housing policies and regulations. It will also examine the similarities and differences between housing policies and regulations in these cities; such identification is useful in assessing the compliance of local government practices with international obligations.

This chapter ends with a reflection on the existing problems in housing policies and regulations, and on how these problems hinder fulfilment of the right to adequate housing. These problems include: land availability and access to urban land; discrimination regarding access to public housing; eviction problems; and accountability, participation and enforcement mechanisms regarding the right to housing. All of the problems and challenges reflected on will be discussed further in the next five chapters, i.e. Chapters 6, 7, 8, 11 and 12.

5.2 THE HOUSING MARKET IN INDONESIA

5.2.1 General introduction to the Indonesian housing market

The migration process in Indonesia, whereby people move from rural to urban areas, has put pressure on all important urban aspects, from the job market, through public service facilities, to the housing market.² Most of the time, the housing market cannot meet the increasing demand brought by new residents. In many instances, newcomers have little experience in skilled jobs

¹ For the detailed method on selecting the interviewees, see the methodology provided in Chapter I.

² Christian Obermayr, *Sustainable City Management: Informal Settlements in Surakarta, Indonesia* (Springer 2017) <<http://link.springer.com/10.1007/978-3-319-49418-0>>13.

and a formal educational degree at a low level, which together result in difficulty penetrating the job market; as a consequence, they often find work in the informal sector, which is low paid. Earning such low wages, newcomers cannot afford to enter the housing market,³ and this circumstance causes them either to move to existing slums and informal settlements, or to squat in ‘hazardous territory’ to find accommodation.⁴ Similar to existing housing markets in other developing countries (and as was already briefly introduced in Chapter 4), the housing market in Indonesia can be divided into two sectors:⁵ the informal housing sector and the formal housing sector.

5.2.1.1 *Informal housing sector*

The informal housing sector is the sector most commonly found in Indonesia.⁶ This system usually occurs in kampongs, or villages, where one can buy a house from an individual, either directly or through a mediator (or landbroker).⁷ Most houses in the informal sector are built by the owners or occupiers.⁸ An owner is allowed to build on land they have bought from other individuals.⁹ Whereas occupiers acquire their land by squatting, either on empty land that has been abandoned by the landowners or on state-owned land. In relation to the land registration process, land bought from other individuals may or may not be registered.¹⁰

While squatters on empty land abandoned by its owners might create a long-term land conflict, which generates difficulties for the government when building new infrastructure,¹¹ there is also a customary informal arrangement in Indonesia, where owners allow squatters to stay. This arrangement is called *magersari – ngindung (menumpang)*. *Magersari* is often found in regions with palaces, such as Yogyakarta and Surakarta. Due to the large amount of land parcels owned by the kings of these regions, some land is always left vacant, and the palaces allow people to build houses and grow plants on it. This arrangement may be formalised by

³ Delik Hudalah, Yunie Nurhayati Rahmat and Tommy Firman, ‘Housing Low- and Middle-Income Households : Land Development and Policy Practice in Two Indonesian Cities’ in John F McCarthy and Kathryn Robinson (eds), *Land and Development in Indonesia: Searching for the People’s Sovereignty* (ISEAS–Yusof Ishak Institute 2017)197.

⁴ *ibid.*

⁵ Samba Mukoko, *Low-Income Housing in Growing Urban Economies: A Case-Study of Surabaya, Indonesia*, (United Nations Centre for Regional development (UNCRD 1996) 66-67.

⁶ PaaVo Monkkonen, ‘Urban Land-Use Regulations and Housing Markets in Developing Countries : Evidence from Indonesia on the Importance of Enforcement’ (2013) 34 Land Use Policy 255 <<http://dx.doi.org/10.1016/j.landusepol.2013.03.015>>.

⁷ *ibid.*

⁸ Ray W Archer, ‘Urban Land Consolidation for Metropolitan Jakarta Expansion, 1990-2010’ (1994) 18 Habitat International 37.

⁹ Andri Supriatna and Paul Van Der Molen, ‘Land Readjustment for Upgrading Indonesian Kampung: A Proposal’ (2014) 22 South East Asia Research 379.

¹⁰ Archer (n 8).

¹¹ For example, in Surabaya, for decades people have been living in one of the informal settlements in the unused irrigation area that is owned by the government. People allowed to live in this area make a very low yearly contribution to the local government. When these people applied to have clean pipe water and requested the service from the Regional Water Service Company, a private company called Pekuwon objected and did not allow the water company to establish a water network on the land; this was because Pekuwon claimed that the land parcels being squatted by the people requesting the service were owned by the company. When field research was conducted, the land claim case between The Surabaya Government, the affected people, and Pekuwon was ongoing, and no decision has yet been taken.

providing a licence for individuals to squat for a certain amount of time; in some cases, such arrangements run for an unlimited period. People might stay in a palace's squatting ground for generations. With *ngindung*, people must pay the palace a rental fee, whereas those who have a *magersari* arrangement do not need to pay the palace any rental fee.¹² *Magersari* residents have their own house but they do not own the land it is built on, and they must fulfil certain social obligations, such as participating in guarding the settlement (*ronda*) according to a schedule arranged by the community, and paying into a social fund used to help sick people (or for other social purposes).

The practice of the *ngindung*, which began within the grounds of palaces, is now also carried out on plots of land belonging to ordinary people. In some places, people may even live on the same plot of land as the person who owns it (*ngindung – menumpang*).¹³ The owner should be in agreement with this arrangement. Sometimes, people living this way have to pay a relatively small amount of money to the owner of the land. This type of arrangement often brings difficulties for landowners, such as conflicts with their tenants if they sell the land or bequeath it to their children.¹⁴

As for the squatters, most of the time they use land that is not designated for settlements, such as riverbanks or cemeteries. Such housing is sometimes considered to be illegal settlement. In many cases, this illegal housing is sold or rented out to migrants. Although such arrangements are indeed insecure, these settlements are the only solution for low-paid migrants wishing to survive in urban areas.

The informal sector has provided accommodation for Indonesians for a long time, as it is relatively quick and cheap to procure, particularly for people who have a middle to low income.¹⁵ However, this sector cannot provide adequate access to essential services, such as safe drinking water, a sewage system, and electricity.¹⁶ Dwellers have to arrange access to such services by themselves, for example, by creating an informal drainage or sewage network to share with other dwellers.¹⁷

Around 60 percent of Jakarta's inhabitants are living in densely populated informal settlements, constructed with poor quality materials, and lacking access to essential services.¹⁸ Most people who cannot afford to buy or rent adequate housing will live in dense and unhealthy houses in slum areas, which in the long run (as the area grows) forms a *kampung*. In 2013, the slum areas in Jakarta covered 1,700 hectares of the city's total area of 66,200 hectares.¹⁹ Although most *kampungs* are categorised as squats and illegal settlements, lacking the security of tenure, many regular dwellers possess their land by proof of ownership in the form of

¹² Ni'matul Huda, *Daerah Istimewa Yogyakarta dalam Perdebatan Konstitusi dan Perundang-Undangan Indonesia* (Nusa Media 2013). See also Ni'matul Huda, 'Beberapa Kendala dalam Penyelesaian Status Hukum Tanah Bekas Swaparaja di Daerah Istimewa Yogyakarta' (2000) 13 (7) *Jurnal Hukum* 90.

¹³ Huda 2013 *ibid*, 211.

¹⁴ *ibid*.

¹⁵ Hudalah, Nurhayati Rahmat and Firman (n 3) 186-187.

¹⁶ Monkkenon (n 6) 257.

¹⁷ Patrick Guinness, 'Land and Housing Security for the Urban Poor' in John F McCarthy and Kathryn Robinson (eds), *Land and Development in Indonesia: Searching for the People's Sovereignty* (ISEAS-Yusuf Ishak Institute 2016).

¹⁸ Florian Steinberg, 'Jakarta: Environmental Problems and Sustainability' (2007) 31 *Habitat International* 354.

¹⁹ Badan Pusat Statistik (BPS), 'Evaluasi Rukun Warga (RW) Kumuh Provinsi DKI Jakarta 2013' (BPS 2013) <<https://jakarta.bps.go.id/publication/2015/04/14/04be43a83abb4c41d594034d/evaluasi-rukun-warga-rw--kumuh-dki-jakarta-2013.html>> accessed 12 January 2019.

property tax receipts, letters from the head of the district, or other documents to show their long-term usage of the land.²⁰ On the other hand, slum dwellers who are categorised as squatters do not have possession of their plot of land, and they instead live on state land, such as empty plots, waste disposal sites, riverbanks, or next to railway tracks.²¹

Moreover, rented housing or rooms (*kos*) are also common in this setting.²² A person can easily lodge in a rental house, after they have met the landlords and agreed to the terms and conditions for the rental. This kind of rental system is quite informal; there is no government arrangement or regulation governing it. The rental period and price depends on an agreement between the parties (the tenant and landlord).

An agreement between tenant and landlord can be either written or verbal, without any involvement from government. Tenants with verbal rental agreements are vulnerable, as they have very little protection before the law. Although rented houses are rampant in Indonesia, and have been used for decades by people looking for accommodation, no regulations have been enacted to regulate such arrangements. Only recently have local governments started to plan to tax landlords who lease their houses to other people.²³ However, no further action has been taken by the government, particularly in terms of adopting measures to protect informal tenants from arbitrary actions taken by landlords.

5.2.1.2 Formal housing sector

In the formal sector, public housing is provided by the government and private housing is provided by private property developers. The public housing system is an option for those who want to live in accommodation provided by the government, which comes with both an ownership title and a lease agreement. This type of housing is designated exclusively for people within low-income brackets.²⁴ Issues regarding the legality of the settlement and tenure security only rarely occur in this sector, as public housing is arranged formally.

Another type of formal housing is that provided by the private sector. Usually, private developers build commercial houses for profit,²⁵ mostly focusing on houses for middle to high-income groups. The prices in this housing market are often high, which makes the properties unaffordable for people on a low income. In this regard, the government needs to adopt specific measures to establish more affordable housing for the disadvantaged in society. In some cases, developers can enjoy privileges provided by the government if they are willing to build low-

²⁰ Archer (n 8).

²¹ *ibid*.

²² *ibid*; see also Helga Leitner and Eric Sheppard, 'From Kampung to Condos? Contested Accumulations through Displacement in Jakarta' (2017) *Environment and Planning A* 1; Ashok Das, 'A City of Two Tales: Shelter and Migrants Surabaya' (2017) 8 *Environment and Urbanization Asia* 1.

²³ The government categorised incomes received from leasing houses or rooms as 'taxable'. The initiation can be found in Government Regulation No. 46/2013, Taxing of Entrepreneurial Businesses who Receive a Certain Gross Income (*Peraturan Pemerintah No. 46/2013 tentang Pajak Penghasilan atas Penghasilan dari Usaha yang Diterima atau Diperoleh Wajib Pajak yang Memiliki Peredaran Bruto Tertentu*) SG 106/2013. This government regulation has been annulled and replaced by Government Regulation No. 23/2008 (SG 89/2018), stipulating similar taxes.

²⁴ Law No. 1/2011 on Housing and Settlement Areas (*Undang-Undang No. 1/ 2011 tentang Perumahan dan Kawasan Pemukiman*) SG No. 7 of 2011 art 1 para 10.

²⁵ *ibid* art 1 para 8.

cost houses. Such advantages include fast-tracked land title conversion and building permit procedures.²⁶

In Indonesia the housing market influences the establishment of settlements, both formal and informal. As discussed in chapter four, formal settlements refer to both formal and individual settlements which follow the city planning adopted by governments. On the other hand, informal settlements are settlements mostly built by individuals, which do not follow the spatial planning regulations of the city and are not equipped with public infrastructure. Such settlements include illegal settlement in slum areas. Therefore, all the types of housing tenure mentioned in figure 4.1, in Chapter 4, exist in every type of settlement across the country. The formal housing market and ownership is not always affordable for all groups of people. People with a low income will have difficulty accessing such a market. In addition to the housing market with ownership title, a formal rental housing market is also available in every city. Rental housing is often provided by the government via a rented public housing scheme, subsidised by local governments. In summary, the division of the housing market in Indonesia, and the types of housing tenure that are commonly found in each sector, can be seen in the following figure:

Figure 5.1 The housing market in Indonesia, based on housing providers²⁷

²⁶ *ibid* arts 33 and 54 (3).

²⁷ Wording similar to ‘formal’ and ‘informal’ has been used to categorise the housing market in this figure, as well as to differentiate the Indonesian settlements discussed in figure 4.1 (Chapter 4, p 128). The Chapter 4 category is broader, as it refers to settlements in general, while the category in this figure only refers to housing tenure.

5.2.2 Localised housing market

Of all cities in this study, Jakarta occupies the top position in terms of land and housing prices. This status might be influenced by its position as the capital city and centre of the Indonesian economy. Research conducted in 1991 showed that land prices for formal plots are 2.2 times higher than those for informal plots.²⁸ Such prices will automatically influence the price of houses located on these two types of plot. Due to the urban development and economic crisis that hit Indonesia in 1998, as well as the commodification of urban land in informal settlements, the housing and land prices sky-rocketed within 20 years of the study.²⁹

A survey conducted by Indonesia Property Watch predicted that, in the period 2018-2020, land price will increase yearly by between 10 and 15 percent.³⁰ As a consequence, housing prices might even double. There is a possibility that people will choose to live in flats or apartments, rather than in single houses (as they used to),³¹ in order to reduce the expense of buying land.

However, the increased price of houses and land has forced a certain group of people to live in informal settlements, particularly in slum areas, either through buying or renting houses, or through squatting state land. In Jakarta, people tend to live in informal settlements as it is cheaper than living in formal settlements. The formal housing market is experiencing a slight dip in sales, as both demand and people's ability to buy is decreasing.³² Other cities (for example, Surabaya) are also experiencing increases in both housing and land prices. The availability of land for settlements in Surabaya is decreasing significantly, due to the massive development of hotels, offices, and supermalls. As a result, the price of residential land and housing in the city has nearly doubled.³³

The considerable increase in housing prices cannot be separated from land policy and permitting requirements. Several studies found that the procedure of acquiring construction permits and registration in Indonesia is indeed immensely costly³⁴, and it takes an extremely

²⁸ David E Dowall and Michael Leaf, 'The Price of Land for Housing in Jakarta' (1991) 28 *Urban Studies* 707.

²⁹ Leitner and Sheppard (n 22). The commodification of urban land relates to its dispossession, because land treated as a commodity enables capital accumulation by developers and other capitalists. In Jakarta, the dispossession of a legal informal settlement was carried out by land brokers, who negotiated the land price with its owners and sold it on to developers at a higher price. This dispossession also encourages massive investment in real estate, which in turn puts pressure on informal settlements. See also in Abidin Kusno, *After the New Order: Space, Politics, and Jakarta* (University of Hawai'i Press 2013) pp 139-171.

³⁰ —, 'Inilah Harga Tanah di Jakarta Menurut Indonesia Property Watch' (*Detik Finance*, 31 Maret 2017) accessed 30 November 2017.

³¹ Ispurwono Soemarno and Erwin Sudarma, 'The Implication of Small Scale Land Sub-Division for Formal Housing Towards Sustainable Living and Environment' (2015) 179 *Procedia - Social and Behavioral Sciences* 230 <<http://linkinghub.elsevier.com/retrieve/pii/S1877042815017802>> accessed 30 January 2018.

³² Eduardo Simorangkir, 'Daya Beli Lesu, Kok Harga Rumah Naik Terus? Ini Jawaban Bos Lippo' (*Detik.Com* 13 November 2017) <https://finance.detik.com/properti/d-3750209/daya-beli-lesu-kok-harga-rumah-naik-terus-ini-jawaban-bos-lippo?_ga=2.44343780.1782904918.1517308862-1811038770.1499633241> accessed 30 January 2018.

³³ Ardy Maulidy Navastara and Prananda Navitas, 'Impact of Residential Land Development towards Land Price Dynamics in Surabaya' (2012) paper presented at the 11th IRSA International Conference July 2012; see also Puspita Anggraini, 'The Spatial Pattern of Urban Land Prices Determination in Indonesia The Case of Surabaya , East Java' (Institute of Social Studies, the Netherlands 2013) 36.

³⁴ See for example P.C. Cruz, 'Transaction Costs and Housing Affordability in Asia' (2008) 11 *International Real Estate Review* 128; World Bank and The International Finance Corporation, 'Doing Business in Indonesia 2010' (2009) <<http://hdl.handle.net/10986/27602>>.

long time.³⁵ Private developers state that land administration and construction permits are often more expensive than the land itself.³⁶ This factor will indeed affect the price of houses produced by developers.

Housing markets vary between cities and countries. Housing prices not only depend on the land, but also on any regulatory provisions involving housing development. The cost of housing might also be subjective, dependent on the income of typical customers. For example, the extremely pricey houses or apartments in Jakarta are deemed not to be expensive, when they are compared to international standards.³⁷ Based on such an assumption, Indonesia - with its immensely vast territories, housing prices and regulating policies - cannot be made uniform. Inequality, in terms of income, and access to financial assistance are different between regions. Therefore, taking all these variables into account, housing markets in Indonesia are local in nature.³⁸ In this regard, local regulations and policies play a significant role in shaping Indonesian housing markets.

The following sub-sections will provide a brief discussion and analysis of the local regulations and policies relating to housing in the four cities investigated.

5.3 HOUSING POLICIES AND HOUSING REGULATIONS IN FOUR CITIES

5.3.1 Local regulations relating to housing³⁹

Besides housing regulation at the national level, which due to the decentralisation system adhered to by Indonesia gives considerable autonomy to local governments in housing matters, much is done at the local level. Law No. 23/2014 on Local Government⁴⁰ gives the mandate for housing affairs to local governments.⁴¹ Local governments then share the responsibility for establishing housing policies with central government. Central government eventually adopts general housing policies. For example, it adopts programmes to provide housing for low-income groups, develops the financial support system to enable access to housing for the poor, and enables public facilities for people affected by national policies.⁴² Meanwhile, local governments are responsible for adopting local regulations, and for providing and enabling

³⁵ Monkkenon (n 6) 257.

³⁶ *ibid* 262.

³⁷ MC Hoek-smit, 'The Housing Finance Sector in Indonesia' (2005) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.505.5973&rep=rep1&type=pdf>>; see also United Nations Human Settlements Programme, 'Housing Finance Mechanisms in Indonesia' (2008).

³⁸ Monkkenon (n 6) 259.

³⁹ Part of this chapter on local housing regulation and policy has been published, E.D. Kusumawati, A. Hallo de Wolf and M.M.T.A. Brus, 'Access to Public Housing for Outsiders: A Practice of Indirect Discrimination in Decentralised Indonesia' (2018) 19 (2) Asia Pacific Journal on Human Rights and the Law.

⁴⁰ Law No. 23/2014 on Local Governments (*Undang-Undang No. 23/2014 tentang Pemerintah Daerah*) SG No. 244/2014.

⁴¹ Article 9 Law No. 23/2014 divides governments' affairs in Indonesia. It classifies three types of affairs that can be or cannot be distributed to regional governments, i.e. absolute affairs, concurrent affairs and general affairs. Concurrent affairs serve as the basis for autonomy and can be delegated to local governments. These affairs are categorised as either 'mandatory' or 'optional'. Mandatory affairs include those which relate to basic services, including housing. Optional affairs include those not related to basic services.

⁴² Law No. 23/2014 (n 40) art 15 & Annex paras C (6) and D (1, 2, and 3).

public facilities for people affected by local policies, such as local development projects.⁴³ The municipal governments are also in charge of issuing permits for houses or buildings.⁴⁴

Another essential law defining local government responsibility regarding housing affairs is Law No.1/2011. It aims to provide all citizens with a decent house in a healthy, secure, harmonious and sustainable settlement.⁴⁵ Furthermore, it regulates the roles of government at each level, with the goal of guaranteeing equal access to housing for all citizens. The primary difference between the role of central and local governments is that central government lays down the general policy on housing and settlement and provides national funding,⁴⁶ while local governments apply such policy at their own level.⁴⁷

Local governments have the authority to create housing policies suited to their territory, if these are in line with national policies. Local governments should adopt a range of mechanisms that they can apply to improve housing, such as housing subsidies, incentives for self-help houses, tax incentives, building permits, making more land available, certification of land ownership, and the provision of public facilities.⁴⁸

However, the division of roles between the national government and local governments, as enshrined in Law No. 23/2014 and Law No. 1/2011, is somewhat unclear and contradictory, particularly with regard to the financing of housing for the poor. While Law No. 1/2011 confirms that central government holds the responsibility for housing for the poor, Law No. 23/2014 states that this responsibility is delegated to local governments.⁴⁹ However, in an annex to the latter, it is observed that central government will remain responsible both for housing the poor and for developing financial schemes to help those with a low income.⁵⁰ It is problematic that no explanatory notes have been provided until now,⁵¹ because these laws have created confusion at the local level.⁵² While the housing law encourages, even expects, local governments to be proactive in providing housing for the poor, instead they tend to wait passively for financial assistance from the national government, rather than using their local budget or seeking financial support from third parties.⁵³

Each of the four local governments have adopted regulations on housing and settlements. Many of the local instruments are to be found in the form of local regulations (*Peraturan Daerah*), governor regulations (*peraturan gubernur*), and mayor regulations (*Peraturan Walikota*). Under the Indonesian hierarchical norms, the three types of local regulations are considered to be the implementation of higher national laws - for example laws (*undang-*

⁴³ *ibid* paras D (1, 2, and 3).

⁴⁴ *ibid*.

⁴⁵ Law No. 1/2011 (n 24) Preamble para. B.

⁴⁶ Law No. 1/2011 (n 24) arts 13 and 16.

⁴⁷ This is also in line with Article 16 of Law No. 23/2014 (n 40), mentioning that the national authority will decide the norms, standards, procedures, and criteria in implementing the concurrent affair, and that local governments should follow the guidelines provided by the national government.

⁴⁸ Law No. 1/2011 (n 24) art 54.

⁴⁹ Law No. 23/2014 (n 40) arts 9, 11, 12.

⁵⁰ *ibid*, Annex D1.

⁵¹ Interview with housing officials of the Ministry of Public Works and Public Housing, Jakarta, 15 September 2016.

⁵² *ibid*.

⁵³ *ibid*.

undang) and government regulations (*peraturan pemerintah*) - at a more practical or local level.⁵⁴

As local regulations implement higher laws, they are mostly technical in nature and are based on local programmes. This is so-called, “programmatic regulation”, meaning that the regulations are connected to other programmes or policies adopted by the local governments. For example, local regulations on housing improvement and resettlement might relate to regulations on slum prevention, the environment, disaster management, or poverty prevention.⁵⁵ The regulations on multi-storey housing at municipal level often stipulate the type of multi-storey housing and the procedure for building (including any required permits and the people being targeted).⁵⁶

The more practical type of regulation is adopted in the form of mayor regulations.⁵⁷ Examples include mayor regulations on the pricing of rented public housing,⁵⁸ the procedure for renting and extending a rental agreement,⁵⁹ and procedures for monthly payment and local retribution.⁶⁰ Such regulations often involve sanctions for tenants who do not pay their monthly rent.⁶¹ Sometimes, local regulations also include an element of tenant responsibility, such as requiring tenants to report regularly to the housing authority concerning the condition of the accommodation, and of the public services and facilities available in their apartment block.⁶² In addition, tenants are entitled to receive compensation from the municipality if the housing units cannot be used due to fire or natural disasters.⁶³

The adoption of local regulations varies among the cities, as local regulations mirror the needs of the region; therefore, the content and type of regulation will not be the same between any of the cities. The full list of local regulations relating to housing will be presented in the Annex to this book.

All of the cities investigated have implemented an obligation to adopt local housing legislation. The steps towards adopting local regulations can be seen as a favourable starting

⁵⁴ Law No. 12/2011 on Formation of Legislation (*Undang-Undang No. 12/2011 tentang Pembentukan Peraturan Perundang-Undangan*) SG 82/2011, art 14.

⁵⁵ Local Regulation of Yogyakarta No. 3/2018 on the Prevention and The Improvement of Quality of Slum Areas (*Peraturan Daerah Kota Yogyakarta No. 3/2018 tentang Pencegahan dan Peningkatan Kualitas Perumahan Kumuh dan Permukiman Kumuh*)

⁵⁶ For example, Local Regulation of Yogyakarta No. 2/2016 on Multi-storey Housing (*Peraturan Daerah Kota Yogyakarta No. 2/2016 tentang Rumah Susun*) mentions four types of multi-storey housing: general, particular, state, and commercial multi-storey housing (art 4). The first two types are designated for low-income groups and are the responsibility of local government (art 6).

⁵⁷ The form of local legislations in Indonesia varies. Legislation can be found in the form of provincial/municipal/district regulations, governor/mayor regulations, and governor/mayor instructions. The legal basis of such variation is Law No. 12/2011 (n 54) art 8.

⁵⁸ Surabaya, Mayor Regulation No. 28/2016 on Rental Fees of Rented Public Housing that are Managed by the Surabaya Municipality (*Peraturan Walikota No. 28/2016 tentang Tarif Rumah Susun Sederhana Sewa dalam Pengelolaan Pemerintah Kota Surabaya*).

⁵⁹ *ibid*; see also Jakarta, Governor Regulation No. 111/2014 on The Occupancy Mechanism of Rented Modest Multi-Storey Housing (*Peraturan Gubernur DKI Jakarta No. 111/2014 tentang Mekanisme Penghunian Rumah Susun Sederhana Sewa*).

⁶⁰ *ibid*.

⁶¹ Jakarta, Governor Regulation No. 111/2014 (n 59).

⁶² See for example Surabaya Local Regulation No. 15/2012 jo No. 2/2010 on the Use of Multi Storey Housing (*Peraturan Daerah Kota Surabaya No. 15/2012 jo No. 2/2010 tentang Pemakaian Rumah Susun*) arts 6 & 17.

⁶³ *ibid*; see also Surabaya, Mayor Regulation No. 30/2013 on Services for the Usage of the Multi-Storey Housing (*Peraturan Walikota Surabaya No. 30/2013 tentang Pelayanan di Bidang Pemakaian Rumah Susun*) art 16.

point in fulfilling the right to adequate housing, particularly for the poor. As discussed in Chapter 2, adopting local regulation and policy is one of the legal obligations that should be fulfilled by the state in facilitating the realisation of human rights, including the right to adequate housing.⁶⁴ The fact that local regulations also underline that housing the poor falls under the responsibility of local authorities can also be seen as an indication of the intention of such authorities to play their roles in human rights implementation.⁶⁵

The adopted local regulations vary in each city, as they depend on the needs and specialties of the city. In general, all cities recognise the urgency to provide affordable housing for lower income groups. As not every city can provide subsidised housing, they depend on assistance from the national government for the development of public housing. However, each municipality should provide their own human resources to manage and maintain all houses provided, including the distribution of housing units. The four cities also acknowledge a need to upgrade housing conditions in certain areas.⁶⁶ Therefore, with the resources available to them, local governments have provided assistance for housing improvement through several requirements stipulated in local regulations (see the discussion in sub-section 5.3.2).

While acknowledging the improvement in local efforts to achieve implementation of the right to adequate housing, when adopting local regulations on housing, an in-depth examination of the provisions contained therein is necessary. As stated in Chapter 4, the government's obligations to realise human rights do not stop at enacting legislation, but go far beyond that. For example, governments have to make sure that local legislation does not contain discriminatory provisions. For this purpose, the author has conducted a review which lists all the provisions contained in housing regulations for the cities studied (see Annex 1). The review aims to investigate whether the provisions lead to discriminatory or unfair treatment, or contain burdensome requirements that can limit or hinder the enjoyment of the right to adequate housing.

By looking at the local regulations, the author found that the content of several provisions does indeed contain limitations that could hinder the right to housing for inhabitants. These include;⁶⁷

⁶⁴ Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 3 The Nature of States Parties' Obligations (Art 2, Para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23 (General Comment 3), paras 3,4 and 8; see also CESCR, 'General Comment No. 4: Article 11 (1) (The Right to Adequate Housing)' (13 December 1991) UN Doc E/1992/23 (General Comment 4) para 15; CESCR, 'General Comment No. 7: The Right to Adequate Housing (art. 11 (1) of the Covenant): Forced evictions' (20 May 1997) UN Doc E/1998/22 (General Comment 7), para 9.

⁶⁵ United Nations General Assembly (UNGA), 'Role of Local Government in the Promotion and Protection of Human Rights – Final report of the Human Rights Council Advisory Committee' (7 August 2015) UN Doc A/HRC/30/49.

⁶⁶ Interview with the housing officials of Jakarta (19 September 2016); Surabaya (5 October 2016); Yogyakarta (13 October 2016); Surakarta (11 and 12 October 2016). This recognition of housing upgrades or improvements was also stipulated in numerous local regulations, such as in Surakarta: Mayor Regulation No. 13/2007 on Guidelines for the Implementation of a Subsidy for Housing Improvement for the Poor in Surakarta (*Peraturan Walikota Surakarta No. 13/2007 tentang Pedoman Pelaksanaan Pemberian Bantuan Pembangunan/Perbaikan Rumah Tak Layak Huni bagi Masyarakat Kota Surakarta*).

⁶⁷ The details of the regulations and their provisions can be found in Annex 1.

- 1) The existence of local residence card requirements, for accessing public housing to rent⁶⁸ and for obtaining aid to upgrade inadequate housing.⁶⁹
- 2) The existence of a salary limit to determine eligibility to rent a public housing unit.⁷⁰
- 3) The requirement to already own a house and land, in order to be eligible to receive funds or assistance for improving an inhabitable dwelling.⁷¹
- 4) A lack of provisions relating to complaint mechanisms or remedies available, should any infringements occur.⁷²
- 5) The existence of administrative and penal sanctions that are only applicable to tenants, renters or private developers, whereas no sanctions are envisioned for the authority. Sanctions can be imposed on tenants who violate their obligations as enshrined in the agreement. The form of sanctions varies from fines, through the termination of rental agreements, to evictions.⁷³ Penal sanctions involve fines and jail sentences. However, these sanctions do not exist in all the local regulations on housing.⁷⁴
- 6) No monitoring mechanisms exist for housing programmes.⁷⁵

As discussed in Chapter 2, the obligations relating to the realisation of the right to housing involve not only the adoption of regulations. State obligations reach further than that. State obligations include the monitoring of programmes, the provision of mechanisms, and sanctions for parties who violate the right to housing, including any infringement by third parties.⁷⁶ Moreover, these state obligations extend to local governments. In this regard, local governments hold tripartite obligations to respect, protect and fulfil human rights within their local competencies.⁷⁷ Indeed, Indonesian local governments have faced several challenges in their

⁶⁸ Jakarta Governor Regulation No. 111/2014 (n 59) arts 4 and 6; see also Peraturan Walikota Yogyakarta No. 44/2009 tentang Pengelolaan Rumah Susun Sederhana Sewa Milik Pemerintah Kota Yogyakarta, arts 6 & 10.

⁶⁹ Surakarta Mayor Regulation No.13/2007 and Mayor Regulation No. 15/2007 on Guidelines for the Implementation of a Subsidy for Housing Improvement for the Poor in Surakarta (Peraturan Walikota Surakarta No. 13/2007 as amended by Peraturan Walikota No. 5/2007 Pedoman Pelaksanaan Pemberian Bantuan, Pembangunan/Perbaikan Rumah Tak Layak Huni bagi Masyarakat Miskin Kota Surakarta), art 10 (3a).

⁷⁰ Local Regulation No. 15/2012 and Local Regulation No 2/2010 on the Use of Multi Storey Housing (*Peraturan Daerah Surabaya No. 15/2012 jo Peraturan Daerah Surabaya No. 2/2010 tentang Pemakaian Rumah Susun*) art 10c; Mayor Regulation No. 44/2009, as amended by Mayor Regulation No. 55/2014 on the Management of Multi-Storey Housing owned by the Yogyakarta Municipality (*Peraturan Walikota Yogyakarta No. 44/2009 tentang Pengelolaan Rumah Susun Sederhana Sewa Milik Pemerintah Kota Yogyakarta*) art 4.

⁷¹ Surakarta Mayor Regulation No. 13/2007 as amended by Mayor Regulation No.15/2007 (n 69) art 10 (3b).

⁷² This was found to be the case in all local regulations.

⁷³ Surabaya, Mayor Regulation No. 30/2013 (n 55) arts 9-15; see also Jakarta Governor Regulation No. 111/2014 (n 59) arts 17 and 18.

⁷⁴ See Jakarta Governor Regulation No. 111/2014 (n 59) 17 and 19.

⁷⁵ A specific local institution is established to fulfil a supervisory function. Nevertheless, this institution is mandated only to monitor daily administrative procedures - such as payment of rent, or management of public facilities and services for the housing - and not to monitor or evaluate the housing programme for the poor, as such. See for example: Surabaya Mayor Regulation No. 72/2013 on the Organisation and Working Procedure of the Technical Implementation Unit of Multi storey housing Surabaya I, II and III at the Management Office of Land and Building of Surabaya (*Peraturan Walikota Surabaya No. 72/2013 tentang Organisasi dan Tata Kerja Unit pelaksana Teknis Dinas Rumas Susun Surabaya I, Surabaya II dan Surabaya III pada Dinas Pengelolaan Bangunan dan Tanah Kota Surabaya*).

⁷⁶ CESCR, General Comment 3 (n 64) para 5; General Comment 7 (n 64) para 9; UNGA, UN Doc A/HRC/30/49 (n 65) para 25; see also UNGA, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Leilani Farha (22 December 2014) UN Doc A/HRC/28/62.

⁷⁷ UNGA, UN Doc A/HRC/30/49 (n 65) para 27.

efforts to realise the right to housing (as stated by the UN Special Rapporteur on the Right to adequate housing), including⁷⁸ inadequate resources (through depending only on national expenditure) and becoming more protectionist (which limits the provision of housing services to only local residents).⁷⁹

The next section will discuss the local implementation of policies and programmes relating to access to public housing, housing improvement, and resettlements, based on the local regulations mentioned in the previous section.

5.3.2 Policies and programmes related to housing

Based on the division of housing affairs between central government and local governments, as enshrined in Law No 23/2014⁸⁰ and Law No 1/2011,⁸¹ local governments have the authority to create housing policies suited to their territory, as long as these are in line with national policy. Local governments should adopt a range of mechanisms that they can apply in order to improve housing provision, such as housing subsidies, incentives for self-help houses, tax incentives, building permits, making land available, certification of land ownership, and provision of public facilities.⁸²

The four cities that are the focus of the present study are categorised as ‘big cities’ in Indonesia. People from surrounding rural areas are attracted to settling in these cities, aiming for a better life. In addition to the problems caused by the natural growth in population, internal migration has created challenges in providing housing for the cities’ existing residents. For people who have a fixed or permanent job with a decent salary, buying a house within the current housing market will not be such a problem. However, this is not the case for the poor. The poor in Indonesia live mainly in informal (and often illegal) settlements, mostly under bridges, on riverbanks, on the sides of railway tracks, or on other people’s land.⁸³ They simply cannot afford either to buy the land parcels they live on or to rent adequate houses.

The number of illegal and informal settlements is increasing, particularly in urban areas, in which land and dwellings have become unaffordable for the poor. Both the national and local governments have tried to adopt several measures to tackle this problem. Mostly, housing policies target the poor, although in general, strategies aim to reduce the housing backlog for all people, regardless of their economic status.

Because of decentralisation, all cities in Indonesia run two programmes regarding housing for their inhabitants: i) the national programme - using national expenditure, but conducted in local areas; and, ii) local programmes - employing local expenditure. The national programme derives from the national government’s responsibility to provide housing for those

⁷⁸ UNGA, UN Doc A/HRC/28/62 (n 76) para 21.

⁷⁹ United Nations Human Rights Council, ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Raquel Rolnik, Mission to Indonesia’ (23 December 2013) UN Doc A/HRC/25/54/Add.1, paras 11, 70-71.

⁸⁰ Law No. 23/2014 (n 40).

⁸¹ Law No. 1/2011 on Housing and Settlements Areas (*Undang-Undang No. 1/2011 tentang Perumahan dan Kawasan Pemukiman*) SG No. 7/2011.

⁸² *ibid* art 54.

⁸³ Leitner and Sheppard (n 22).

of low income. The local programmes are based (and depend) on the economic resources of local governments and the needs of local inhabitants.

As discussed in Chapter 4, national programmes relating to housing include the development of low-cost housing (the so-called one million houses programme), housing subsidies in the form of a down payment, and building more rented public housing. These three programmes are planned, implemented and monitored by the Ministry of Public Works and Public Housing.

The first two programmes will not be discussed in this chapter, as their implementation is directly from central government and involves the national housing company, private developers and banks. So far, the only involvement of local governments in the one million houses programme has been to provide location permits⁸⁴ and building permits for housing projects if the national housing company or private developers choose to build housing complexes in their area. In the down-payment assistance programme, local governments play a very minimal role, simply providing a recommendation letter for applicants.⁸⁵ The recommendation letter functions as evidence that the people who wish to apply for aid did not possess a house before; thus, the application helps them to buy their first home.

The third programme, which is the development of rented public housing, requires more involvement from local governments. As discussed in Chapter 4, local governments may make a proposal for rented public housing, and they should also provide the land for such purpose. Therefore, the initiative for the development comes from local governments, not from the national government. Moreover, after the project is finished, the distribution of houses and their maintenance are in the hands of local governments. Such housing, with a very low rental cost, is targeted at low-income groups. Local governments determine the rental fees for each house and regulate them in a local regulation (*Peraturan Daerah*). For example, the rental price for a studio with one living room, one bedroom, a kitchen and a bathroom, is around 45,000 (3 Euro) – 200,000 IDR (13 Euro), monthly.⁸⁶ In addition to the rental fee, tenants must also pay monthly retribution to the local government at around 20,000 (1.5 Euro) - 80,000 IDR (5.5 Euro), depending on the location and floor on which they live.⁸⁷

In addition to this, there are programmes run by the Ministry of Social Affairs. However, these programmes do not aim to provide houses, instead they grant funding to increase the habitability of existing dwellings for the poor. As mentioned before, the majority of houses in slum areas are inhabitable. Implementation of the Ministry of Social Affairs programmes

⁸⁴ The permitting system that is applicable to any parties wishing to build a project not limited to housing projects. The location permit is even applicable to individuals who want to build their houses. This permitting system is regulated in Law No. 28/ 2002 on Building (*Undang-Undang No. 28/2002 tentang Bangunan*), Law No. 26/2007 on Spatial Planning (*Undang-Undang No. 26/2007 tentang Penataan Ruang*), and Government Regulation No. 36/2005 on Building (*Peraturan Pemerintah No. 36/2005 tentang Bangunan Gedung*). However, the procedure for these permits will not be discussed in this book, as it is a deviation from its central topic.

⁸⁵ Interview with the official from the Directorate of Housing Finance of the Ministry of Public Works and Public Housing, 14 September 2016.

⁸⁶ Surabaya, *Peraturan Walikota No. 28/2016 on Tarif Sewa Rumah Susun Sederhana Sewa dalam Pengelolaan Pemerintah Surabaya*.

⁸⁷ Surabaya, *Peraturan Walikota No. 2/2013 on Perubahan atas Peraturan Daerah Kota Surabaya No.13/2010 tentang Retribusi Pemakaian Kekayaan Daerah*.

involves local governments in creating a list of the poor who are entitled to the fund, distributing the fund, and then monitoring its implementation.⁸⁸

In addition to the national programmes, local governments have adopted local policies with regard to housing, particularly for improving housing quality and access to housing for the poor. Within the four cities, local policies range from housing upgrades, resettlement, and relocation, to providing rented public housing via a fund provided by private parties. Below is a table showing the adopted programmes related to housing that can be found in the four cities:

Table 5.1: Available programmes related to housing which target the poor⁸⁹

Programmes Cities	National Programmes		Illegal Settlement Clearance	Local Programmes			
	Rented Public Housing	Slum Improvement		Rented Public Housing	Re-location	Re-Arrangement	Slum Upgrades
Jakarta	X	X	X	X	X		X
Surabaya	X	X	X				X
Solo	X	X	X		X	X	X
Jogjakarta	X	X	X				X

From the information provided in table 5.1, it can be concluded that although several programmes related to housing are locally available, only two programmes target the poor who do not have access to adequate houses. These programmes are the development of rented public housing and the relocation programmes.

Slum upgrading programmes are designed for people who already have a house, but their house is inadequate. Nationally, Indonesia categorises ‘inadequate houses’ based on several factors, such as the state of the roof, floor, walls, ventilation, and sanitation system.⁹⁰ If dwellings fulfil the specific requirements mentioned in the rules, the owners of the houses are entitled to take advantage of the housing upgrade programmes. The money provided for such programmes ranges from 5,000,000 – 10,000,000 IDR (330 – 660 Euros), and depends on who provides the fund - either the national or the local government.⁹¹

Illegal settlement clearance targets people living on the riverbanks or other state land, who are then relocated or moved on to formal settlements. The settlements that the people previously occupied were prone to flooding, which is why the local governments moved them to a different location. The two programmes are found in two cities, Jakarta and Surakarta. In

⁸⁸ Interview with officials of the Agency of community empowerment of Surakarta and from the Social Department of Yogyakarta, 11 October 2016 and 13 October 2016 respectively.

⁸⁹ Based on interviews with the officials of those five cities. The transcription of the interviews are in the possession of the author in the original language (Bahasa Indonesia).

⁹⁰ See Regulation of the Ministry of Public Work and Public Housing No 33 /PRT/M/2016 on Technical Guidance on the Implementation of Special Fund on Infrastructure.

⁹¹ Interview with officials of the Agency of community empowerment of Surakarta and from the Social Department of Yogyakarta, 11 October 2016 and 13 October 2016 respectively.

these two cities, the respective local governments introduced two programmes, using two completely different approaches.

Initially, when the Jakarta government introduced the programme to the community, there was discussion about rearranging the informal settlements according to the way of life of the people living there⁹². However, a change in government followed. Joko Widodo, the previous governor, was elected as president, and his vice governor, Basuki Tjahya Purnama, was inaugurated as the Governor of Jakarta.⁹³ After a lengthy discussion, no agreement was reached between the government and the people. The government insisted that settlements on the riverbanks were illegal and should be eradicated, despite the fact that several inhabitants possessed proof of tenure of their land.⁹⁴ Evictions were carried out, and no compensation was given.⁹⁵ Several cases on the illegality of evictions were brought before the court, and other available mechanisms, yet the inhabitants were not satisfied with the results.

The government forcibly evicted people living on the riverbanks and moved them into storey houses, which were a bit too far from the original settlements, in some cases.⁹⁶ Living in formal settlements generated a big and sudden change for the community. Although several measures were introduced by the Jakarta government, such as providing school buses for the children, providing clean water, and setting up garbage collection, most people experienced great loss in terms of economy and the value of living in a community.⁹⁷

On the other hand, Surakarta followed a different approach.⁹⁸ Its government tried to discuss a way out with the community. In essence, the community did not mind being relocated as it always experiences a similar loss whenever the river is flooding. In this regard, the former mayor of the city, Joko Widodo (the current President of the Republic of Indonesia), empowered the community to look for alternative land in the area.⁹⁹ They discussed several possibilities, and the government provided financial assistance of 10,000,000 IDR, per household.¹⁰⁰ Therefore, the community found and bought plots of land in the sub-district of Mojosongo, then divided itself into a number of different households. Finally, they built a new settlement on legal land, without losing the bond of community.¹⁰¹

In 2010, a rearrangement programme was planned in Surakarta, when the city introduced the plan to rearrange settlements on the banks of the river which flows through the city, the River Pepe.¹⁰² Two programmes were found to be successful. The first was the

⁹² Interview with NGO Urban Poor Linkage and Yayasan Ciliwung Merdeka, Jakarta 10 September 2016 and 20 September 2016 respectively; see also Alldo Fellix Januardy and others, *Mereka Yang Terasing: Laporan Pemenuhan Hak Atas Perumahan Yang Layak Bagi Korban Penggusuran Paksa Jakarta Yang Menghuni Rumah Susun* (Lembaga Bantuan Hukum Jakarta 2016) 25.

⁹³ *ibid.*

⁹⁴ Leitner and Sheppard (n 22).

⁹⁵ *ibid.*

⁹⁶ E.D. Kusumawati, 'Between Public and Communal Interests: A legality Issue of Forced Evictions Occurred in Jakarta' (2018) 8 Indonesia Law Review 87.

⁹⁷ Fellix Januardy and others (n 92) 42-93.

⁹⁸ Interview with officials of the Agency of Community Empowerment of Surakarta, 11 October 2016.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² Interview with the officials of the Office of Public Works of Surakarta, 12 October 2016.

achievement of land registration and the beautification of the riverbanks.¹⁰³ The second was the development of rented terraced houses on River Pepe's banks.¹⁰⁴

In the first programme, the local authority realised that one of the settlement complexes near the riverbanks was not yet legal, although the inhabitants have lived there for generations. The settlers squatted ex-*Swapraja*¹⁰⁵ land, left behind by the Dutch in colonial times, which was not yet registered. Moreover, the settlers built some parts of their houses, such as the kitchen and bathroom, too close to the riverbank. These developments caused the river to silt due to household waste, and the riverbanks became a slum area. As a local regulation orders that riverbanks within 10 meters of the river should be emptied, the head of the district at that time asked the settlers to disassemble the buildings that were located on the riverbank, without compensation.¹⁰⁶ However, the district offered to help settlers in receiving land certificates.¹⁰⁷ The settlers agreed to do so, and duly received them.¹⁰⁸

Furthermore, several inhabitants lived as squatters on the riverbanks without a legal title. The local government built terraced houses so that people could live in adequate houses by renting them from the government. These houses are located in Saharjo Street and Raden Mas Said Street. The houses were built with local government budgeting in the form of shop houses, meaning that the ground floor can be used as a shop or small restaurant and the first floor can be used as a family house. The settlers were willing to move from their illegal settlements to these houses, due both to the discussions they had had with the local government and to the approach taken by the local government.¹⁰⁹

A programme that can be found in all cities is the development of rented public housing. Most rented public housing is built using national expenditure, in collaboration with local officials to provide construction sites - with the exception of Jakarta, where social corporate responsibility schemes from private parties are used, in addition to programmes from the national government.¹¹⁰ The idea is that when private parties build a hotel, malls, or luxury offices or apartments, they must set aside a certain budget (20 percent of the total project) for public spaces, such as city parks, playgrounds and public houses.¹¹¹ The location of public spaces developments must be decided in consultation with the local authority. All aspects (including infrastructure) built by private parties using this fund will become the local government's asset.¹¹² In Jakarta, this programme is quite successful in reducing local expenditure for public needs, and it has resulted in 14 towers of public housing and several

¹⁰³ Interview with the former head of sub-district of Setabelan, Surakarta, 20 October 2016.

¹⁰⁴ *ibid.*

¹⁰⁵ Ex *swapraja* land is the land that was given by the Mangkunegaran Palace to the Dutch Administrative power. And after the Independence, the land became state lands.

¹⁰⁶ Interview with the former head of sub-district of Setabelan, Surakarta (n 103).

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ Interview with the official of the Office of Public Works of Surakarta (n 102).

¹¹⁰ Interview with officials of the Technical Plan Division, Department of Housing and Building of DKI Jakarta, 19 September 2016 (currently, the department's name was recently changed into Department of Public Housing and Settlements).

¹¹¹ There is no local law regulating this practice, nevertheless several public spaces have been built with the SCR fund.

¹¹² Interview Jakarta (n 110).

other public areas.¹¹³ While the Jakarta government can use private funds to build public spaces, other local governments mostly rely on state expenditure, at both local and national levels.

In order to qualify for receiving such help from central government, local governments should be able to provide a minimum 3,000 m²¹¹⁴ - 5,000 m² of land for construction sites.¹¹⁵ They can then submit a proposal to the Ministry for the development of high-rise housing. With regard to this requirement, housing officials have expressed their concern about, and difficulty in finding, plots of land for public housing, particularly in cities which occupy smaller areas, such as Surakarta.¹¹⁶

The purpose of the rented storey housing is to improve the quality of life for people living in informal settlements, as part of an overall urban renewal strategy.¹¹⁷ It is also part of a strategy to tackle the problem of non-availability of land in big cities, and to improve the security of tenure for low-income groups.¹¹⁸ Some cities, such as Jakarta and Surakarta, have benefited from rented public housing, used to resettle people affected by eviction or a resettlement programme.

In addition to resettling people affected by development programmes, rented public housing generally targets lower income groups. However, local governments often set requirements for people who wish to access local programmes, such as the local residence card¹¹⁹, and such requirements expect the applicant to have a certain minimum salary.¹²⁰ In Surakarta, for example, the government requires that people should earn monthly salaries of between 750,000 IDR and 2.8 million IDR.¹²¹ In fact, many people living in slums do not have the required salaries, as most of them are informal workers.¹²² Therefore, this programme

¹¹³ Data gathered from the local government institution responsible for the development and maintenance of public housing, within field research conducted in 2016. The original data is in Indonesian.

¹¹⁴ There are variations in the minimum requirement for construction sites. For example, the Local Jakarta Regulation No. 1/ 2014 requires 3,000 m², while the guidance adopted by the Ministry of Public Works and Housing states a requirement of 5,000 m².

¹¹⁵ Direktorat Jenderal Cipta Karya, *Rusunawa: Komitmen Bersama Penanganan Pemukiman Kumuh*, (Kementerian Pekerjaan Umum, 2012) 27, <http://ciptakarya.pu.go.id/bangkim/old_file/v2/download/ebook/Buku_Rusunawa_2012.pdf?iframe=true&width=1400&height=650> accessed 10 February 2018.

¹¹⁶ Interview with the official of the Office of Public Works of Surakarta (n 102).

¹¹⁷ Direktorat Jenderal Cipta Karya (n 115) 21-22.

¹¹⁸ Direktorat Jenderal Cipta Karya (n 115).

¹¹⁹ 1) Jakarta: Governor Regulation No. 111/2014 on the Occupancy Mechanism for Rented Modest Multi-Storey Housing (*Peraturan Gubernur No. 111/2014 on Mekanisme Penghunian Rumah Susun Sederhana Sewa*); 2) Surabaya: Local Regulation No. 15/2012 and Local Regulation No 2/2010 on the Use of Multi Storey Housing (*Peraturan Daerah Kota Surabaya No. 2/2010 tentang Pemakaian Rumah Susun and No. 15/2012 tentang Perubahan Perda No. 2/2010*), and Mayor Regulation No 30/2013 on the Services for Usage of Multi-Storey Housing (*Peraturan Walikota Surabaya No. 30/2013 tentang Pelayanan di Bidang Pemakaian Rumah Susun*); 3) Yogyakarta: Local Regulation No. 2/2016 on Multi-Storey Housing (*Peraturan Daerah No. 2/2016 tentang Rumah Susun*), and Mayor Regulation No. 46/2016 on Guidelines on Impementing Local Regulation No. 2/2016 (*Peraturan Walikota Yogyakarta No. 46/2016 tentang Petunjuk Pelaksanaan Perda No. 2/2016*), and Mayor Regulation No. 44/2009, as amended by Mayor Regulation No. 55/2014 on the Management of Multi-Storey Housing owned by the Yogyakarta Municipality (*Peraturan Walikota Yogyakarta No. 44/2009 sebagaimana telah diubah dengan Peraturan Walikota No. 44/2009 sebagaimana telah diubah dengan Peraturan Walikota No. 55/2014 tentang Pengelolaan Rumah Susun Sederhana Sewa Milik Pemerintah Kota Yogyakarta*); 4) Surakarta: Local Regulation No. 7/2011 on Multi-storey Housing (*Peraturan Daerah No. 7/2011 tentang Rumah Susun*).

¹²⁰ See for example, Yogyakarta, Mayor Regulation No. 44/2009, as amended by Mayor Regulation No. 55/2014 *ibid*, art 10 (c).

¹²¹ Obermayr (n 2) 140.

¹²² *ibid*.

misses its target and supports only the lower-middle incomes, not the poorest group in the city.¹²³ This phenomenon can also be observed in Jakarta, where the tenants of subsidised housing are most likely to be from lower-middle income groups, who already possess cars.¹²⁴ This result is certainly unfair, as low-income groups are then put on a waiting list for living in subsidised housing provided by the government.

In light of the unclear and confusing regulations at the national level, particularly regarding the distribution of housing affairs between the national and local governments, as discussed in Section 5.3.1, local governments have adopted several programmes that allow people from low-income groups access to adequate housing. Although several weaknesses were found, such as the limitation provided by local governments that hindered several groups in accessing public housing, the efforts of local governments should be appreciated. In addition, there are several ways to improve the regulations and programmes in future, with the possibility of employing accountability in the field of human rights to housing, at both the national and local levels.

5.4 PRELIMINARY REFLECTIONS: EXISTING PROBLEMS AND CHALLENGES FOR IMPLEMENTING THE RIGHT TO ADEQUATE HOUSING IN INDONESIA

Based on the findings discussed in previous sections, the Indonesian government (at both central and local levels) intends to comply with its obligations relating to the right to housing. The intention is shown through several programmes and policies which have been adopted that relate to housing. Particular attention is given to low-income groups which cannot afford to buy houses or access to adequate housing. Several programmes have been adopted which facilitate this group in gaining better access to adequate housing.

In addition to the national government, as discussed in the previous chapter, local governments have responsibilities to respect, protect and fulfil the right to housing, as guaranteed in national legislation. In implementing these obligations, local governments often face challenges and difficulties, particularly relating to the paucity of resources. As it is understood, making housing or settlements available is not merely a matter of providing a building which has four walls and one roof. A house is much more than that. Several requirements need to be considered if local government is planning to develop housing for settlements; these include proper city planning, available land, and sufficient funding for construction. In building adequate settlements, local governments cannot stand alone, and it needs to cooperate with private actors. Private actors can assist local government, especially in terms of funding and building.

As housing types in Indonesia are both formal and informal, local governments tend to target the two types. Based on the programmes discussed in previous sections, there are several

¹²³ *ibid* 141.

¹²⁴ Nursita Sarim, "Djarot: Infonya Ada Penghuni Rusun yang Sudah Punya Mobil" (Kompas.com, Jakarta 25 September 2017) <<http://megapolitan.kompas.com/read/2017/09/25/13065431/djarot-infonya-ada-penghuni-rusun-yang-sudah-punya-mobil>> accessed 10 February 2018; see also _____, "Gubernur Djarot Minta Penghuni yang Punya Mobil Dikeluarkan Dari Rusunawa, Ini Alasannya" (Warta Kota, Jakarta 25 September 2017) <<http://wartakota.tribunnews.com/2017/09/25/gubernur-djarot-minta-penghuni-yang-punya-mobil-dikeluarkan-dari-rusunawa-ini-alasannya>> accessed 10 February 2018.

policies aimed at improving the adequacy of informal housing, both in terms of a building's condition and its environs, although formal housing is preferred by the current housing development policy.

The government is, for example, inclined toward construction of multi-storey public housing for the resettlement of people living in illegal settlements. The arrangement of such public housing is formal, and it is directly monitored by the government. Current developments show that private developers build private houses in a more organised way, compared to informal settlements, meaning that facilities and essential services in private housing are immediately made available for the inhabitants.

In providing general housing services, governments faced several challenges. Such problems can be perceived in housing policy, from its adoption to its implementation. Government officials have acknowledged in interviews that several hindrances exist. These include the lack of funding experienced by one local government and a lack of officers to monitor local programmes.

Based on the interviews and a further investigation on housing regulations, policies and programmes, the author has discovered several drawbacks that might hinder the fulfilment of the right to housing in Indonesia. These pitfalls are the most apparent, and are experienced by all the local governments studied in this research:

1. Land availability and access to urban land
2. Discrimination against migrants seeking to access housing
3. Eviction, due to development programmes
4. Accountability, as a process for the right to housing

All of these challenges will be discussed in detail in Chapters 6, 7, 8 and 11, respectively.

CHAPTER 6

LAND AVAILABILITY AND THE OBLIGATION TO FULFIL THE RIGHT TO ADEQUATE HOUSING

6.1 INTRODUCTION

This chapter evaluates the extent to which the Indonesian Land Law influences land availability for settlements and the security of housing tenure. The aims of this chapter are threefold. First, as discussed in Chapter 5, land availability becomes one of the most pressing issues in providing adequate settlements, particularly for the construction of public housing. This chapter argues that the practice of land tenure influences the land availability for settlements as well as the security of tenure of the settlements. It explores the land tenure, as practised by the four local governments, and examines the intersecting issues between the land tenure and housing tenure.

Second, this chapter aims to further analyse the relation between land availability and the human right obligation to fulfil the right to adequate housing. Land availability is considered as a primary requirement for housing development, particularly for public housing for the low-income groups. Ensuring land availability for settlements is a precondition for fulfilling one of the human rights obligations related to the right to housing that should be fulfilled, particularly for the vulnerable low-income groups. The third purpose is to explore the possibility of increasing land availability under the current agrarian law regime. This should enable the local governments to provide more accessible public housing for the poor.

In order to achieve the three aforementioned aims, Section 6.2 will provide a short description of the land tenure in Indonesia, as it closely relates to the issue of housing tenure. Land tenure also influences the housing policies of the local governments. Moreover, it will provide an understanding that the land tenure problem will also limit the availability of housing for the poor and will affect the security of housing tenure in general. Furthermore, Section 6.2.2, will provide data on the practices of land tenure of the four cities. Section 6.3 emphasises the converging issue between land tenure and housing tenure in Indonesia; then Section 6.4 provides the framework for ensuring land availability in relation to the human rights obligations of the government. The final part of Chapter 6 proposes several possible means to improve the availability of land to house the poor.

6.2 THE INDONESIAN LAND LAW AND ITS TENURE SECURITY

Land tenure is considered as an essential feature in society. Its existence is influenced by social, political, legal, historical, as well as economic structures of society.¹ On the issue of housing

¹ David Palmer and others, 'Towards Improved Land Governance' (*FAO*, 2009) 11 <<http://www.fao.org/3/a-ak999e.pdf>> accessed 13 February 2018; see also Geoffrey Payne and Alain Durand-Ilasserve, 'Holding On : Security of Tenure-Types, Policies, Practices and Challenges' (OHCHR 2012)

tenure, several studies show that the land tenure and land policies adopted by governments are crucial, as these policies determine the access to a piece of land for settlements and the living conditions of inhabitants.² Land tenure security is believed to be a useful tool for reducing poverty, particularly among the poor and squatters.³ Although other factors, such as housing policies and the adequate planning of the city and settlements, will also influence the housing tenure and living conditions of the society; it is undisputable that land tenure security is critical.

This section provides a historical background of the Indonesian land tenure under the Basic Agrarian Law (BAL) of 1960, and the particularities of the land tenure practices in four cities.

6.2.1 The Indonesian land tenure from history to current arrangement

Land tenure in Indonesia is a long-standing problem and it is indeed a challenge to solve. The complex Indonesian land law can be traced back to the colonial era, when the Dutch ruled the archipelago. In that time, the Dutch separated the law for Dutch people, foreigners and native Indonesians. The separation of the applicable law was also the case for the land regulation. The Agrarian Law codified in the Civil Code (*Burgerlijk Wetboek*) and the Agrarian Law of 1870 (*Agrarische Wet*) follow the dualist system, which distinguished between registered land under European title and unregistered land.⁴ The strongest form of tenure security could be achieved through registration procedures. Unregistered land held a lesser degree of security of tenure than the registered land parcels. There were several land rights recognised in the Dutch agrarian law applicable during that time, for example:⁵

- a) Ownership (*eigendom – hak milik*) land rights which can only be acquired by foreign landlords (Dutch and other European Descendants and other foreigners)
- b) Private ownership (*eigendom particulier- tanah pertikelir*): (1) with landlords' rights (*landheerlijke rechten - hak tanah kongsi*) and (2) adat/communities land (*hak tanah usaha*). The private ownership with landlords' rights can be used by other individuals under a rental system. *Adat* land can be in the form of villages' land or communities'

<<http://www.ohchr.org/Documents/Issues/Housing/SecurityTenure/Payne-Durand-Lasserve-BackgroundPaper-JAN2013.pdf>> accessed 13 February 2018.

² See for example Carlos Roberto Hernandez Velasco, 'The Role of Land Tenure in Housing the Urban Poor' (D Phil thesis, University of Glasgow 2013); see also Johnie Kodjo Nyametso, 'The Link between Land Tenure Security, Access to Housing, and Improved Living and Environmental Conditions: A Study of Three Low-Income Settlements in Accra, Ghana' (2012) 66 *Norsk Geografisk Tidsskrift* 84.

³ World Bank Staff and Klaus Deininger, *Land Policies For Growth And Poverty Reduction* (World Bank Publications 2003), see also Paul van Asperen and Jaap Zevenbergen, 'Can Lessons Be Learnt From Improving Tenure Security in Informal Settlements?' (European Network for Housing Research 7th International Conference on Sustainable Urban Areas, Rotterdam, 2007).

⁴ Adriaan Bedner, 'Indonesian Land Law : Integration at Last? And for Whom?' in John F McCarthy and Kathryn Robinson (eds), *Land and Development in Indonesia: Searching for the People's Sovereignty* (ISEAS–Yusof Ishak Institute 2016) 66.

⁵ See for example Peter Boomgard, 'Land Rights and the Environment in the Indonesian Archipelago, 800-1950' (2011) 54 *Journal of the Economic and Social History of the Orient* 478; Bedner (n 4).

owned land that has been managed and cultivated by ethnic communities for generations.⁶

c) *The Dutch state land (Domein van de Staat – tanah negara).*

With independence, Indonesia inherited this dualist system of land law. Land parcels with *Eigendom* rights, such as plantations, were abandoned by the owners and then squatted by Indonesians. This resulted in a discrepancy in the data of real-land use, rules and the state registration system.⁷

To deal with this discrepancy, the government of Indonesia introduced the Basic Agrarian Law (BAL) in 1960 which aimed to unify the land law system.⁸ To achieve unification, land parcels had to be registered to formalise their legal status. This would protect owners from unjust evictions or land grabs. It provides individuals and certain legal entities with an ownership title to their land.⁹ To receive a title, the BAL requires a registration procedure that includes the mapping and survey of the parcels.¹⁰ To implement the BAL, new regulations had to be enacted, which, however, were inconsistent with the BAL itself and resulted in several problems¹¹ and land conflicts.¹²

The BAL provisions cover non-forested land, which only consists of 30 percent of all Indonesian land.¹³ 70 percent of the total land in Indonesia is categorised as forested land, which is governed by the Ministry of Forestry.¹⁴ According to the BAL, the national government has the competence for land affairs.¹⁵ The land's management and administration is mandated to a special institution, namely the National Land Agency (*Badan Pertanahan Nasional – BPN*).¹⁶ According to Presidential Regulation No. 63/2013 the BPN is a non-departmental agency assigned to manage land administration, both at national and at the provincial/local level.¹⁷ This task has always been centralised within the local governments.

The national government have decentralised several land affairs, related to the land use, to the local governments' territories.¹⁸ These affairs include:¹⁹ (1) issuing location permits for new

⁶ See details in Law No. 1/1958 on the Elimination of Private Ownership Lands (*Undang-Undang No. 1/1958 tentang Penghapusan Tanah Tanah Partikelir*) SG 2/1958; see also Luthvi Febryka Nola, 'Sengketa Tanah Partikelir' 2013 (4) 2 Negara Hukum 183.

⁷ Bedner (n 4) 65.

⁸ Law No. 5/1960 on Basic Agrarian Law (*Undang-Undang No. 5/1960 tentang Peraturan Dasar Pokok-Pokok Agraria*) SG 104/1960 (BAL), the section on Consideration.

⁹ Daniel Fitzpatrick, 'Dispute and Pluralism in Modern Indonesian Land Law' (1997) 22 Yale Journal of International Law 171, 188-189.

¹⁰ BAL (n 8) art 19.

¹¹ Daryono, 'Transformation of Land Rights in Indonesia: A Mixed Private and Public Law Model' (2010) Pacific Rim Law and Policy Journal Association 417.

¹² Martin E Gold *et al*, 'Indonesian Land Rights and Development' (2014) 28 Columbia Journal of Asian Law 41, 57-58; Achmad Sodiki, *Politik Hukum Agraria* (Konstitusi Press 2013) 29-46.

¹³ Klaus Deininger, Harris Selod, and Anthony Burns, *The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in the Land Sector* (World Bank Publications 2011) 108.

¹⁴ *ibid*.

¹⁵ BAL (n 8) art 2.

¹⁶ Prior to the BPN, the institution has experienced changes both on its names and the Ministry.

¹⁷ Presidential Regulation No. 63/2013 on National Land Agency (*Peraturan Presiden No. 63/2013 tentang Badan Pertanahan Nasional*) SG 155/2013, art 1.

¹⁸ Presidential Decree No. 34/2003 on National Land Policies (*Keputusan Presiden No. 34/2003 tentang Kebijakan Nasional di Bidang Pertanahan*) SG 60/2003.

¹⁹ *ibid* art (2).

buildings, (2) providing land for development, (3) solving disputes about cultivated land, (4) settling disputes on compensation for land affected by development programmes, (5) determining the subjects and objects of land redistribution and providing compensation for the excess of maximum land ownership and absentee land,²⁰ (6) settling communal land disputes (7) deciding the use of abandoned land, (8) providing permits for land clearance, and (9) planning the land-use within the municipality. The tasks given to local governments are extensive, particularly in relation to solving existing land disputes as well as the planning for the future use of land. However, the national government did not give the local governments freedom when implementing the mandates. Instead, the national government authorised the BPN to adopt standards and guidance for the implementation of the local governments' tasks.²¹ This provision shows that the land administration powers are still in the hands of the central government. Thus, the task of land administration is still in the hands of the BPN, so most of the local governments' tasks still rely on the nationalised administration.

The land administration for the whole of Indonesia is indeed a daunting task. Although the BPN has local representatives at each municipal level, to record all data on land administration, the data is not always updated.²² Only 48.61 percent of all non-forested land parcels had been registered in 2014 and 44,092,035 land parcels remain unregistered.²³ In its Strategic Plan for 2015-2019, the Ministry of Agrarian and Spatial Planning has set a target to register 9 million land parcels in 2019.²⁴ This data shows that the primary aim of the BAL, land registration, has not been completely achieved after more than 50 years, or after the 200 years since the Dutch established land registration in the Dutch East Indies Territories.²⁵

In addition to forested land management, which is strictly under the control of the state, the BAL recognises several types of land tenures. These tenures are: *hak milik* (proprietary or ownership rights); *hak guna usaha* (right to cultivate/commercial use right); *hak guna bangunan* (right to construct or right of buildings); *hak pakai* (right of use); *hak sewa bangunan* (right of building lease); *hak ulayat* (customary/communal rights); *hak memungut hasil hutan dan membuka lahan* (right to collect forest products and right to open land—land clearance); and others rights, such as the right to crop sharing and the right to stay on one's land.

²⁰ The BAL has set an upper limit to land ownership (see Articles 7 and 17 BAL). It also aims to avoid absentee land which owners may only own land located in sub-districts of their residence or located in the border with other sub-districts. Such limitation aims to the owners should actively utilise their land (see art 10 BAL). The aim to avoid land absentee is proven to be ineffective, due to difficulty to proof the ownership of land located in other districts. See detail in Ulrich Löffler, *Land Development in Indonesia* (GTZ, Deutsche Gesellschaft für Technische Zusammenarbeit 1996)

²¹ Presidential Decree No. 34/2003 (n 18) art (3).

²² Dianto Bachriadi and Gunawan Wiradi, 'Land Concentration and Land Reform in Indonesia: Interpreting Agricultural Census Data 1963-2003' in Anton E Lucas and Carol Warren (eds), *The State and Agrarian Conflict in Indonesia* (Ohio University Press 2013) 69.

²³ Badan Pertanahan Nasional, 'Laporan Kinerja Tahun 2014' (2014)

<<http://www.bpn.go.id/Portals/0/perencanaan/dokumen-publik/LAPORANKINERJA2014.pdf>> 6 accessed 18 January 2018>.

²⁴ Kementerian Agraria dan Tata Ruang/ Badan Pertanahan Nasional, 'Laporan Kinerja Tahun 2015' (2015) <http://www.bpn.go.id/Portals/0/perencanaan/dokumen-publik/LKj_Kementerian_ATR_2015.pdf> 23 accessed 18 January 2018>.

²⁵ van der Eng P, "After 200 Years, Why Is Indonesia's Cadastral System Still Incomplete?" in John F McCarthy and Kathryn Robinson (eds), *Land and Development in Indonesia: Searching for the People's Sovereignty* (ISEAS-Yusof Ishak Institute 2016).

The ownership right entails absolute ownership of land parcels. It is hereditary, and only Indonesians can possess ownership.²⁶ This right is the strongest and most complete ownership of all rights acknowledged in the BAL.²⁷ The holders of this right can rent out or sell their land to individuals or private companies for various purposes, such as housing. In other words, the ownership right as the primary right can be the source of other secondary rights enshrined in the BAL.²⁸

The right to cultivate is the right to rent state-owned land for a maximum of 25 years for individuals and 35 years for companies.²⁹ This right is specifically designed to avail land parcels for farming, fishing and planting industries.³⁰ The right of building is a right of individuals or legal entities to build and to own buildings on land parcels that are not owned by them.³¹ This right has a time limit of 30 years and can be prolonged for a maximum of another 20 years.³² Government Regulation No 40/1996 stipulates that a further extension for the same period of time is possible if the owners of the plots agree to the request.³³

The next right is the right to use land owned by the state or an individual for a specific purpose.³⁴ This right can be granted to individuals (both Indonesians and foreigners) or entities (both Indonesian and foreign)³⁵ for a defined period subject to the agreement between the landowner and the “*hak pakai*” holder. The state limits the use of state-owned land for a period of 25 years, and it is extendable for a maximum of 25 years.³⁶ Another right enshrined in the BAL is the right of building lease that allows individuals who do not and cannot own land parcels to lease a property built on land parcels owned by other individuals.³⁷

The BAL recognises land rights based on “*adat*”³⁸ laws that exist in many of Indonesia’s regional communities, as long as such rights are not in contradiction with the BAL.³⁹ It is important to note that *adat* laws may vary between these regional communities. In the development of agrarian law in Indonesia, the requirement of registration of land parcels is not in line with the communal spirit manifested in the *adat* land rights, and can be the source of

²⁶ BAL (n 8) arts 20-21.

²⁷ Gold et al n (12).

²⁸ Fitzpatrick, (n 9)184.

²⁹ BAL (n 8) arts 28 and 29.

³⁰ *ibid* art 28.

³¹ *ibid* art 35.

³² *ibid*.

³³ Government Regulation No. 40/1996 on Commercial Usage Rights, the Right of Building and the Right of Use Rights on Lands (*Peraturan Pemerintah No. 40/1996 tentang Hak Guna Usaha, Hak Guna Bangunan dan Hak Pakai atas Tanah*) SG 58/1996, art 25.

³⁴ BAL (n 8) art 41.

³⁵ *ibid* art 42.

³⁶ Gold et al (n 12) 50.

³⁷ BAL (n 8) art 44.

³⁸ The term *adat* has been used extensively in foreign literature on the sociology and origins of Indonesian society. It refers to a community or ethnic group sharing specific norms and value, which characterise them and differentiate them from other communities. Such communities have lived in a particular area of land for generations. *Adat* laws refer to norms and values that set to organise the live of the community. *Adat* law may differ from one community to one another and have been used by the community far before Indonesia exists. These laws include land, marriage and inheritance, as well as criminal law; and sometimes form in either written texts or unwritten. Several of the *adat* laws are still applicable in several Indonesian ethnic communities even though contemporary law has existed in the country. See details in B. Ter Haar, *Adat Law in Indonesia (trf)* (Institute of Pacific Relations 1948); see also Fitzpatrick (n 9).

³⁹ BAL (n 8) art 5.

land conflicts, particularly in case of development projects, such as dams or highways.⁴⁰ In addition, the BAL protects the right to collect forest products and the right to open land.⁴¹ This right usually given to “*adat*” communities living close to forests.

The BAL is considered as a *lex generalis* as the rights enshrined in it need some laws functioning as *lex specialis* to regulate all of the land rights in more detail. Such regulation includes government regulations, presidential decrees, ministerial regulations from the Ministry of Home Affairs to the Ministry of Agrarian Affairs and Spatial Planning and the head of BPN.

Although the BAL regulates the full protection of land rights as individual property and aims to achieve unification in land management, the development shows that the aims are not yet achieved.⁴² Prior to the adoption of the BAL, the land management in Indonesia follow a dualism system, indicating that two land arrangements exists. These arrangements are land rights recognised by the old Dutch Agrarian law for the Dutch Indies i.e. land registered under European title (Western rights) and the non-registered *adat* land.⁴³ As unification has not been fully achieved, this dual arrangement still exists. As most of the land registered under the European title has been converted into rights under the BAL, the dualism now divides land arrangements between land registered under the BAL and the land under *adat* rights. The BAL itself aims to register all the *adat* land under the BAL, however it has not achieved such an aim. While several *adat* rights can be converted into the statutory rights under the BAL, some are not compatible with the individual proof requirement.⁴⁴ This can be understood that the BAL requires a proof of ownership, for example receipt of Ground tax or tax of Agricultural products,⁴⁵ while *adat* lands are governed by principles of shared values applicable in a certain community, which lack evidence of individual ownership, and therefore cannot be registered.⁴⁶

Current development shows that there is a growing third category of non-registered, occupied (or squatted) parcels,⁴⁷ in which people occupy state land, without any proof of title or any licence. This leads to challenges with regard to urban land in the cases of eviction and infrastructural development.

Most of the unregistered plots of land do not have a certificate for a proof of registration under the BAL. The owners of the land parcels hold “land-rent receipts” received during the colonial era (*tanah girik*), which are accepted as formal proof before the courts in land disputes.⁴⁸ Other landowners have receipts of land and building tax (*pajak bumi dan bangunan-PBB*).⁴⁹ With the combination of other official letters, such as a *Surat Keterangan Tanah* (SKT-letter of land clarification) from the head of districts, the tax receipt can be used to prove the

⁴⁰ Fitzpatrick (n 9) 188-193.

⁴¹ BAL (n 8) art 46.

⁴² Michael Leaf, ‘Land Rights for Residential Development in Jakarta, Indonesia: The Colonial Roots of Contemporary Urban Dualism’ (1993) 17 International Journal of Urban and Regional Research 477 479.

⁴³ Bedner (n 4) 66.

⁴⁴ See Fitzpatrick (n 6).

⁴⁵ BAL (n 8), arts II and VI of the Conversion Provision; see also Regulation of the Minister of Agrarian Affairs No. 2/1960, SG 2086/1960 and Regulation of the Minister of Agriculture and Agrarian Affairs No. 2/1962, SG 2508/1962.

⁴⁶ Fitzpatrick (n 9).

⁴⁷ Bedner (n 4) 66.

⁴⁸ *ibid* 67.

⁴⁹ This receipt is given by the local authorities as a proof that the inhabitants pay taxes to the municipalities and thus they are entitled to basic services provided by the government. This type of receipts is not known under the BAL and is not recognised as a proof of ownership.

ownership of land.⁵⁰ The plots are not yet registered under the BAL; however, the owners have proof of ownership under the customary law. These proofs of ownership can be accepted for registration if there is no other party to claim the plots. If another party claims the land, the court should decide which party has the right.

Therefore, based on the status of land registration as discussed in the previous paragraph, there exist several categories of land in Indonesia:⁵¹ (1) land registered under the BAL; (2) individual *adat* land with a tax receipt and/or SKT; (3) unregistered *adat* land (individual or communal); (4) occupied land with a tax receipt (*girik*) and/or SKT ('administratively registered', occupied land); and (5) unregistered occupied land (informal tenure).

The practice of occupied land with a *Girik* and/or *SKT* still exists, for example in rural areas. Land transactions are acceptable with the *SKT* and tax receipts. On the other hand, in urban areas, although this practice exists in the case of eviction or land acquisition, compensation will only be given to the occupants of BAL-registered land, with little to no compensation given to those who do not have any evidence of ownership of the land. The variations on the status of land rights has brought several challenges in providing housing in urban areas, as the availability of land and the clarity of land tenure are the main requirements for settlements to be securely established.

It can be concluded that the Indonesian land registration still adopts a dualist policy, i.e. land that registered under the BAL and the land regulated under the *adat* law.⁵² The BAL itself could not overcome this administrative dualism⁵³ and how *adat* land is transferred to individuals remains unclear.⁵⁴ The central government holds the authority of the land tenure and this authority has never been fully delegated to local governments.⁵⁵ Meanwhile, local governments face challenges in providing land for settlements in their respective regions due to the lack of registration data, for example if the local governments need to provide land for a public housing settlement project conducted either by the national government or by the local governments themselves.

⁵⁰ Gustaf Reerink, 'Tenure Security for Indonesia's Urban Poor: A Socio-Legal Study on Land, Decentralisation, and the Rule of Law in Bandung' (D Phil thesis, University of Leiden 2011) <https://openaccess.leidenuniv.nl/bitstream/handle/1887/18325/Nieuwste_pdf_Tenure_Security_bijdruk_binnenwerk_met_omslag.pdf?sequence=1> 105.

⁵¹ Bedner (n 4) 67.

⁵² Delik Hudalah, Yunie Nurhayati Rahmat and Tommy Firman, 'Housing Low- and Middle-Income Households: Land Development and Policy Practice in Two Indonesian Cities' in John F McCarthy and Kathryn Robinson (eds), *Land and Development in Indonesia: Searching for the People's Sovereignty* (ISEAS–Yusuf Ishak Institute 2017).

⁵³ See for example Leaf (n 42); see also Bedner (n 4).

⁵⁴ J Soedarjanto, 'Perspektif Penguasaan Tanah Di Indonesia: Disarikan Dari Kajian ILAP (Indonesian Land Administration Project)' (2007) *Bulletin LMPDP Land* 8 <<http://tataruangpertanahan.com/pdf/pustaka/majalah/14.pdf>> accessed 18 January 2018.

⁵⁵ During the beginning of decentralisation period, around 1991, there was an attempt to decentralise the land administration to the city level alongside with others affairs; however the land administration was retained back to the Central government. See for detail in Elita Rahmi, 'Tarik Menarik Antara Desentralisasi Dan Sentralisasi Kewenangan Pemerintah Daerah Dalam Urusan Pertanahan' (2009) 16 *Jurnal Hukum* 137; see also Paavo Monkkonen, 'Urban Land-Use Regulations and Housing Markets in Developing Countries: Evidence from Indonesia on the Importance of Enforcement' (2013) 34 *Land Use Policy* 255 <<http://dx.doi.org/10.1016/j.landusepol.2013.03.015>> accessed 18 January 2018.

6.2.2 The land tenure as practiced in four cities

Land tenure for settlements in Jakarta, Surabaya, Yogyakarta and Surakarta is complicated and challenging. All of the housing officials that were interviewed stated that land availability is a major hindrance in providing public housing for settlements.⁵⁶ These four cities each have their own particularities; Jakarta as a metropolitan city, Surabaya still possesses and uses *domein verklaring* for its land tenure, and most of Yogyakarta's and Surakarta's land plots are under the royal domains.

The national land tenure based on the BAL is recognised in these four cities. Three of the five types of land tenure that are generally found in Indonesia also exist in Jakarta, *i.e.* unregistered land under the *adat* law (in the form of *girik* and *garapan*), that is administered by the *Kelurahan*,⁵⁷ land plots registered under the BAL and unregistered occupied land (informal tenure).⁵⁸ In 1993, it was noted that almost all land parcels in Jakarta's '*kampungs*'⁵⁹ were unregistered.⁶⁰ Then, after the government adopted programmes on land registration, such as the Land Administration Project in 1991 and the Land Management and Policy Development Project in 2004, the amount of land registered under various titles such as the ownership right, the right of use and the right of building, has increased in the *kampungs*.⁶¹ Following such projects, the *kampungs* received recognition from the government; thus, they are considered as informal legal settlements.⁶² The third type, as discussed by Adriaan Bedner *i.e.* informal tenure, such as squatters on state's lands or private lands, also exists in Jakarta's *kampungs*.

In addition to the *kampung* settlements, Jakarta is infamous for its illegal settlements. The categorisation of illegal settlements began in 1988, when the Jakartan government adopted a public order regulation which prohibited people from settling and building on streets, within ten meters of rivers and other water bodies, in parks and green spaces, along railroad tracks, and under flyovers and bridges. This public order was revised in 2007 but without any significant changes. The illegality of settlements, that violate the public order regulation, has become a legitimate reason for the Jakartan government to evict thousands of inhabitants.⁶³

Due to the massive urbanisation and the increasing demand for housing, private developers have built millions of houses and apartments. This situation has resulted in land speculators offering the land to developers. Many people sell their land parcels or agricultural land to

⁵⁶ Interviews with housing officials in four cities Jakarta, Surabaya, Yogyakarta and Surakarta, 19 September, 5 October 2016, 13 October 2016, 12 October 2016 respectively.

⁵⁷ *Kelurahan* is the smallest system of governance and the closest local government to the society. In the hierarchical position of the Indonesian Governance system. *Kelurahan* is located under the municipalities.

⁵⁸ Helga Leitner and Eric Sheppard, 'From Kampung to Condos? Contested Accumulations through Displacement in Jakarta' (2017) *Environment and Planning A* 1.

⁵⁹ Generally, a *kampung* is an informal urban settlements in Indonesia which has unique characteristics due to heterogenous inhabitants and traditional values, which were brought by the inhabitants coming from different areas of Indonesia. In the literature on the urban development, *kampungs* are often perceived as highly densely populated settlements that lack basic infrastructure. See details in Shuji Funo, Naohiko Yamamoto and Johan Silas, 'Typology of Kampung Houses and Their Transformation Process-- A Study on Urban Tissues of an Indonesian City' (2002) 1 *Journal of Asian Architecture and Building Engineering* 193.

⁶⁰ Leaf (n 42).

⁶¹ Leitner and Sheppard (n 58).

⁶² See the category of settlements in Indonesia in Chapter 5.

⁶³ See for example E.D. Kusumawati, *Between Public and Communal Interests: A Legality Issue of Forced Evictions Occurred in Jakarta* (2018) 8 *Indonesia Law Review* 87.

developers. This contributes to the reduction of the number of informal legal settlements. This rapid development has changed the face of Jakarta into a city full of high-rise buildings and formal settlements. Slum dwellers were excluded from the development of urban areas; hence, they remain living with the informal status and insecurity of tenure.⁶⁴

Surabaya has a different story. In the colonial era, Surabaya was also an important city, as a business hub located in the East of Java Island. Many foreigners, i.e. Dutch and Chinese, lived there. Based on the Agrarian Law, these foreigners were entitled to own land parcels under *Eigendom recht*. When Indonesia gained independence, the land parcels were abandoned. These land parcels, with *ex-eigendom rights*, automatically changed into state-controlled land under the BAL. The national government mandated the local government to manage the *ex-eigendom* land. While other types of land tenure have been converted into the rights recognised under the BAL, the *ex-eigendom* land presently still exists under the possession of the local government.

Most land plots in Surabaya, which totals around 1496 hectares, are state-controlled.⁶⁵ More than 50 per cent of the land has been used for settlements under the usage rights.⁶⁶ The residents hold a licence or certificate to use the land, namely *Surat Ijo* (Green Letter) or *Ijin Pemakaian Tanah – IPT* (Permission to Use Land). The residents of a settlement are considered to be tenants that owe a certain amount of money (retribution) annually to the Surabaya municipality. In 2014, around 46,600 land parcels, totalling 831.9 hectares, are under the IPT.⁶⁷

There have been several cases involving this type of certificate where the holders cannot convert their occupation of the land into ownership rights for decades, although such conversion is possible under *Peraturan Daerah (Perda - Local regulation) No.16/2014 on the Discharge of Land controlled by the Surabaya Municipality*.⁶⁸ Several authors, such as Bismar Simbolon, believe that this IPT system is an extension of the principle of *domeinverklaring* stemming from the colonial era that is no longer in force in Indonesia.⁶⁹ While many municipalities, such as Malang, Bogor, Bandung and Jakarta, had successfully transferred the *eigendom* right to individual rights under the BAL,⁷⁰ Surabaya still maintains such a right that affects its inhabitants' land tenure.

There are also cases in Surabaya where people have made a tacit agreement with the branch office of the National Railway Company (*Kereta Api Indonesia Persero – PT. KAI*) to be able to stay on the company's land by paying a monthly contribution to the company.⁷¹ Many of them have lived there for generations and built permanent houses. Settlements under such agreement can also be found in other cities, such as Jakarta, Yogyakarta and Surakarta. These agreements are generally based on mutualism, meaning that while the company's lands are its assets, it does not make use of it yet; therefore it allows the people a place to stay. Several

⁶⁴ Abidin Kusno, 'Power and Time Turning: The Capital, the State and the Kampung in Jakarta' (2015) 19 International Journal of Urban Sciences 53; Abidin Kusno, 'Housing the Margin: Perumahan Rakyat and the Future Urban Form of Jakarta' (2013) Indonesia 23.

⁶⁵ Sukaryanto, 'Conflict over Landownership in the Postcolonial Era: The Case of Eigendom Land in Surabaya' (2017) 6 Southeast Asian Studies 63.

⁶⁶ Sukaryanto *ibid*.

⁶⁷ Dinas Pengelolaan Bangunan dan Tanah Kota Surabaya, *Buku Saku* (Surabaya 2017) 12.

⁶⁸ Surabaya, *Peraturan Daerah No. 16/2014 tentang Pelepasan Tanah Aset Pemerintah Kota Surabaya*.

⁶⁹ Bismar Simbolon *et al*, *Surat Hijau di Kota Surabaya, Provinsi Jawa Timur* (Sekolah Tinggi Pertanian Nasional/STPN 2008); see also Sukaryanto (n 65).

⁷⁰ Sukaryanto (n 65) 84.

⁷¹ Interview with lawyers from Surabaya Legal Aid Institute, 3 October 2016.

regulations have been adopted which succeeded in making the agreements between the PT KAI and its tenants are secure.⁷² Nevertheless, the usage of the land is subject to a clause “as long as the company does not use it, the people may stay.”

The other two cities, Yogyakarta and Surakarta, have special arrangements regarding land ownership. In these cities, two royal courts exist. While Yogyakarta hosts Sultanate (King) Palace and *Paku Alaman* Palace, Surakarta hosts *Kasunanan* (King) Palace and *Mangkunegaran* Palace. These palaces existed long before the colonial powers acquired the islands. While the King of Surakarta (the *Sunan*) has no political power in the modern government and functions as a cultural symbol, the King of Yogyakarta (the *Sultan*) is an exception.

The Sultan of Yogyakarta serves two functions, i.e. as the head of the palace and the head of the province (Governor) of *Daerah Istimewa Yogyakarta* (DIY). The DIY province has a broader territory than the city of Yogyakarta that includes several municipalities in the region. The Governor’s position is hereditary monarchy, and it is a lifetime position. Such an arrangement is derived from the national law on this special province. The newest law that governs this so-called ‘monarchy inside a republic’ is Law No. 13/2012.⁷³ However, this section will not discuss the reasoning behind this unique arrangement. Instead it will discuss the consequences of the position in relation to land titles in Yogyakarta.

The palaces, as the former centre of power, still possess a great number of land parcels in these two cities. After the BAL was introduced in the region in 1984, the palaces’ land administration continues to coexist under the *adat* law of the region. Yogyakarta was the last province to implement and accept the BAL. Most land in the Yogyakarta province belongs to the palaces in the forms of Sultanate Ground (SltnG) and *Pakualaman* Ground (PAG). Some land parcels were given to the government after independence; however, several problems still exist, for example the location, borders and the usage of the SltnG and PAG are not apparent.

People who wish to make use of the Palaces’ land can submit a request to the palaces via an *adat* institution called *Paniti Kismo*, who will deliver the licence to the applicants. The *Paniti Kismo* issues a certificate of usage (*kekancingan*) or *magersari* with some requirements such as not to build permanent houses, not to sell the licence and the obligation to return the land in case the King needs it. In short, no ownership title stems from the usage of SltnGs and PAGs. Although SltnGs and PAGs comprise a great number of land plots in the province and the city, there are also land parcels with ownership titles to which the BAL applies. Next to this, there are also the state lands that are not targeted for human settlements and have been used by the local inhabitants for decades. These lands have never been registered nor have the inhabitants been evicted from such land.

The city of Surakarta has similar arrangements to Yogyakarta, where its palaces (*Kasunanan* and *Mangkunegaran*) own the vast majority of land in the region. As there is no clear map indicating which land is owned by the city government and which is owned by the palaces, many land parcels, particularly in the Eastern part, were left abandoned. For decades, people

⁷² For example Keputusan Direktur Djendral Kepala Djawatan Kereta Api No 20912/BB/1962. This decision allowed the company to lease their asset to third parties in order to maximise their assets and provide additional income for the company.

⁷³ Law No. 13/2012 on the Specialities of the Special Region of Yogyakarta (*Undang-Undang No. 13/2012 tentang Keistimewaan Daerah Istimewa Yogyakarta*) SG 170/2012.

squatted the abandoned land and built permanent houses, and they did not register the land.⁷⁴ Some inhabitants then tried to register the land and have been successful in receiving certificates of ownership from the municipality.⁷⁵ Moreover, the city also faces illegal settlements through squatting in land parcels that were not planned for settlements and are prone to natural disaster, such as the regular floods in the rainy monsoon season. This squatting has resulted in the development of slums inside the city. The city also experiences extremely dense settlements in several areas such as in Semanggi Sub District. This densely populated settlement created an unhealthy living environment, with overcrowded houses and lack of sanitation, causing the government classifies the Semanggi Sub District as one of the slum areas in the city. In 2014, the slums' covered 467 hectares⁷⁶ of the total area of the city of 4400 hectares.⁷⁷

Based on the description above, challenging issues on Indonesian land tenure still exist. The dualist policy, complexity of law and regulations, the registration system and, on top of that, the lack of available data on land plots owned by the local governments, creates a complex problem. Land tenure problems will directly affect the tenure security of houses, particularly for the low-income dwellers.⁷⁸

As stated by the UN special Rapporteur on the right to housing, the insecurity of tenure can lead to forced evictions that further can lead to violation of human right to housing.⁷⁹ In certain cases secure tenure that is 'ambiguous', meaning that the tenure can be revoked by states or third parties, is also categorised as insecure.⁸⁰ The tenure insecurity affects the most vulnerable groups in the society, such as residents in informal settlements, migrants, jobless and landless people. Such conditions are experienced by the local inhabitants of the four cities, particularly those who live in illegal settlements or on other's lands, such as municipality, palaces, other individuals or even states' enterprises. Not only are the illegal settlers under constant threat of eviction, but the other categories may also be evicted as the result of an "ambiguous" secured tenure. Although they might have proof of right to stay, such as "*surat kekancingan*" for those who living in Palaces' lands or "*Surat Ijo*" for Surabaya residents, such proofs are not absolutely secured. The residents must give up their occupied lands if the owners need to use the lands. This situation, indeed, will cause them to lose their home. While there

⁷⁴ Registering land is somewhat complex and problematic in Indonesia as it takes months and even years as well as relatively costs a lot of money. See for example Leon Schreiber and Jordan Schneider, 'A Work in Progress: Upgrading Indonesia's National Land Agency, 2004-2014' (2017) *Innovations for Successful Societies*, Princeton University <<http://successfultsocieties.princeton.edu/>>.

⁷⁵ Akbar Hari Mukti, 'Wali Kota Solo Bagikan 50 Sertifikat Tanah pada Warga Kecamatan Banjarsari' *Tribun Jateng* (Semarang, 4 August 2017) <<http://jateng.tribunnews.com/2017/08/04/wali-kota-solo-bagikan-50-sertifikat-tanah-pada-warga-kecamatan-banjarsari>> accessed 3 February 2018; see also Chrysnha Pradipha, "86 Sertifikat Tanah Dibagikan Kepada Warga Tiga Kelurahan di Solo," *Tribun Solo* (Surakarta, 22 September 2017) <<http://solo.tribunnews.com/2017/09/22/86-sertifikat-tanah-dibagikan-kepada-warga-tiga-kelurahan-di-solo>> accessed 3 February 2018.

⁷⁶ Surat Keputusan Walikota Surakarta Nomor 032/97-C/1/2014 tentang *Penetapan Lokasi Perumahan dan Permukiman Kumuh di Kota Surakarta*.

⁷⁷ Dinas Komunikasi, Informatika, Statistik dan Persandian dan Informasi, Kota Surakarta, *Figur Data Kota Surakarta* (2018) 1.

⁷⁸ Reerink (n 50) 233.

⁷⁹ United Nations General Assembly (UNGA), 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Raquel Rolnik' (24 December 2012) UN Doc A/HRC/22/46.

⁸⁰ *ibid*.

are some potential avenues to change the security of tenure, such as in Surabaya, the local governments are still reluctant to change the system of land tenure.

Figure 6.1 below represents a summary of the land tenure situation with regard to non-forested land in Indonesia. The forested land is excluded in the discussion above and it is not within the scope of this thesis investigation. The figure is based on the registration arrangements of land parcels. Moreover, it also includes the rights that are derived from the registration status. The entitled rights show to some extent the degree of security of tenure of the rights holders.

Figure 6.1 The existing Indonesian land tenure based on the registration and the entitled rights

6.3 THE INTERTWINING ISSUES BETWEEN LAND TENURE AND HOUSING TENURE IN INDONESIA

Land tenures serve as the legal basis for the housing tenures of individuals or developers. As the Indonesian government aims to register all land parcels, only registered land provides a legitimate basis for formal housing/settlements. However, not all of the land tenures recognised in the BAL can be used for housing purposes. Therefore, if people possess land tenure certificates or proof of registration, it does not mean that they also are entitled to housing tenures, with an exception for the ownership right. Although someone can build houses on their land, several procedures apply to change the purpose of land parcels, for example from a farming purpose into housing or settlements.

The land tenures that can be used for granting housing tenures are the ownership right, the right of building, the right of use, and the right of building lease. The figure below describes the cross-cutting between land tenures and housing tenures under the Indonesian land law.

Figure 6.2 Indonesian land tenure under the BAL of 1960 and housing tenure

The converging tenure between land tenure and housing tenure above is only valid for the registered land under the BAL. The problem is that most of the land in Indonesia is not registered individually, and the registration process is still ongoing. Several experts suggest that the dualism in land policy contributed to the creation of the informal arrangements of land, as well as informal housing in Indonesia.⁸¹ This section examines the housing tenure and housing market in Indonesia as related to the land tenure that was considered in the previous section.

The ownership status of a house is considered as an indicator for measuring the level of welfare of a household.⁸² The family's financial situation greatly affects the status of the house. The types of housing tenure commonly found in Indonesia are⁸³ ownership, contract/lease,⁸⁴ rent,⁸⁵ rent-free,⁸⁶ parents' or relatives' lodging, official houses, and other types of tenure, such as communal or *adat*⁸⁷ land.

Table 6.1 shows the characteristics of the Indonesian housing tenure. In 2014, the percentage of households possessing their houses was 79.77 percent. The data does not differentiate the land tenure of the houses. The percentage included households who own their land and other tenures. The remaining 20.23 percent consisted of other tenure types.⁸⁸

⁸¹ Monkkonen (n 55); Leaf (n 42), see also Hudalah *et al* (n 52).

⁸² William M. Rohe, Shannon van Zandt, and George McCarthy, 'Social Benefits and Costs of Homeownership' in Nicolas P. Retsinas and Eric S. Belsky (eds), *Low-Income Homeownership : Examining the Unexamined Goal* (Brooking Institution Press 2000); see also another author from the same book: Thomas P. Boehm and Alan M. Schlottmann, 'Housing and Wealth Accumulation: Intergenerational Impacts'; see also Jane R. Zavisca and Theodore P. Gerber, 'The Socioeconomic, Demographic, and Political Effects of Housing in Comparative Perspective' (2016) 42 Annual Review of Sociology 347.

⁸³ These categorisations were used in the national socio-economic census in 2014. This programme, called SUSENAS, was carried out several times since 2005. The results of the Census are available in Indonesian at <<https://www.bps.go.id/index.php/Subjek/view/29#subjekViewTab1>> accessed 20 November 2017.

⁸⁴ The term "contract" refers to a formal leasing shown by the existence of the written agreement between a tenant and a land lord in which the tenant agree to pay regularly a certain amount of money for a fixed term, for instance 1-2 years of stay. The schedule of the payment will depend on the agreement, either in one time or several times.

⁸⁵ The term "rent" refers to a relation between a tenant and a landlord in which the tenant pays regularly without any limit in terms of how long the tenant will stay if they pay the rental fee.

⁸⁶ The term "rent-free" means a mechanism when people can stay in someone's piece of land or house without any payment.

⁸⁷ See (n 38).

⁸⁸ Badan Pusat Statistik (BPS), *Indikator Kesejahteraan Rakyat 2015 (Welfare Indicators 2015)* (BPS Indonesia, Jakarta, 2015) 116-117, <http://www.bappenas.go.id/files/data/Sumber_Daya_Manusia_dan_Kebudayaan/Indikator%20Kesejahteraan%20Rakyat%202015.pdf> accessed 20 November 2017.

Table 6.1 Percentage of Households based on housing tenure (adapted from data available at the National Statistical Agency)⁸⁹

Housing Tenure	Urban and Rural Areas							
	2011 ⁹⁰	2012 ⁹¹	2013 ⁹²	2014 ⁹³	Housing Tenure ⁹⁴	2015 ⁹⁵	2016 ⁹⁶	2017 ⁹⁷
Ownership	78.77	80.18	80.08	79.77	Ownership	73.87	73.96	70.92
Contract/Lease	4.12	3.57	3.71	3.74	Rent	14.99	15.38	16.51
Rent	4.55	4.67	4.35	4.63				
Official	1.65	1.48	1.45	1.46	Official	1.30	1.42	1.33
Rent Free	1.96	1.59	1.49	1.39	Others	9.85	9.24	11.24
Parents' or Relatives'	8.76	8.32	8.74	8.85				
Other	0.19	0.19	0.17	0.15				

The data above provides an interesting fact that housing tenures, particularly the ownership title experienced a slight decrease between 2015 and 2017. What is striking in this table is that the general pattern of a steady increase of the tenures in the forms of lease and rent increases. The figures of such tenures almost doubled from 2014 to 2015, and from then on experience a continual gradual growth until 2017.

Veritably, this phenomenon cannot be interpreted merely based on figures alone. Nonetheless, the data reported here appear to support the assumption that people tend to rent or lease houses rather than to buy them due to the skyrocketing housing prices. Compared to 2016, housing prices increased from 3.17 to 3.32 percent in the third quarter of 2017.⁹⁸ In addition, the phenomenon might occur as a result of the resettlement programmes adopted by local governments that move people from informal settlements to rented public housing. Moreover, limited land availability has caused the national government to shift the focus of its housing

⁸⁹ This data set contains different criteria of housing tenures used for the census. The difference can be seen in the data of 2015-2017.

⁹⁰ Badan Pusat Statistik (BPS), *Indikator Kesejahteraan Rakyat 2013* (BPS, 2013) 90, <https://www.bps.go.id/website/pdf_publicasi/watermark%20_Indikator%20Kesejahteraan%20Rakyat%202013.pdf> accessed 20 November 2017.

⁹¹ *ibid.*

⁹² BPS (n 88) 117.

⁹³ *ibid.*

⁹⁴ Starting 2015, the BPS used a different category for the measurement compared to the period of 2011-2014. It did not differentiate between lease and rent, and combine these categories into "rental premises." In addition, the BPS combined three categories of housing tenure which are rent-free, parents' or relatives and others, under one category that is "others".

⁹⁵ BPS 2015 (n 88).

⁹⁶ BPS, *Statistik Kesejahteraan Rakyat 2016* (BPS, 2016) 176

<<https://www.bps.go.id/publication/2016/12/29/9d7ac6db1fbf8bbb00792b8/statistik-kesejahteraan-rakyat-2016.html>> accessed 12 February 2018.

⁹⁷ BPS, *Statistik Kesejahteraan Rakyat 2017* (BPS, 2017) 162

<<https://jakarta.bps.go.id/publication/2017/12/29/9cdb305ee78b056493e28271/statistik-kesejahteraan-rakyat-provinsi-dki-jakarta-2017.html>> accessed 12 February 2018.

⁹⁸ Bank Indonesia, *Residential Property Price Survey for Primary House, Third Quarter of 2017* (Jakarta 2018) <<http://www.bi.go.id/en/publikasi/survei/harga-properti-primer/Documents/PISRT%20SHPR%20TW%20III-2017%20E.pdf>> accessed 12 February 2018.

policies from the ownership title to tenancy tenure.⁹⁹ Next to that, the data retrieved by the Indonesian Statistical Agency show that more people living in urban areas are staying in rented accommodations (16.52 percent) than those living in rural areas (1.60 percent).¹⁰⁰

The National Economic Census of 2017, conducted in all Indonesian municipalities, provides rough data on housing tenure in each city. It shows not only the tenure but also the housing conditions based on the size, the materials used for floor, walls and roofs. However, the national census does not represent the entire population as it only works with samples. Across the country only 300,000 samples are used. For the purpose of comparison, the March census of Jakarta only used samples of 5,200 households, while Jakarta was inhabited by 2,600,000 households in 2015.¹⁰¹ With a ratio as large as 1:500, the results of the census might be biased and do not mirror the real conditions. Nevertheless, the national census can be used to understand certain phenomena, including the condition of housing tenure. Based on the Census, the table below shows the housing tenure in four cities.

Table 6.2 Percentage of Housing Tenure based on National Economic Census in 4 cities

Housing Tenure	Cities			
	Jakarta ¹⁰²	Surabaya ¹⁰³	Yogyakarta ^{104 105}	Surakarta ¹⁰⁶
Ownership	48.33	55.06	36.83	58.78
Contract/Lease/Rent	36.27	31.89	36.43	18.26
Rent Free	13.25	10.77	26	21.89
Officials'	1.78	1.87	1.48	1.06
Parents' or Relatives' or Others	0.36	0.42		

⁹⁹ Interview with the officials of the Technical Planning of the Office of Housing and Governmental Building Jakarta, 19 September 2016.

¹⁰⁰ BPS 2017 (n 97).

¹⁰¹ Badan Pusat Statistik DKI Jakarta, 'Penduduk, Rumah Tangga, dan Rata-rata Anggota Rumah Tangga menurut Kabupaten/Kota Administrasi' (BPS 2015) <<https://jakarta.bps.go.id/statistictable/2017/01/30/147/penduduk-rumahtangga-dan-rata-rata-anggota-rumahtangga-menurut-kabupaten-kota-administrasi-2015.html>> accessed 12 February 2018.

¹⁰² Badan Pusat Statistik DKI Jakarta, 'Statistik Kesejahteraan Rakyat Provinsi DKI Jakarta 2017' (BPS DKI Jakarta, 2017) 33 <<https://jakarta.bps.go.id/publication/2017/12/29/9cdb305ee78b056493e28271/statistik-kesejahteraan-rakyat-provinsi-dki-jakarta-2017.html>> accessed 12 February 2018.

¹⁰³ Badan Pusat Statistik Surabaya, 'Statistik Kesejahteraan Rakyat Kota Surabaya 2017' (BPS Surabaya, 2017) 72 <<https://surabayakota.bps.go.id/publication/2018/01/03/0d60693a01515b51719606b4/statistik-kesejahteraan-rakyat-kota-surabaya-2017.html>> accessed 12 February 2018.

¹⁰⁴ Badan Pusat Statistik Kota Yogyakarta, 'Statistik Kesejahteraan Rakyat Kota Yogyakarta' (BPS Yogyakarta 2017) <<https://jogjakota.bps.go.id/publication/2017/12/29/bd8fbb45ca316a0ac584bd21/statistik-kesejahteraan-rakyat-kota-yogyakarta-2017.html>> accessed 20 February 2018.

¹⁰⁵ The available data on housing tenure in Yogyakarta (n 79) divides the housing tenure between men and women, and no general data was available. The figures in this column were achieved by adding the figure of housing tenure between man and women, and then divide the result. The last result will describe the closest percentage of housing tenure in Yogyakarta.

¹⁰⁶ Badan Pusat Statistik Kota Surakarta, 'Statistik Kesejahteraan Rakyat Kota Surakarta 2017' (BPS Surakarta, 2017) 57 <<https://surakartakota.bps.go.id/publication/2017/12/29/aecdd9ddd08db8c817fbfdb/statistik-kesejahteraan-rakyat-kota-surakarta-2017.html>> accessed 12 February 2018.

As it can be seen from the table, housing tenure with ownership status occupies the highest ranking for all four cities. As mentioned before, owning a house is considered to be a badge of pride in Indonesian society. Furthermore, the table reveals that Jakarta, despite of its status as a megacity, it ranks the second lowest in housing ownership. The lowest rate of housing tenure with ownership can be found in Yogyakarta, while Surakarta has the highest. In terms of housing with tenancy tenure (contract/lease/rent), Yogyakarta places higher although with a near identical figure to Jakarta, with a 0.16 percent difference. Moreover, the tenancy rate in Surabaya is also relatively high compared to Surakarta. What stands out in this table is the high figure of the rent free or free use tenure in Yogyakarta and Surakarta which are double, compared to the other two cities.

The phenomena found in the data above could be influenced by the land tenure in each city. For example, Surabaya, with its IPT (*Ijin Pemakaian Tanah*), and IPR (*Ijin Pemakaian Rumah*), with its *ex-eigendom* land, might explain the higher lease or rent tenure figure, as people cannot own the land from the colonial rights. Furthermore, the striking result of the high rent free tenure figures from Yogyakarta and Surakarta might be influenced by the land owned by the palaces or other aristocrats. The existence of *Ngindung* on someone's land or on the Kings' land has resulted in the high figure of rent free. Although this type of tenure is not secure, it is commonly found in the two cities.

Having discussed the relationship and the interplay between land and housing tenure, it can be summed up that land tenure indeed affects housing tenure. The more secure land tenure is, the more secure a house is. The security of housing tenure is not always achieved through buying a house with an ownership status. Based on BAL there are several other rights attached to houses, *e.g.* right of building and right of use that give a security of tenure between 25 to 30 years and can be extended. These two land tenures are often used by private developers and the national government to build multi storey houses. However, the national government, through local governments, only allows people to rent a unit in a public housing complex for two to three years. Although there are provisions stating that a rental agreement in public housing can be extended,¹⁰⁷ the extension depends on the local government's consideration. One of the requirements is the performance of the tenants in paying their rent. Based on the research conducted by the Jakarta Legal Aid Institute, many of the tenants, particularly those who were affected by development-related eviction, could not pay the rent and were facing a threat of being evicted for the second time.¹⁰⁸ The rental periods of two to three years is considerably short for the tenants to comply with their obligation in their new place. Therefore, the short rental period could contribute to the issue of insecurity of housing tenure.

Following the discussion on land tenure and its intersect issue with housing tenure, the next section will analyse the availability of urban land in relation to the obligation to fulfil the right to adequate housing.

¹⁰⁷ See for example Mayor Regulation of Yogyakarta No. 44/2009 on the Management of Storey Housing owned by the Yogyakarta Municipality (*Peraturan Walikota Yogyakarta No. 44/2009 tentang Pengelolaan Rumah Susun Sederhana Sewa Milik Pemerintah Kota Yogyakarta*).

¹⁰⁸ Alldo Januardy Fellix and others, *Mereka Yang Terasing: Laporan Pemenuhan Hak Atas Perumahan Yang Layak Bagi Korban Penggusuran Paksa Jakarta Yang Menghuni Rumah Susun* (Lembaga Bantuan Hukum Jakarta 2016).

6.4 THE RELATION BETWEEN LAND AVAILABILITY AND THE HUMAN RIGHT TO HOUSING

One can argue that the availability of land is crucial in the housing market.¹⁰⁹ Not only for the housing market, but also for providing housing for the poor. Land availability is a big issue in every country, particularly in urban areas. Such a problem has challenged governments to efficiently plan and use lands for public welfare. To regulate and equally distribute the lands, a country must adopt specific regulations at the national and local level.

Although the right to land is not directly recognised under international human rights law, a secure access to land has been linked to multiple rights enshrined in the ICESCR, for example the right to an adequate standard of living (Art 11.1) particularly the right to housing, and the right to cultural life (Art 15). The Committee has acknowledged and elaborated on the relationship between land and the Covenant's substantive rights in its general comments.¹¹⁰ The fact that a large number of people cannot have access to land and some are evicted from the land for development projects has created an issue on the enjoyment of human rights. The right to housing is one of several economic, social and cultural rights which the enjoyment depends on land management decisions both at the national and local level.¹¹¹

Through decentralisation, national governments can transfer powers to local governments, particularly those with regard to availability of housing. The international human rights instruments clearly extend international human rights obligations to all branches of government agencies and authorities, including local governments.¹¹² The UN Special Rapporteur also emphasises the significant responsibilities of local government with regard to the right to housing, particularly in implementing national housing policies at the local level.¹¹³

The best authorities to adopt land-use policies are local governments.¹¹⁴ Under the UN Habitat Global Housing Strategy (GHS),¹¹⁵ land availability becomes one prerequisite among other conditions, such as the availability of a variety of tenure types and adequate tenure security, that needs to be ensured to achieve "housing for all."¹¹⁶ This document is not a legally binding document and does not oblige states to comply with the standards enshrined in it.

¹⁰⁹ Angel S, *Housing Policy Matters: A Global Analysis* (OUP 2000).

¹¹⁰ CESCR, General Comment No. 4 (1991) on the Right to Adequate Housing, paras. 8(a) and (e); CESCR, General Comment No. 7 (1997) on Forced Evictions, paras. 2, 3, 7, 9, 15 and 16;

¹¹¹ United Nations Economic and Social Council, 'Report of the United Nations High Commissioner for Human Rights' (11 July 2014) UN Doc E/2014/86, paras 10-11.

¹¹² Human Rights Committee (HRC) 'General Comment No. 31: the Nature of the General Legal Obligations Imposed on States Parties to the Covenant (26 May 2004) UN doc CCPR/C/21/Rev.1/Add.13, para 4 (HRC, General Comment 31).

¹¹³ United Nations General Assembly (UNGA) 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of living, and on the Right to Non-discrimination in this Context' (7 August 2014) UN Doc A/69/274; see also UN Human Rights Council (HRC) 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Leilani Farha' (UNGA A/HRC/28/62) (22 December 2014) UN Doc. A/HRC/28/62, para 11.

¹¹⁴ HRC, A/HRC/28/62 (n 113) para 13.

¹¹⁵ UN Habitat GHS is a collaborative global movement towards adequate housing for all and improving housing and living conditions of slum dwellers. The strategy aims to assist member states in working towards the realisation of the right to adequate housing. See UN-Habitat 'Global Housing Strategy Framework Document' (UN Habitat GHS) <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Workshop-Social-Inclusion_UN-Habitat.pdf> accessed 15 November 2018, paras 1 & 5.

¹¹⁶ *ibid* para 29.

However, this framework may assist states, particularly in developing national housing strategies, with the aim to further realise the right to adequate housing for their inhabitants.¹¹⁷

According to this framework, to ensure land availability for housing, governments (local) should adopt a mixed urban land-use policy as a part of their urban land management.¹¹⁸ Such policy will enable local governments to integrate housing with economic, social and recreational, as well as other, land-uses.¹¹⁹ Local governments are the ones who know how to develop their urban land based on their culture, tradition, economy, and local needs;¹²⁰ therefore, mandating them to manage and organise their own urban land is the right choice.

The framework suggests that land availability may become part of the international obligations in realising the right to adequate housing. Similar to other human rights obligations, the obligation to ensure land availability for settlements requires states to employ its available resources to the maximum level. An example of implementing this obligation is the mandate of the Indonesian local governments to plan the land-use in their territory as well as to make use of abandoned land.¹²¹ Therefore, Indonesian local governments should list their land assets, as well as the abandoned land in their territory, and further plan to provide lands for settlement or other development needs. The unoccupied land is often unregistered, or possibly registered but abandoned. In some areas, the abandoned land has people squatting there who have been living there for decades. By listing the plots and registering such land, the land then can be distributed to the squatters so that they can possess land tenure and secure their houses. Moreover, local governments can also benefit from the listing and registration, so they can provide land for the development of rented public housing tower blocks and other public use.¹²² The next section will propose several methods to increase land availability to implement the human rights obligation related to the right to adequate housing.

6.5 OPTIONS TO INCREASE LAND AVAILABILITY FOR HUMAN SETTLEMENTS

As discussed in Section 6.2, the general legal framework of land in Indonesia is regulated in the Basic Agrarian Law (BAL) No. 6/1960. Based on the BAL, the government, at the highest level, is responsible for controlling and managing the land, water, atmosphere, and resources within them.¹²³ The BAL recognises a legal concept of private property in the form of a ownership title, which is limited to only Indonesians, as the strongest and the complete form of title containing full rights of alienation and inheritance.¹²⁴ It categorises land in Indonesia as state-owned land, ‘*adat*’ land, and individual-owned land. The BAL includes a social function principle, meaning that the state can revoke the ownership or any other title of land owned by

¹¹⁷ *ibid* paras 1 & 3.

¹¹⁸ *ibid* para 57.

¹¹⁹ *ibid* para 17.

¹²⁰ UNGA, A/HRC/28/62 (n 113) para 19.

¹²¹ Government Regulation No. 11/2010 on the Controls and Utilisation of Abandoned Land (*Peraturan Pemerintah No 11/2011 tentang Penertiban dan Pendayagunaan Tanah Terlantar*). Based on this regulation, the identification and registration of abandoned land is conducted by the National Land Agency at the provincial level.

¹²² *ibid* art 15.

¹²³ BAL (n 8) art 2 (1).

¹²⁴ *ibid* art 20.

individuals if a broader public interest is involved.¹²⁵ The purpose of its social function, and its limitation towards foreign ownership, is to inhibit the change of land into a commodity falling under the market mechanisms.¹²⁶ Land prices as a commodity have significantly increased, particularly in urban areas. As a result, the land for housing becomes rare, unaffordable and inaccessible for the poor.

A strategy to enhance land availability might involve an agrarian reform in the form of land consolidation. Basically, land consolidation can be interpreted to have several meanings. It refers to (a) developing areas without any dislocation and maintain the land titling; (b) developing infrastructures and facilities of the urban areas through voluntary contribution of land; (c) financing projects covered by contribution of land reserved for commercial use.¹²⁷ Land consolidation in urban areas often involves in-situ resettlement and voluntary contribution of individual assets of the affected households. For example, if there would a need of school in the area, the surrounding land owners may contribute a portion of their land for the project. This contribution is possible due to the social function principle under the BAL. Land consolidation needs primarily a participatory approach from all individuals involved.

Land consolidation as a tool in urban development planning has gained a reputation for being successful in several countries such as Japan, Taiwan, Korea, Thailand and Malaysia.¹²⁸ Moreover, it is a longstanding issue in Indonesia, since the government has been trying to acquire and consolidate its land for several decades.¹²⁹ Two programmes were governed by the Presidential Decree (*Keputusan Presiden*) 55/1993 on Land acquisition for public purposes and the Regulation of the Head of the National Land Agency (*BPN*) No. 4 of 1991 respectively. However, the programmes did not achieve success due to several limitations,¹³⁰ including unclear provisions on procedures and compensation, unskilled persons to evaluate the value of lands particularly at local levels, no clear accountability mechanisms for officials involved, and uncertain financial resources due to a heavy dependence on the availability of resources owned by local administrations.

Learning from past experiences, the government currently intends to employ land consolidation again to overcome urban problems in big cities, specifically in providing public housing. This intention has been incorporated in the current housing laws, which specifically mention land consolidation, as a means to tackle the land availability problem.¹³¹ Furthermore, the housing regulations also indicate several other means to provide land for public housing, including land titling (land distribution) of state-owned land,¹³² ownership transfer of state's or

¹²⁵ BAL (n 8) arts 6 & 11.

¹²⁶ BAL (n 8) See in particular the elucidation (*Penjelasan*) to the BAL/UUPA, Elucidation II/7, III/1, which intends to minimise the influence of both capitalism and feudalism; see also Lucas A. Carol Warren, Land for the People, in Anton E. Lucas, Carol Warren (eds), *Land for the People: The State and Agrarian Conflict in Indonesia*, (Ohio University Press 2013) 7.

¹²⁷ P. Agrawal, 'Urban Land Consolidation: a Review of Policy and Procedures in Indonesia and Other Asian Countries' (1999) 49 (3) *GeoJournal* 311, 312.

¹²⁸ Agrawal (n 127).

¹²⁹ *ibid*; see also Gustaaf Reerink & Jean-Louis van Gelder, 'Land titling, Perceived Tenure Security, and Housing Consolidation in the Kampongs of Bandung-Indonesia' (2010) 34 *Habitat International* 78.

¹³⁰ Agrawal (n 127).

¹³¹ Law No. 1/2011 on Housing and Settlement Areas (*Undang-Undang No. 1/2011 tentang Perumahan dan Kawasan Pemukiman*) SG 7/2011, art 106 (b); see also Law No. 20/2011 on Tower Blocks (*Undang Undang No. 20/2011 tentang Rumah Susun*) SG 108/2011, art 22.

¹³² Law No. 1/2011 *ibid* art 106 (a).

regional's enterprises' assets, buying back land from its owners,¹³³ and land procurement programmes for the public interest.¹³⁴ Each of these approaches will be briefly discussed in the following paragraphs.

6.5.1 Land titling of state-owned land

The distribution of state-owned land started in 1981;¹³⁵ however, due to similar problems as the land consolidation programme, this programme only showed promising results in the 1980s and it was found ineffective due to political manipulation and corruption.¹³⁶ Due to decentralisation of governance, the central government has to cooperate with local administrations to register the land owned by governments and their status. Although the National Land Agency was established to record all the data of land, including their ownership status, the data is not always available due to a poor registration and land management systems.¹³⁷ Therefore, there is an urgency to re-register the state-owned land to support the land consolidation programme for settlements.

The facts show that the available state-owned land is usually located on the outskirts of the city or urban areas, which introduces additional infrastructural problems, such as the need to provide public schools, public transportation and public health facilities. If governments have enough resources to fund the infrastructures, the development of public housing outside the city will not be an issue.

In the current programme of restructuring urban areas, the national government, in 2016, selected a district in Surakarta (Semanggi) to be a model of urban land consolidation. This KOTAKU (*Kota Tanpa Kumuh* 2019) programme is under the coordination of the Ministry of Public Works and Public Housing.¹³⁸ The programme starts in June 2019 and is aimed to be completed by the end of 2019.¹³⁹ The community is involved in designing the neighbourhood, and the programme has started by placing the inhabitants in temporary houses. The land consolidation concept used here is improving living conditions without evicting inhabitants and, at the same time, is building sewage systems, green public spaces as well as sidewalks. Although it is not finished yet, the government in this regard is confident that land consolidation can be utilised to provide adequate housing and environment, particularly in urban areas.

¹³³ *ibid* art 106 (c).

¹³⁴ *ibid* art 106 (f).

¹³⁵ With a programme called the National Agrarian Operation Project (*Proyek Operasi Nasional Agraria* or PRONA), the government aimed to increase tenure security for economically vulnerable residents by allocating property titles and the resolution of land disputes, which believed to contributing to the stabilization of the socio-political of the Indonesian society. See detail in Reerink & van Gelder 2010 (n 129).

¹³⁶ Caron Waren & Anton Lucas, 'Indonesia's Land Titling Program: The Market Solution' in Anton E Lucas, Carol Waren (eds), *Land for the People: The State and Agrarian Conflict in Indonesia* (Ohio University Press 2013) 94-95.

¹³⁷ Bedner (n 4).

¹³⁸ _____, 'Penataan Kawasan Semanggi Menjadi Percontohan Nasional' (25 Maret 2018)

<<http://surakarta.go.id/?p=9534>> accessed 14 June 2019.

¹³⁹ Perdana, 'Tanpa Relokasi, Semanggi Ditata dari Nol' (20 April 2019) Jawa Pos: Radar Solo <<https://radarsolo.jawapos.com/read/2019/04/20/132864/tanpa-relokasi-semanggi-ditata-dari-nol>> accessed 14 June 2019.

6.5.2 Ownership transfer from assets of the state's or regional's enterprises' assets

According to Indonesian legislation, the governments' enterprises as legal entities also enjoy the right to property including the right to the land. However, this right is limited not to land with ownership status, but only to the usage right (*hak pakai*) and the construction right (*hak atas bangunan*),¹⁴⁰ which is also limited to a certain time frame.¹⁴¹ Several of the governments' enterprises were inactive or have been liquidated; however, their assets, in the form of usage rights or construction rights, may still exist, but remain unmanaged. The housing regulations target these type of assets, which can be used to build public housing, by transferring back the ownership of such assets from the companies to governments.

6.5.3 Buying back land plots

Another possibility to provide land for public housing is to buy plots of land from the previous owners. As discussed above, the largest part of Indonesia's urban land is owned by individuals or private companies. However in recent years there has been a slight change in the land ownership which tends to be more owned by private companies than individuals. For example, urban lands in the kampungs of Jakarta have been reduced by over 50 per cent in the past 30 years due to massive purchases by real estate developers and private land speculators.¹⁴² They built hotels, shopping centres or luxury houses, which has increased the price of land in the surrounding areas. This condition created difficulties for the government to deliver public housing as the land became unaffordable. The government can buy back plots of land; however, this approach will need enormous amount of funding. Such an approach might not be realistic in the immediate future as the government has already experienced a shortage of funds to finance its One Million Houses programme.

6.5.4 Land acquisition for the public interest

One of the strategies to provide land for public housing is for land acquisition based on public interest. As was discussed in the previous paragraphs, the BAL stipulates that all types of land and property have a social or public function. This means that in some instances people have to allow the government to seize their land (with compensation upon the takeover) if the area is needed to provide public services.¹⁴³ To provide land for public interest, the central government has promulgated the Law No 2/2012 on Land Acquisition for Development in the Public Interest.¹⁴⁴ It covers several development affairs which are categorised as public interest, including public roads; dam, irrigation, drinking water facilities, sanitation and sewage, rearrangement of slums, and the development of rented public housing. A detailed and technical

¹⁴⁰ Law No. 25/2007 on Capital Investment (*Undang-Undang No. 25/2007 tentang Penanaman Modal*) SG 67/2007, arts 21 & 22.

¹⁴¹ *ibid* art 22.

¹⁴² Paul McCharty, 'Urban Slums Report series: The Case of Jakarta, Indonesia' (*World Bank*, 2003) 3 <http://www.ucl.ac.uk/dpu-projects/Global_Report/pdfs/Jakarta.pdf> accessed 20 November 2017.

¹⁴³ BAL (n 8) art 6.

¹⁴⁴ Law No. 2/2012 on Land Acquisition for Development in the Public Interest (*Undang-Undang No. 2/2012 tentang Pengadaan Tanah Bagi Pembangunan Untuk Kepentingan Umum*) SG No. 22/2012.

implementation of the acquisition law is stipulated under Presidential Regulations of 2012, 2014 and 2015.¹⁴⁵

Although public housing can be categorised as one of the public interests and it can be a just reason for the government to confiscate somebody's land, the expropriation process is challenging. Several procedures could be carried out by the government ranging from providing due notice and conducting a consultation, to providing fair compensation for any possible loss.¹⁴⁶ Land acquisition for development programmes often leads to eviction. Such procedures will be further discussed in Chapter 8.

Land consolidation, redistribution and land procurement, with a basis in public interest, must be conducted with precaution by the government. All of these processes require a clear, fair, and transparent process, as well as public participation and clear accountability mechanisms. These three elements were not fulfilled in their previous attempts. Thus, the government must focus to improve these three elements when tackling the problem of access to land and the unavailability of land for developing public housing.

6.5 PRELIMINARY REFLECTIONS

This chapter analysed the Indonesian land tenure system and its influence on the security of housing tenure. Furthermore, the empirical elements on how the land tenure and housing tenure are exercised at local levels, as well as local policies and regulations, were included in this chapter. The empirical data was gathered from interviews conducted first-hand with directly involved people. In addition, the data from the available literature and previous research were also employed. These two sources of data contributed to a plausible argument for the need to strengthen the land tenure security to respect, protect and fulfil the right to housing.

It is indisputable that land tenure has a significant effect on housing tenure. Availability of land is central for housing development, both for the public and private markets. However, not everyone can easily have access to land, particularly the poor. This chapter has shown that there are flaws in Indonesia's land governance; showing an overlap of the dualist systems which further contribute to the problems of housing delivery.

Based on international human rights law discussed in Chapter 2, the obligations relating to the fulfilment of the right to housing is not limited to only adopting regulations. State obligations reach further and include monitoring of the programmes, providing mechanisms and sanctions for the parties who violate the right to housing, including infringements by third parties. The international obligations do not bind the national government alone. They also bind local governments, as the state's representatives.

¹⁴⁵ Presidential Regulation No. 71/2012 on the Implementation of Land Acquisition for Development in the Public Interest (*Peraturan Presiden No 71/2012 tentang Penyelenggaraan Pengadaan Tanah bagi Pembangunan untuk Kepentingan Umum*) SG 156/2012; Presidential Regulation No. 99/2014 on the second amendment of Presidential Regulation No. 71/2012, SG 223/2014; Presidential Regulation No. 53/2015 the third amendment of the Presidential Regulation No. 71/2012, SG 55/2015.

¹⁴⁶ Law No. 2/2012 (n 144) art 13. It provides information on several stages that should be followed by the government started from planning, preparation, execution and transfer of rights. Further the law describes in details each of the stages (arts 14-44).

The obligations relating to the right to housing do not specifically mention that states have to ensure land availability to ensure the right to their inhabitants. However, under the ICESCR, the states are obliged to employ their maximum available resources to progressively achieve the rights enshrined in the Covenant, including the right to housing. As land availability and access to land are evident, in facilitating the enjoyment of adequate housing, authorities should also adopt measures under the obligation to ensure that land for settlements is available, particularly for public and low cost housing. .

In this case, local governments should ensure the land availability for settlements in their territory. This can be carried out by implementing the national governments' mandate. However, in Indonesian situations, land authority is not mandated to local governments and is centralised. The National Land Agency, who received the mandate for national registration of land across the country, could not finish the mandate. As a result, land databases are often unavailable, which creates a long term issue that should be tackled as soon as possible. As discussed previously, as land policies and land-use decisions influence housing delivery, the mismanagement on land will directly diminish the enjoyment of the right to housing. Due to this correlation, the national government should speed up the agrarian reform processes, in order to provide a clear database on land tenure and its records to ease the public housing delivery at the local levels.

Local governments are the authority who are most familiar with the needs in their areas, while taking into account the cultural and social elements of their people. On the one hand, local governments are definitely a leading factor in implementing this specific obligation, which further could lead to the increasing chance of the realisation the right to adequate housing. On the other hand, local governments may also become the actors that can impede human rights.

The next chapter will focus on the practice of Indonesian local governments, in realising the right to adequate housing, by providing rented public housing for the low income groups and communities affected by development programmes. However, at the same time, these local authorities, through local legislation, limit access to such houses for particular groups. This practice may arguably constitute an infringement of the immediate obligation of the right to housing enshrined in the international human rights instruments.

CHAPTER 7

ACCESS TO PUBLIC HOUSING FOR OUTSIDERS: A PRACTICE OF INDIRECT DISCRIMINATION IN DECENTRALISED INDONESIA¹

7.1 INTRODUCTION

Chapter 5 discussed several drawbacks in the realisation of the right to housing in Indonesia. One of the obstacles mentioned previously is the limited access for domestic migrants to the public housing provided by local governments. Domestic migrants are those who reside in a city but have not obtained official residence in the city. This chapter discusses this problem in detail. Together with Chapters 6 and 8, Chapter 7 attempts to answer the sub research questions mentioned in Chapter 1, particularly the challenges faced by the Indonesian local governments in implementing the right to adequate housing, and whether the right to housing as implemented in Indonesia complies with its international human rights obligations.

Large cities in Indonesia, just like many other cities around the world, face massive urbanisation due to internal migration, triggered by economic development and the availability of better facilities and services in bigger cities,² as well as the chance for a better life.³ Measures have been adopted in Indonesia to reduce the number of people migrating, such as urban and rural linkage programmes enumerated in the National Medium-Term Development Plan (RPJMN) 2015-2019.⁴ These programmes aim to develop and provide more facilities in villages and rural areas; nevertheless, the government cannot stop urbanisation. As a result, the population concentration in cities leads to several urban problems, such as inadequate housing and lack of employment. Particularly, internal migrants with little education and job experience are affected most.⁵ Without a proper job, there is no other choice than to work in informal sectors, which are extremely low paid. As a result, it is difficult for such groups to afford adequate housing. Hence, informal settlements and slum areas grow on the riverbanks, railway tracks and green areas such as lakes or city forests. Slums have developed in most big cities,

¹ An earlier version of this chapter was published in E.D. Kusumawati, A. G. Hallo de Wolf and M.M.T.A. Brus, 'Access to Public Housing for Outsiders A Practice of Indirect Discrimination in Decentralised Indonesia' (2018) 19 *Asian Pacific Journal on Human Rights and the Law* 238. The first draft of this chapter was presented in Housing Law Symposium in Malmo, 23-24 March 2017. All the domestic laws provided in this chapter are in Bahasa Indonesia and their translation belongs to the first author.

² Wahyu Mulyana, 'Rural-Urban Linkages : Indonesia Case Study' Document No. 126, Territorial Cohesion for Development Programme (Rimisp 2014) 26.

³ P McDonald and others, 'Migration and Transition to Adulthood: Education and Employment Outcomes among Young Migrants in Greater Jakarta' (2013) 9 *Asian Population Studies* 4. See also Khalid Koser, *International Migration: A Very Short Introduction* (OUP 2007) 31-32.

⁴ Presidential Regulation No. 2/2015 on National Medium-Term Development Plan (*Peraturan Presiden No 2/2015 tentang Rencana Pembangunan Jangka Menengah Nasional Tahun 2015-2019*); <<http://www.bappenas.go.id/id/data-dan-informasi-utama/dokumen-perencanaan-dan-pelaksanaan/dokumen-rencana-pembangunan-nasional/rjpp-2005-2025/>> accessed 14 October 2017; See also Mulyana (n 2) 33-34.

⁵ Yuan Zhang, 'Urbanization, Inequality, and Poverty in the People's Republic of China' (2016) 584 <<https://www.adb.org/sites/default/files/publication/189132/adbi-wp584.pdf>> accessed 14 October 2017.

such as Jakarta, Surabaya and Surakarta.⁶ In 2013, Jakarta had 905 hectares of slums, comprising of 20% of its territory.⁷ In 2014, Surakarta held 468 hectares of slums, which amounts to 11% of the territory.⁸

Local governments have initiated programmes to eliminate informal settlements. For example, Jakarta started such a programme in collaboration with the Ministry of Public Works and Public Housing, aiming to make the city free from slums in 2019.⁹ In addition, the government initiated several programmes to improve living conditions and clean up riverbanks and other slum locations. These measures have negative consequences, including the eviction of people from their homes.¹⁰ However, these communities have been living in such settlements for decades. Moreover, they have established socio-cultural networks within the society. While some might have become legal or registered residents of Jakarta, evident from the steady increase in Jakarta's residents each year,¹¹ others did not renounce their legal residency in their area of origin. For instance, from 83.400 households living in Jakarta's informal settlements in 2008, as many as 56.000 households did not possess a Jakartan residence card (KTP).¹² These internal migrants are referred to in this chapter as "outsiders."

Preliminary research shows that outsiders experience difficulty in accessing public housing provided by the local and national governments, in particular those affected by evictions or settlements upgrading programmes.¹³ On this matter, the UN Special Rapporteur on the right to adequate housing has identified that in many cases outsiders neither have access to compensation nor relocation, other than returning to their place of origin, which was not considered to be a sustainable solution.¹⁴

⁶ Nizar Harsya Wardhana and Haryo Sulistyarso, 'Faktor-Faktor Penyebab Kekumuhan Di Kelurahan Kapasari Kecamatan Genteng Kota Surabaya' (2015) 4 Jurnal Teknik ITS Surabaya 2; see also Christian Obermayr, *Sustainable City Management: Informal Settlements in Surakarta, Indonesia* (Springer 2017) 126.

⁷ BPS DKI Jakarta, *Evaluasi Rukun Warga (RW) Kumuh* (2013) available <<https://jakarta.bps.go.id/publication/2015/04/14/04be43a83abb4c41d594034d/evaluasi-rukun-warga--rw--kumuh-dki-jakarta-2013.html>> accessed 13 June 2018.

⁸ Keputusan Walikota Surakarta No. 032/97-C/1/2014 tentang Penetapan Lokasi Perumahan dan Permukiman Kumuh di Kota Surakarta.

⁹ _____, 'Jakarta aims to be free of slums by 2019' *Jakarta Post* (26 August 2016) <<http://www.thejakartapost.com/news/2015/08/26/jakarta-aims-be-free-slums-2019.html>> accessed 13 March 2017.

¹⁰ In 2015, the government carried out more or less 30 large scale evictions, affecting approximately 3400 people uprooted from their place to live; see Alldo Fellix January, Atika Yuanita Paraswaty and Andi Ramadhan Nai, *Kami Terusir Laporan Penggusuran Paksa Di Wilayah DKI Jakarta Januari-Agustus 2015* (LBH Jakarta 2015) 9-15.

¹¹ Badan Pusat Statistik DKI Jakarta, 'Statistik Daerah Provinsi DKI Jakarta 2015' (Jakarta 2015) <<http://jakarta.bps.go.id/backend/pdf/publikasi/Statistik-Daerah-Provinsi-DKI-Jakarta-2015.pdf>> accessed 14 October 2017.

¹² This is the most recent data available from Dinas Perumahan Provinsi DKI Jakarta, *Pembangunan Rusunawa dan Rusunami di DKI Jakarta* (Jakarta 2008) <<http://www.jakarta.go.id/jakv1/application/public/download/bankdata/ad14379bc0aa5c156e2970897e63b791.pdf>> accessed 14 October 2017. The number might have changed since 2008. Moreover, there was a change in policy to switch from the paper KTP to e-KTP since 2011. Until today, several hundreds of people do not possess the identity card yet.

¹³ United Nations Human Rights Council (HRC), 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context. Mission to Indonesia' (23 December 2013) UN Doc. A/HRC/25/54/Add.1, paras 70 & 71.

¹⁴ *ibid.*

This chapter discusses the situation of outsiders from a legal perspective and analyses how it relates to a broader notion of equality and non-discrimination in Indonesian and international human rights (IHR) law. As Indonesia is a unitary state that decentralises parts of its affairs to local governments, there are multi-level housing regulations that apply to local governments. Moreover, local governments are allowed to adopt their own housing regulations. The mandate to adopt local legislation and how the local governments deal with their obligations have been discussed in Chapters 4 and 5. The practices of local governments may, thus, vary. This variation has been investigated by comparing practices in four cities: Jakarta, Surabaya, Yogyakarta and Surakarta.

This chapter consists of three parts. Section 7.2 starts with an analysis of the implementation of Indonesia's international obligations at the local level, and the practice of the four cities regarding the outsiders' access to housing is discussed. This section is based on interviews conducted with the local officials responsible for housing affairs in the aforementioned cities studied.¹⁵ The interviews have provided more practical insights than can be found in existing literature. Section 7.3 provides a legal discussion of indirect discrimination based on place of residence and how it relates to the right to housing. The analysis also includes the permissible differential treatment for human rights limitations based on Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Section 7.3 functions as the vital part of this chapter that thoroughly assesses the compliance of the Indonesian local governments with the relevant international human rights instruments. Section 7.4 concludes the chapter by suggesting local governments should amend their regulations and adopt new housing policy for migrants.

7.2 THE FOUR CITIES' PRACTICES ON ACCESS TO PUBLIC HOUSING FOR OUTSIDERS

People are migrating from rural to urban areas for a better life. These migrants come from all over Indonesia and most of them do not become official residents of their host cities.¹⁶ Rather, they keep the residential status of their previous area. Finding adequate housing in the housing market is a challenging issue for poor migrants.

The governments at both the local and the national level have built more public housing to tackle housing problems. The national government tends to build rented public housing rather than public housing with the potential for ownership.¹⁷ As a part of urban renewal strategies, the development of rented storey housing aims to improve the quality of life for people living in informal settlements.¹⁸ Moreover, rented public housing is one of the strategies to tackle the

¹⁵ The author conducted interviews in August-November 2016. The interviews are in file with the author, and are being used with the informed consent of the interviewees.

¹⁶ See for example for the case of Jakarta in P McCarthy, 'Urban Slums Reports: The Case of Jakarta, Indonesia' (2003) <http://www.ucl.ac.uk/dpu-projects/Global_Report/pdfs/Jakarta.pdf> accessed 15 October 2017.

¹⁷ Interview with housing officials of the Ministry of Public Works and Public Housing, Jakarta, 15 September 2016.

¹⁸ Direktorat Jenderal Cipta Karya, *Rusunawa: Komitmen Bersama Penanganan Pemukiman Kumuh*, Kementerian Pekerjaan Umum (Jakarta, 2012) 21-22, available <http://ciptakarya.pu.go.id/bangkim/old_file/v2/download/ebook/Buku_Rusunawa_2012.pdf?iframe=true&width=1400&height=650> accessed 18 March 2017.

problem of land availability in big cities and to improve the security of tenure of low income groups that cannot afford to buy a house.¹⁹ Cities such as Jakarta and Solo benefited from the building of rented public housing to relocate people affected by eviction or resettlement programmes.²⁰

In the four cities, the construction of rented public housing is financed by the national government, but requires collaboration with local governments to provide the construction sites.²¹ To be qualified to receive such assistance from the central government, a local government should be able to provide a minimum of 3,000m² to 5,000m²²² of land for the construction sites.²³ Upon meeting these requirements, they can then submit a proposal to the Ministry for the development of high-rise housing.

The Jakartan government has adopted programmes engaging private parties through corporate social responsibility schemes (CSR)²⁴ and a building compensation scheme.²⁵ According to the CSR scheme, if private parties build hotels, malls, luxury offices, or apartments, they must allocate a certain amount of money for public spaces, such as city parks, playgrounds and public housing.²⁶ The building compensation scheme allows private parties to request to exceed the height of buildings as limited by the city planning regulations; however, they have to pay a certain amount of money as compensation to the local government. This compensation money must only be used to build public facilities. All public housing and public facilities built by private parties from these funds will become the property of the local government. These programmes are quite successful in reducing local expenditures for public expenses and have resulted in the building of fourteen towers for public housing and several other public areas such as parks and playgrounds.²⁷ With this approach, the Jakartan government can use private funds to build public spaces, while the government of Surabaya, Yogyakarta, and Surakarta mostly rely on financial support from the central government.

Until 2016, Jakarta provided 6978 housing units (242 blocks), of which around 3300 units were built by the national government and the remainder built by local governments and private companies.²⁸ In Surakarta for example, in 2011 five tower blocks have been constructed to accommodate around 2600 people.²⁹ Surabaya has built 15 high-rise blocks for rented

¹⁹ *ibid.*

²⁰ Interview with housing officials of Jakarta and Surakarta, 19 September 2016 and 12 October 2016 respectively.

²¹ Direktorat Jenderal Cipta Karya (n 18) 26.

²² See for example, the Local Regulation of Jakarta No. 1/ 2014 requires 3000m²; the guidance adopted by the Ministry of Public Works and Housing stated 5000m².

²³ Direktorat Jenderal Cipta Karya (n 18) 27.

²⁴ There is no local law regulating this practice, nevertheless several public spaces have been built with the CSR fund.

²⁵ Jakarta, Governor Regulation No 175/2015 as amended by Governor Regulation No. 251/2015 and No. 119/2016 on Imposing Compensation for Exceeding the Building's Floor Coefficient Values (*Peraturan Gubernur DKI Jakarta No. 175/2015 jo No. 251/2015 jo No. 119/2016 tentang Pengenaan Kompensasi terhadap Pelampauan Nilai Koefisien Lantai Bangunan*).

²⁶ *ibid.*

²⁷ The data gathered is from the local government institution responsible for development and maintenance of public housing within the field research conducted in 2016 in file with the authors. The original data is in Indonesian language.

²⁸ Data received from Dinas Perumahan dan Pembangunan Gedung Pemerintah Daerah, Jakarta (2016).

²⁹ Obermayr (n 6)140.

housing.³⁰ Yogyakarta only owns six high-rise houses due to its limited size.³¹ In Surabaya, Yogyakarta, and Surabaya, most of the public houses were built by the national government.

Although the national government bears the financial responsibility for these projects, the building and management are fully in the hands of local governments. To arrange the distribution and management of public housing, based on local law, local authorities should adopt local regulations on housing, particularly on the use of public housing and access to such housing.³²

Access to rented public housing is limited to a certain demographic. In Jakarta, for example, rented public housing targets two types of prospective residents.³³ The first type is people affected by disasters and city renewal programmes, including evictions based on developments and urban renewal projects. The second is the low-income groups in general.

The four local governments have established several requirements for accessing rented public housing. Such requirements include:³⁴ 1) to hold a local residential identity card (*Kartu Tanda Penduduk*–KTP) and family document (*kartu keluarga*–KK); 2) to be married; 3) not to be in possession of a house; 4) to receive a monthly salary; 5) to own a Tax Identification Number (*NPWP*); and 6) to be able to pay the monthly rental fee, water tax, energy and other fees as decided by the head of the public housing unit.³⁵

If prospective residents cannot fulfil the first four requirements, they can still apply to obtain access to public housing, if they receive a recommendation letter from the head of the village they live in. Although the list of requirements generally varies between cities, the above mentioned four requirements exist in all four of the cities under review. Variations include a requirement to provide a certain size self-portrait picture of prospective tenants,³⁶ a limitation on the number of family members who can live in one unit,³⁷ and the requirement to earn an income between the provincial minimum wage (*UMR*) and twice of that amount.³⁸

All of the requirements above are apparently neutral and common for local regulations. Moreover, they are in line with the national legislation related to housing. All local regulations adhere to the national aim, which is to provide adequate housing for low income groups.³⁹ However, local regulations on the rented public housing of each of these four cities contain potentially discriminatory provisions that disadvantage certain groups. These provisions

³⁰ Peraturan Walikota Surabaya No. 37/2017 tentang Tarif Sewa Rumah Susun Sederhana Sewa dalam Pengelolaan Pemerintah Kota Surabaya.

³¹ —, 'Daftar Rusunawa di Yogyakarta' <<http://rusunawa.slemankab.go.id/daftar-rusunawa-di-yogyakarta.html>> accessed 20 August 2017.

³² See for example Surabaya, Local Regulation No. 2/2010 on Multi-Storey Housing (*Peraturan Daerah Surabaya No. 2 /2010 tentang Rumah Susun*).

³³ Jakarta, Governor Regulation No. 111/2014 on the Occupancy Mechanism for Rented Modest Multi-Storey Housing (*Peraturan Gubernur DKI Jakarta No. 111/2014 tentang Mekanisme Penghunian Rumah Susun Sederhana Sewa*) arts 2, 3.

³⁴ *ibid* art 4.

³⁵ The head of the public housing unit refers to an official appointed by local government to manage public housing in a certain area.

³⁶ See for example Surabaya Local Regulation No. 2/2010 (n 32), art 5 (a.3).

³⁷ *ibid* art 5 (a.6); see also Mayor Regulation No. 44/2009, as amended by Mayor Regulation No. 55/2014 on the Management of Multi-Storey Housing owned by the Yogyakarta Municipality (*Peraturan Walikota Yogyakarta No. 44/2009 sebagaimana diubah dengan Peraturan Walikota No. 55/2014 tentang Pengelolaan Rumah Susun Sederhana Sewa Milik Pemerintah Kota Yogyakarta*) art 10e.

³⁸ *ibid* art 10c.

³⁹ Law No. 20/2011 on Tower Blocks (SG No. 108/2011) arts 3 (paras e & g) and 54.

stipulate the requirement to hold a residence card of the region where the housing is located. It means that people who want to rent public housing must become a registered resident of that region. This type of provision disadvantages a group of people who might reside in such region, but have not yet become a registered resident.

Under Indonesian law, a citizen can only register as a resident of one place.⁴⁰ However, migrants may have various reasons for not changing their registration, with the following four as the most important ones. Firstly, the person may not have the resources to follow the required administrative procedures, such as withdrawing their prior residency status and applying for a new status in the city where they live,⁴¹ since such procedure would require them to return to their place of origin. Secondly, they do not have a new address to be registered.⁴² Thirdly, they may choose to keep their residency in their previous city due to personal reasons, such as an emotional relationship with their place of birth or for other cultural reasons. Finally, a large number of people do not have a KTP or other administrative proof of residency at all: they are not registered at either their previous or current place of residence. This can occur because they have experienced difficulties in complying with all procedural requirements to apply for a KTP.⁴³

One of the groups experiencing this problem is the outsiders. Most of them live in cities for work and may not have an intention to permanently stay; therefore, they do not register and apply for a residence card in their host cities. Many of these migrants live in slums. As local governments do not have data on the people living there, they are mostly excluded from the public housing programmes for the low-income groups.⁴⁴

Another group that is excluded is the unmarried persons.⁴⁵ According to the local legislation, one should be married to have access to public housing.⁴⁶ This will unfavourably treat single people in need of accommodation, including single parents. Although Yogyakarta, for example, provides targeted single occupancy public housing for single labour workers, not every city provides such an accommodation. If outsiders have single status and do not possess the local identification card, they will experience an additional barrier in accessing public housing that, supposedly, is more affordable and adequate than housing in the informal rental market.

As less favourable treatment can influence the enjoyment of human rights, the following section will provide a brief discussion on the prohibition of discriminatory practices. Discriminatory practices may include both direct and indirect discrimination. The discussion will focus on indirect discrimination emanating from the states' policies, measures and regulations.

⁴⁰ Law No. 23/2006 as amended by Law No. 24/2013 on Population Administration (SG No. 232/2013 jo No 124/2006 respectively) arts 62 (1) & 63(6).

⁴¹ *ibid* art 15.

⁴² See for example, Peraturan Daerah DKI Jakarta No. 2/2011 tentang Pendaftaran Penduduk dan Pencatatan Sipil, art 29; see also Yuanita, 'Ini Persyaratan Jika Ingin Menjadi Warga DKI Jakarta' *Sindonews.com* (Jakarta, 31 Juli 2014) <<https://metro.sindonews.com/read/887343/31/ini-persyaratan-bila-ingin-jadi-warga-dki-jakarta-1406801427>> accessed 14 October 2017

⁴³ Ashok Das, 'A City of Two Tales: Shelter and Migrants Surabaya' (2017) 8 *Environment and Urbanization Asia* 1, 12-13.

⁴⁴ *ibid* 17.

⁴⁵ See for example Jakarta, Governor Regulation (n 33) art 4.

⁴⁶ *ibid*.

7.3 THE RIGHT TO ADEQUATE HOUSING AND DISCRIMINATION BASED ON THE PLACE OF REGISTERED RESIDENCE

7.3.1 General observations on discrimination and access to housing

To be able to discuss discrimination related to the right to housing, we have to understand the meaning of discrimination and equality. This chapter will not make an attempt to discuss discrimination and equality in general, but will, instead, focus on the prohibition of discrimination as enshrined in IHR law, particularly in the ICESCR and as elaborated in its subsequent General Comments (GCs) and Concluding Observations (COs) adopted by the Committee on Economic, Social and Cultural Rights (CESCR).

In general, discrimination refers to unjustified differential or unequal treatment of individuals or groups within societies that are based on characteristics owned by such individuals or groups.⁴⁷ Under IHR, discrimination based on any ground is strictly prohibited,⁴⁸ making the principle of equality pivotal for the fulfilment of human rights,⁴⁹ including economic, social and cultural rights.⁵⁰ A distinction can be made between formal and substantive equality. Formal equality means that every subject of law is the same and thus should be treated equally.⁵¹ This is reflected in discrimination based on prohibited grounds as enshrined in positive law.⁵² Substantive equality deals with the equal results or opportunities.⁵³ A situation of equal treatment may result in a discriminatory practice. Therefore, substantive equality allows differential treatment to achieve equal results.

Substantive equality does not mean to simply ensure equal treatment but involves the elimination of structural inequalities and social and economic discrepancies.⁵⁴ A violation of substantive equality can be in the form of direct and indirect discrimination. Direct discrimination means a less favourable treatment is given to an individual compared to other individuals in similar or comparable conditions⁵⁵ when the reasons for such treatment are based on the prohibited grounds mentioned in human rights instruments.

⁴⁷ Christa Tobler, *Indirect Discrimination: A Case Study Into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2005) 41-43.

⁴⁸ International Covenant on Economic, Social and Cultural Rights (adopted in 16 December 1966, entered into force 3 January 1976) UNTS 993 (ICESCR), art 2 (2).

⁴⁹ Gillian MacNaughton, 'Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All' (2009) 11 *Health and Human Rights* 47.

⁵⁰ Richard Lewis Siegel, 'The Right to Work: Core Minimum Obligations' in Audrey Chapman and Sage Russel (eds), *Core Obligations: Building a Frameworks for Economic, Social and Cultural Rights* (Intersentia 2002) 36.

⁵¹ Tobler (n 47) 25.

⁵² *ibid.*

⁵³ Sandra Fredman, *Discrimination Law* (OUP 2002) 11; see also Fredman's contribution on the four dimensions of substantive equality, Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712.

⁵⁴ Jackbeth K Mapulanga-Hulston and Paul D Harpur, 'Examining Australia's Compliance to the International Covenant on Economic, Social and Cultural Rights: Problems and Potential' (2009) 10 *Asia-Pacific Journal on Human Rights and the Law* 48; Fredman 2016.

⁵⁵ Erica Howard, 'Indirect Discrimination 15 Years on' (2015) 4 *E-Journal of International and Comparative Law Labour Studies* 1 <http://ejcls.adapt.it/index.php/ejcls_adapt/article/view/321/416> 5 accessed 20 August 2017.

Indirect discrimination, on the other hand, focuses on the effect of similar treatment of persons or groups that disparately affects the position of some of them.⁵⁶ Indirect discrimination is a challenging issue to deal with, as it relates to the less visible, unintended or unexpected effects of equal treatment⁵⁷ provided for in official policies or regulations. It sometimes is “structural in nature.”⁵⁸ In general, indirect discrimination refers to laws, policies and practices which appear to be neutral; nevertheless, they have disproportionate effects on groups that are not specifically targeted,⁵⁹ yet face discriminatory impacts that are similar to those caused by prohibited grounds of discrimination.

IHR treaties prohibit formal discrimination. The treaties recognise and guarantee the right to non-discrimination. For instance, Article 2 ICESCR prohibits discrimination on grounds of “race, colour, sex, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status in the exercise of the rights that it enunciates.” This recognition of non-discrimination is applicable to all human rights enumerated in the Covenants, including the right to adequate housing guaranteed under Article 11. In addition to the ICESCR, several international treaties protecting specific groups grant non-discriminatory access to the enjoyment of housing,⁶⁰ equal access to housing,⁶¹ and access to reasonable housing and to the elimination of physical barriers to accessibility of buildings.⁶²

The CESCR has adopted several GCs emphasising the importance of these principles, particularly related to the right to adequate housing. GC No. 4⁶³ provides that the enjoyment of the right to adequate housing cannot be separated from the fulfilment of other human rights and respect for the principle of human dignity and non-discrimination.⁶⁴ GC No. 7⁶⁵ emphasises that in the case of eviction, governments have an additional obligation “to ensure that appropriate measures are taken to ensure that no form of discrimination is involved.”⁶⁶ In both GCs, the Committee mentions primarily a general prohibition of discrimination. However, they do not specify the types of discrimination that can occur. In the most recent General Comment, GC No. 20 on Non-discrimination in Economic, Social and Cultural Rights,⁶⁷ the Committee establishes several types of discrimination, which people can also experience in the field of housing, including formal, substantive, direct and indirect discrimination.⁶⁸

⁵⁶ *ibid.*

⁵⁷ Janneke Gerards, ‘The Discrimination Grounds of Article 14 of the European Convention on Human Rights’ (2013) 13 Human Rights Law Review 99, 118.

⁵⁸ Tobler (n 47) 24.

⁵⁹ Rodoljub Etinski, ‘Indirect Discrimination in the Case-Law of the European Court of Human Rights’ (2013) 47 Zbornik radova Pravnog fakulteta 57, 66-67.

⁶⁰ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 07 March 1966, entered into force 4 January 1969) 660 UNTS (CERD) art 5(c) (iii).

⁶¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS (ICMW) art 43(1)(d).

⁶² Convention on the Rights of Persons with Disabilities (adopted in 13 December 2006, entered into force 3 May 2008) 2515 UNTS (CRPD) arts 5(3), 9(1) (a).

⁶³ United Nations Committee of Economic Social and Cultural Rights (CESCR), ‘General Comment No. 4: Article 11 (1) (The Right to Adequate Housing)’ (13 December 1991) UN Doc E/1992/23 (General Comment 4).

⁶⁴ *ibid* para 9.

⁶⁵ CESCR, ‘General Comment No. 7: Article 11 (1) (The Right to Adequate Housing: Forced Evictions)’ (20 May 1997) UN Doc E/1998/22 (General Comment 7).

⁶⁶ *ibid* para 10.

⁶⁷ CESCR, ‘General Comment No. 20: Article 2 (2) Non-discrimination in Economic, Social and Cultural rights’ (2 July 2009) UN Doc E/C.12/GC/20 (General Comment 20).

⁶⁸ *ibid* paras 8-10.

In addition to the prohibition of formal discrimination, it is common that states discriminate on grounds that are not expressly listed in the regulations. Therefore, the CESCR considers that the principle of non-discrimination can extend beyond the categories specified in the previous GCs,⁶⁹ for instance age, disability and sexual orientation.⁷⁰ It also mentions that the grounds of discrimination enumerated in Article 2 are not exhaustive, meaning that grounds that are comparable to those listed can be implied.⁷¹ Furthermore, the Committee mentions that places of residence cannot be a reason to justify a different treatment in the enjoyment of economic, social and cultural rights.⁷²

Although the requirement regarding places of residence has been mentioned as one of the factors that can lead to discriminatory practices, the CESCR has not further explored this in its COs. It mostly addressed discrimination based on race, ethnic and cultural ways of life, disability, minority groups, sexual orientation and citizenship.⁷³ The Committee found discrimination by the creation of a conditional requirement for undocumented migrants to access housing, which is based on their willingness to return to their countries⁷⁴ and based on immigrant status in some COs.⁷⁵ Other states i.e. the Netherlands,⁷⁶ Angola,⁷⁷ Kirgizstan,⁷⁸ Uzbekistan,⁷⁹ Vietnam,⁸⁰ and China⁸¹ link access to essential services for internal migrants to a household registration system. These registration systems discriminate against internal migrants who have migrated to big cities, but maintain residential registration in their former place of living. It is interesting to mention that in the CO on Indonesia adopted in 2014, the CESCR has not yet addressed this particular issue in the country. It only noted that people without identity documentation face multiple kinds of discrimination; nonetheless, it did not further discuss this matter.⁸²

To more specifically address the implementation and improvement of housing conditions throughout the world, the former UN Commission on Human Rights appointed a Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard

⁶⁹ Siegel (n 50) 37.

⁷⁰ General Comment 20 (n 67) paras 28, 29, 32.

⁷¹ *ibid* para 15.

⁷² *ibid* para 34.

⁷³ This information is gathered from a library research conducted on concluding observations adopted by the CESCR since 2009, after the adoption of General Comment No. 20. Around 116 COs concluded from July 2009 to July 2017, were investigated for this purpose.

⁷⁴ CESCR, 'Concluding Observations on the Sixth Periodic Report of the Netherlands' (2017) E/C.12/NLD/CO/6, para 39.

⁷⁵ CESCR, 'Concluding Observations on the Sixth Periodic Report of Finland' (2014) E/C.12/FIN/CO/6, para 12.

⁷⁶ CESCR, 'Concluding Observations on Netherlands' (n 74).

⁷⁷ CESCR, 'Concluding Observations on the Fourth and Fifth Periodic Report of Angola' (2016) E/C.12/AGO/CO/4-5, para 41.

⁷⁸ CESCR, 'Concluding Observations on the Combined Second and Third Periodic Reports of Kyrgyzstan' (2015) E/C.12/KGZ/CO/2-3, para 5a.

⁷⁹ CESCR, 'Concluding Observations on the Second Periodic Report of Uzbekistan' (2014) E/C.12/UZB/CO/2, para 9.

⁸⁰ CESCR, 'Concluding Observations on the Second to Fourth Periodic Reports of Viet Nam' (2014) E/C.12/VNM/CO/2-4, paras 14, 16.

⁸¹ CESCR, 'Concluding Observations on the Second Periodic Report of China, including Hong Kong, China, and Macao, China' (2014) E/C.12/CHN/CO/2, paras 15, 41, 54.

⁸² CESCR, 'Concluding Observations on the on the Initial Report of Indonesia' (2014) E/C.12/IDN/CO/1, para 13.

of living.⁸³ In the report on the right to adequate housing for migrants, the Special Rapporteur only focuses on the right to housing for foreign migrants and does not touch on the difficulties faced by internal migrants, particularly irregular and low-paid migrants.⁸⁴ The fact that both foreign and internal migrants share similar challenges in accessing public housing suggests that internal migrants should receive equal attention from states. It is urgent for states to remove any obstacles, including the existence of discriminatory regulations, policies and practices, that prevent the enjoyment of the right to housing to internal migrants and to guarantee equal enjoyment of this right equitable to non-migrants.

It can be concluded that the prohibition of discrimination under IHR law is not limited to discrimination based on expressly listed grounds found in treaties, but it goes beyond that. Several other grounds that are not listed in treaties can also result in discriminatory treatment, for instance, place of residence. Such development can be seen in GC No. 20 as well as in COs, for example, the COs on the Chinese report adopted in 2014 and in the Netherlands' report concluded in 2017. At the regional level, the grounds of discrimination have been extensively examined. For example, the European Court of Human Rights (ECtHR), in several judgements,⁸⁵ has developed a broad interpretation of discrimination which is based on an open-list of grounds of discrimination, and has elaborated upon the discrimination rationale enshrined in the international treaties.⁸⁶

At the national level, the Indonesian Constitution does not provide for a prohibition of discrimination as such, although it does recognise the principle of equality before the law. It also states that all human rights recognised in the Constitution should be equally applied to Indonesians without any discrimination. Moreover, Indonesia does not have a specific law on the prohibition of discrimination. The Human Rights Law 39/1999 only mentions the principle of equality and non-discrimination. It only recognises discrimination as a differential treatment based on prohibited grounds, such as religion, race, ethnic, social and economic status, gender, language and political beliefs. The list is not comprehensive and does not provide a full definition of the various types of discrimination.⁸⁷ In this regard, the Indonesian legislation does not help in assessing whether a less favourable treatment can be categorised as either direct or indirect discrimination.

Furthermore, national legislation does not mention the phrase “or other status” as found in Article 2 ICESCR, which can be interpreted as, for example, the place of residence or a disability that could possibly affect the enjoyment of human rights. Thus, if differential treatment occurs, and it is not based on the listed prohibited grounds, it may not qualify as a discriminatory practice under Indonesian Law. However, as a party to ICESCR, Indonesia is bound by international obligations enshrined in the ICESCR and its authoritative interpretations provided by the CESCR. The section below will focus on indirect discrimination and will examine the practice of local governments in Indonesia.

⁸³ UN Commission on Human Rights, Res 9 (2000) UN Doc E/CN.4/RES/2000/9, para 7c.

⁸⁴ United Nations General Assembly, ‘Right to Adequate Housing, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (2010) UN Doc A/65/261.

⁸⁵ European Court of Human Rights (ECtHR), *Carson and Others v United Kingdom*, App no. 42184/05 (16 March 2010); ECtHR, *Vuckovic and Others v Serbia*, App no. 17153/11 (28 August 2012).

⁸⁶ Etinski (n 78) 64.

⁸⁷ CESCR, Concluding Observations on the Initial Report of Indonesia (n 82) para 10.

7.3.2 Indirect Discrimination Practices and Permissible Differential Treatments in Indonesia

Discrimination in housing can be the result of a complex web of discriminatory processes,⁸⁸ from education level, income, to housing policies and legislation. The apparently neutral policies, regulations and practices can have disadvantageous effects for particular groups, resulting in indirect discrimination. This means that policies intended to have equal effect lead to disparate impacts on particular groups.⁸⁹

Although, a state may adopt a measure by treating individuals differently, for example, to take affirmative action to restore historical injustice, such measure does not amount to a discrimination if it can be justified.⁹⁰ Consequently, not all differential treatments are discrimination.⁹¹

In line with Article 4, GC 20 mentions a permissible treatment that is allowed if it is reasonable and objective. To assess its reasonableness and objectiveness, the analysis of a treatment should include whether the aims of such treatment are legitimate and compatible with the nature and purpose of the relevant rights and obligations.⁹² Moreover, the justification behind the limiting measures should be the promotion of the general welfare in a democratic society.⁹³

In its effort to realise economic, social and cultural rights, a state may adopt a positive measure in the light of its progressive obligations. This chapter argues that in adopting such measures a state may possibly decide on neutral policies which may have an adverse impact on a certain group or individuals, which may result in denying access to affordable homes for a certain group. If a state, then, is able to justify its neutral policies, such a policy may not be categorised as discriminatory.

In examining whether the limitations imposed by Indonesian local governments on outsiders in accessing public housing falls under the discriminatory practices, this section firstly assesses whether the Indonesian local governments' practices could be regarded as indirect discrimination.

Following the analysis on discriminatory practices, this chapter tries to search for a justification of the Indonesian local government policies, as to whether they can be categorised as a legitimate human rights limitation, as enshrined in Article 4 ICESCR.⁹⁴ A measure can be categorised as a 'limitation' based on the Covenant, if it is determined by law, compatible with the nature of the rights and suitable for the purpose of promoting the general welfare in a democratic society. If the practice also meets the limitation requirements, the practice does not constitute as a discriminatory practice and does not violate the human right to housing of the internal migrants. Thereafter, this section will also discuss whether differential treatment can

⁸⁸ Julie Ringelheim and Nicolas Bernard, *Discrimination in Housing* (Office for Official Publications of the European Union 2013) 18.

⁸⁹ Tobler (n 47) 57; Etinski (n 59) 66; Howard (n 55) 9.

⁹⁰ Yvonne Donders, 'Protecting the Home and Adequate Housing: Living in a Caravan or Trailer as a Human Right' (2016) 5 International Human Rights Law Review 1, 2 & 4.

⁹¹ *ibid.*

⁹² General Comment 20 (n 67) para 13.

⁹³ *ibid.*

⁹⁴ See ICESCR (n 48) art 4.

be regarded as permissible based on the three conditions mentioned in Article 4 ICESCR and GC No. 20.

7.3.2.1 Indirect Discriminatory Practices

As discussed above,⁹⁵ indirect discrimination can arise when (1) laws, policies and practices appear to be neutral; (2) have disproportionate effects on specific groups; (3) they are not specifically aimed at a particular group. Each of these elements will be analysed in the following paragraphs.

7.3.2.1.1 Apparently neutral policies, measures or rules

The policies that give locally registered people a more privileged position have become a common practice in Indonesia, based on the argument that the number of residents will influence local expenditures.⁹⁶ The more people that reside in a region, the larger the budget a region needs to deliver public services. Due to the fiscal autonomy principle, local governments hold the primary authority to manage their budget⁹⁷ since the governance of their territory is based on the principles of effectiveness and efficiency.⁹⁸

It is understandable that local governments prioritise providing services to locally registered residents, who pay local taxes and, therefore, are entitled to enjoy the services provided by the authorities. In short, no tax no service. Such a practice seems to be neutral as it applies to all residents without deliberately targeting internal migrants and seems to be in line with other national regulations. However, one of the national housing policies is to provide access to housing for the poor, financed by the national government without discrimination. Consequently, all the poor should be given access to public housing regardless of their residential status, particularly when the public housing is built by the national government.

7.3.2.1.2 Having disproportionately prejudicial effects

Being disproportionate means that the specific negative effects on a particular group are not proportionate to the general aims of the measure that has been established. To avoid such disproportionate effects, governments should, prior to adopting a decision, consider alternatives that are less prejudicial to a particular group, or, once an affect becomes visible, be willing to consider alternatives measures.

This does not seem to be the case for the Indonesian local governments' practices. The local governments refuse access to public housing to any internal migrants without a local residence card. Until now, the local governments have not formulated a policy to house internal

⁹⁵ See Section 7.3.1.

⁹⁶ Hadi Sasana, 'Analisis Determinan Belanja Daerah Di Kabupaten/Kota Provinsi Jawa Barat Dalam Era Otonomi Dan Desentralisasi Fiskal' (2011) 18 Jurnal Bisnis dan Ekonomi 46.

⁹⁷ Local expenditure in Indonesia stems from three sources: local original income (*Pendapatan Asli Daerah-PAD*), fiscal balance transfer from the national government, and other revenues.

⁹⁸ Marwanto Harjowiryo, 'Development of Indonesia's Intergovernmental Financing System' in Directorate General of Fiscal Balance (ed), *Fiscal Decentralisation in Indonesia a Decade after the Big Bang* (University of Indonesia Press 2012) 119-140.

migrants without residential documents. As housing in Indonesia depends heavily on the private market, poor internal migrants are often left behind. They frequently end up living in informal and inadequate houses.

The residential requirement policy appears to be neutral and to treat everyone equally, as it is permitted by local regulations and it occurs in every region. However, in practice, it leads to the less favourable treatment of internal migrants than that of other residents. Thus, it does affect the enjoyment of an internal migrants' right to housing if they do not possess a residential card. Since there is no other choice available for them, particularly in accessing adequate housing facilities provided by public funding, such policies could be considered to be disproportionate. The local housing policies impair the possible fulfilment of the right to housing, as guaranteed by the Indonesian Constitution, human rights law, and housing law.

7.3.2.1.3 The policies, measures or rules are not aimed at a specific group

The fact that the bureaucracy of the registration system is so burdensome has made it difficult for internal migrants to apply for registration. In addition to the need to go back to their place of origin, they also need a new address in order to be registered. Regarding the latter, problems arise if they have no house that can be formally registered, live in illegal settlements, or are homeless. Although not specifically targeted by the registration requirement, internal migrants will not be able to fulfil the requirement for local registration, and they will not have access to public housing. This situation will lead to a paradoxical situation - a catch 22 - which causes a never-ending dilemma for internal migrants unless the governments both national and local are willing to do something.

A strong argument can be made that all of the three requirements used to consider whether a practice indirectly discriminates are fulfilled. The policy that provides access to public housing only for locally registered residents can be regarded as failing under the category of indirect discrimination practices.

7.3.2.2 Permissible Differential Treatment

Although the argument can be made that the practices found in the four cities constitute indirect discrimination, one also has to consider whether the difference in practical treatment between outsiders and local registered residents may still be permissible under human rights law. An investigation into whether such differential treatment is legal and justifiable under the general limitations of Article 4 ICESCR is needed.

To be permitted, a differential treatment with regard to the right to housing should be "(1) determined by law only in so far as (2) this may be compatible with the nature of these (ICESCR) rights and (3) solely for the purpose of promoting the general welfare in a democratic society."⁹⁹

⁹⁹ See ICESCR (n 48) art 4; see also General Comment 20 (n 67) para 13.

7.3.2.2.1. *Legality of the policy*

GC No. 20 does not expressly refer to the first requirement found in Article 4 ICESCR to justify an interference, but it uses the term ‘legitimacy’. However, this concept is not elaborated upon in GC No. 20. The word legitimate is only mentioned twice, yet seemingly offers a different approach to legitimacy. The first reference, in paragraph nine, states that a measure can be legitimate if it is “reasonable, objective and proportional.”¹⁰⁰ The second reference, in paragraph 13, mentions legitimacy as an element that can be employed to assess the reasonableness and objectiveness of a policy.¹⁰¹ As GC No. 20 provides no clear-cut definition of the word legitimacy, we will refer to the concept of legality to assess whether the housing policy based on residential identity is, from a legal point of view, reasonable and objective under international and Indonesian law.

Under IHR law, an interference with non-absolute rights usually requires a legal basis as a precondition to be justified.¹⁰² In other words, an interference needs to be ‘determined by law.’¹⁰³ Human rights adjudicatory bodies have interpreted the concept ‘law’ as entailing legal norms encapsulated in formal legislative acts and other types of legal regulations, including unwritten law.¹⁰⁴ Since the CESCRC does not seem to have provided its own interpretation of the meaning of the word ‘law’ in Article 4, we will use the broad interpretation and approach to the term as adopted by other human rights treaty bodies.

Treaty bodies have suggested that legal norms that limit human rights should remain accessible and be foreseeable/predictable.¹⁰⁵ The latter condition requires a law to be as clear and precise as possible, meaning that individuals should be able to adjust their conduct on the basis of what the law requires them to.¹⁰⁶ Furthermore, the law must also contain adequate safeguards against abuse, as well as actually state the grounds upon which the right can be limited.¹⁰⁷ Finally, according to the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, “laws imposing limitations

¹⁰⁰ General Comment 20 (n 67) para 9.

¹⁰¹ *ibid* para 13.

¹⁰² Christian Tomuschat, ‘Democracy and the Rule of Law’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 490-491.

¹⁰³ Article 4 ICESCR. Other human rights treaties sometimes use the words ‘provided by law’ (art 19(3) International Convention on Civil and Political Rights (ICCPR), ‘in accordance with law/prescribed by law’ (arts 8 (2), 9 (2), 10 (2) and 11 (2) European Convention on Human Rights (ECHR), or ‘established by law’ (arts 13(2) American Convention on Human Rights (ACHR).

¹⁰⁴ The Inter-American Court of Human Rights has observed that only formal legislative acts (and other acts based on valid delegated legal authority) can be regarded as law. See *The Word ‘Laws’ in Article 30 of the American Convention on Human Rights* (Advisory Opinion OC-6/86) IACtHR Series A No 6 (9 May 1986) paras 27 and 36. However, both the Human Rights Committee and the ECtHR have been less restrictive and accepts restrictions to rights through any form of legal rules (eg ECtHR, *P.G. and J.H. v UK*, App no 44787/98 (25 September 2001), paras 37 and 38; ECtHR, *Khan v UK*, App no 35394/97 (12 May 2000) para 27. See also Tomuschat (n 102) 492.

¹⁰⁵ Tomuschat (n 102) 493.

¹⁰⁶ See Human Rights Council (HRC), General Comment No. 34, CCPR/C/G/34 (12 September 2011) para 25 and *Sunday Times v UK* (1979-1980) 2 EHRR 245 para 49.

¹⁰⁷ *Cf. Klass and Others v Federal Republic of Germany* (1979-1980) 2 EHRR 214 para 50; *Roman Zakharov v Russia* [GC], no 47143/06, 4 December 2015, paras 236, 270, 303; *Szabó and Vissy v Hungary*, no 37138/14, 12 January 2016, paras 59 & 86.

on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory.”¹⁰⁸

The paragraphs below will assess the local regulations concerning public housing in Indonesia with regard to their quality, including their accessibility, foreseeability, availability of safeguards, and arbitrariness.

All regulations in Indonesia are published in the State Gazette. This is the official publication for both national and local regulations, and is generally accessible for citizens. Moreover, the Indonesian government has established a platform to provide all information on applicable regulations at both the national and local level. This platform is called *Jaringan Dokumentasi Informasi Hukum* (JDIH). The JDIH is available at local governments’ as well as any other governmental institutions’ websites, so that people can easily access the regulations. However, accessibility through websites requires a good internet connection and a device, but access to the internet may not widely available in the country, thus making the platform inaccessible for certain groups of people, particularly those who live in remote areas. In addition, research conducted in the East Java Province shows that not all municipalities (16 out of 38) uploaded their legislation to this network.¹⁰⁹ Furthermore, the research also found that on several occasions, the platform is not accessible, and often the regulations are not updated.¹¹⁰ Thus, the accessibility of this platform can therefore be questioned.

Housing officials also use the media, such as newspapers, to disseminate the requirements for access to public housing.¹¹¹ This approach is much more efficient as it is easier to access print newspaper than the internet. Moreover, they provide a service and information desk. By considering all the measures adopted by the governments, it can be said that the local regulation on public housing is in general accessible.

The second requirement is the predictability of the regulations to allow individuals to adjust their conduct to the legal requirements. In this case, the wording of the conditions stipulated in the regulations is clear and predictable - people need a local registration card to access public housing.

As discussed in Section 7.2, the requirement includes a complicated procedure that makes it difficult for individuals to fulfil the conditions. Several administrative procedures are needed, for example, the need to obtain a “moving letter”¹¹² from the authority of their place of origin. This letter should indicate that they will move to another city permanently, yet some of internal migrants are not willing to do that for personal reasons. Another reason is that outsiders need a

¹⁰⁸ Although not legally binding, the Limburg Principles provide guidance with regard to the interpretation and application of certain concepts found in the ICESCR. Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, E/CN.4/1987/17 (8 January 1987) 49.

¹⁰⁹ Didik Pramono, ‘Penyelenggaraan Jaringan Dokumentasi Informasi Hukum (JDIH) Online: Evaluasi Situs Web Pemerintah Daerah di Provinsi Jawa Timur’ (2015) 1 Jurnal Ilmiah Administrasi Publik 22.

¹¹⁰ Ibid.

¹¹¹ See for example Nursita Sari, ‘Ingin Tinggal di Rusun Milik Pemprov DKI Jakarta, Ini Syaratnya’ *Kompas.com* (26 Juni 2017)

<<http://megapolitan.kompas.com/read/2017/05/26/16514751/ingin.tinggal.di.rusun.milik.pemprov.dki.jakarta.ini.syaratnya>> accessed 14 October 2017; _____, ‘Ingin Tinggal di Rusunawa Kota Surabaya? Ini Dia 3 Syarat Utama yang Harus Dipenuhi’ *Surya* (28 April 2016) <<http://surabaya.tribunnews.com/2016/04/28/ingin-tinggal-di-rusunawa-kota-surabaya-ini-dia-3-syarat-utama-yang-harus-dipenuhi>> accessed 14 October 2017.

¹¹² A moving letter is a statement made by municipalities where the outsiders previously lived. This letter mentions their identities and previous address. It also mentions a new address in host cities, if applicable, or if no address is stated, it can simply mention the host cities.

local address at which to be registered. Since many of them are still searching for employment and accommodation, this requirement cannot be fulfilled. It can be concluded that it is not easy for migrants to become registered residents.

Furthermore, the local regulations that outline the requirements for access to rented public housing do not include safeguards against possible abuse. Such local rules only stipulate the legal relationship between governments and the prospective tenants who are able to fulfil the requirements.¹¹³ Yet, the regulations do not cover the relationship between governments and people who cannot access housing.

Outsiders can challenge this differential treatment before the courts. The Indonesian legal system provides a judicial review mechanism, through the Supreme Court, for requesting the revocation of local regulations that are inconsistent with higher regulations.¹¹⁴ A potential legal argument could be that the local regulations violate the equality principle under Indonesian human rights law. Until now, no claim has been brought on those grounds.

The arbitrary nature of the accessibility requirements in local regulations conflicts with the purpose of developing rented public housing financed by the national government, which is to provide housing to the poor in general. Although the local rules are not intentionally designed to limit the right to housing of particular groups, it does affect internal migrants in fact and in law, and can be considered indirect discrimination.

Based on the assessment of the legality of a law or a policy limiting human rights, it can be concluded that, to a certain extent, Indonesia's local regulations do not fulfil the preconditions to justify the human rights interference, such as the lack of safeguards, the difficulty of fulfilling certain conditions and the discriminatory nature of the regulations.

7.3.2.2.2. *Compatibility with the nature of the rights*

The ICESCR contains legally binding obligations for states parties to respect, protect and fulfil all human rights which are enumerated in the Covenant.¹¹⁵ The obligations are set at the minimum level; states may do more but may not do less. The Limburg Principles observe that compatibility with the nature of the rights "[...] requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned."¹¹⁶ This means that states

¹¹³ See for example Yogyakarta Mayor Regulation No. 44/2009 (n 53) arts 21, 22, 24; see also Governor Regulation of DKI Jakarta No. 111/2014 (n 53) arts 17-19.

¹¹⁴ Secretariat General of the Constitutional Court of Republic of Indonesia, *The 1945 Constitution of the Republic of Indonesia* (MKRI 2003) art 24; Law No. 14/1985 on the Supreme Court (*Undang-Undang No. 15/1985 tentang Mahkamah Agung*) SG 73/1985 as amended by Law 5/2004 on the 1st Amendment of Law No. 14/1985 on the Supreme Court (*Undang-Undang No. 5/2004 tentang Perubahan Pertama Atas Undang-Undang Nomor 14 Tahun 1985 tentang Mahkamah Agung*) SG 9/2004 and Law No. 3/2009 on the 2nd Amendment of Law No. 14/1985 on the Supreme Court (*Undang-Undang No. 3/2009 tentang Perubahan Kedua Atas Undang-Undang Nomor 14 Tahun 1985 tentang Mahkamah Agung*) SG 3/2009; Law No. 12/2011 on the Formation of Legislation (*Undang-Undang No 12/2011 tentang Pembentukan Peraturan Perundang-undangan*) SG 82/2011; *Peraturan Mahkamah Agung No. 1/2011 tentang Hak Uji Materiil*.

¹¹⁵ Marco Odello and Fransesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2013) 11.

¹¹⁶ Limburg Principles (n 108) para 56.

cannot impose limits on minimum core rights under the ICESCR.¹¹⁷ Nor can they impose limitations “[...] on rights affecting the subsistence or survival of the individual or integrity of the person.”¹¹⁸ This has led the CESCR to observe that with regard to the right to housing, legitimate and legal evictions should not leave individuals in outright homelessness.¹¹⁹ In other words, the practice of only granting access to public housing to registered internal migrants should be ceased as it makes the exercise of the right to housing illusory, or allows it to result in the homelessness of those affected.

Based on the nature of ESC rights that can be progressively achieved, providing public housing with preference to locals can be considered as a measure to fulfil the human rights obligation under Article 11 ICESCR. However, a progressive achievement does not simply require an increase in resources to build more public housing.¹²⁰ The obligation also entails an increasingly effective use of available resources to ensure satisfaction of essential services on an equitable basis.¹²¹ In assessing progressive realisation, one should take into account whether the decision-making process follows the principles of effectiveness, participation, accountability and equality.¹²² Here, the equality of a measure is crucial. While local governments can have discretion, based on their available resources, to progressively achieve housing rights, such discretion must not be discriminatory. Moreover, the obligation to prevent non-discriminatory practices has an immediate nature.¹²³ Considering the legally binding nature of the ICESCR including the prohibition of discrimination entailed, states should ensure that regulations and measures adopted in their countries do not lead to discrimination.

In this case, the Indonesian local governments’ practices can be regarded as incompatible with the ‘immediate’ obligation to establish non-discriminatory regulations and to eliminate existing discriminatory regulations.¹²⁴ This obligation imposes responsibilities not only on national governments but also on local governments, as they are all organs of the state.¹²⁵ However, although certain limitations, such as a lack of resources or capacity, may lead to protectionist and exclusionary practices at the local level,¹²⁶ the national government should ensure that local governments’ practices do not harm human rights and provide, for instance, complaint mechanisms at the local and national level. Transferring the responsibilities for housing to the local level is, as such, compatible with the international obligations of the state,

¹¹⁷ Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 257.

¹¹⁸ Limburg principles (n 108) para 47.

¹¹⁹ General Comment 7 (n 65) para 16. See also Saul, Kinley, and Mowbray (n 117) 257-258.

¹²⁰ Roy O’Connell et al, *Applying an International Human Rights Framework to States Budget Allocations: Rights and Resources* (Routledge 2014) 68.

¹²¹ Asbjorn Eide, ‘Economic and Social Rights’ in Janusz Symonides (ed) *Human Rights: Concepts and Standards* (Ashgate 2000) 126.

¹²² Sandra Fredman, *Human Rights Transformed-Positive Rights and Positive Duties* (OUP 2008) 83.

¹²³ CESCR, ‘General Comment No. 3 Article 2 (1) The Nature of States Parties’ Obligations’ (14 December 1990) UN Doc E/1991/23 (General Comment 3) para. 1.

¹²⁴ *ibid.*

¹²⁵ UN Human Rights Committee, ‘General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (May 2004) CCPR/C/21/Rev.1/Add. 1326, para 4.

¹²⁶ Human Rights Council, ‘Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Leilani Farha’ (22 December 2014) A/HRC/28/62, para 21.

but it cannot be regarded as an excuse for incompliance with international obligations in their implementation.

7.3.2.2.3. *Serving the purpose of the general welfare in a democratic society*

According to Article 4 ICESCR, a limitation has to serve the promotion of the general welfare in a democratic society. The CESCR has not yet expressed its views on the actual meaning and scope of “promotion of the general welfare in a democratic society.” This requirement could be seen as presenting a legitimate aim in a broad nature,¹²⁷ such as national security, public order, public safety, public morals, public health, the protection of the rights and freedoms of others or the economic well-being of the country.¹²⁸ This means that states may have a broad margin of discretion.

Borrowing from the ECtHR’s approach on these matters, the margin of discretion is not limitless and may be restricted by aspects of proportionality. To assess proportionality, the necessity principle should also be considered. Necessity relates to a requirement to consider the “less restrictive means.”¹²⁹ In this regard, the policy makers or legislators should take into account several options and choose the one that has least detrimental effects to rights holders.¹³⁰ In the *Hatton* case, it was held that the state is awarded a wide margin of discretion/appreciation in matters pertaining to economic interests.¹³¹ When balancing economic and individual interests, it may be necessary to determine whether states have adopted mitigating measures regarding the negative impacts on individuals’ interests, or have provided sufficient safeguards for the involvement of those affected in the decision-making.

In light of the above, the housing regulations of the four cities under review should be tested. The aims for such an examination are twofold. First purpose is to see whether the measures requiring a residence registration are actually appropriate to achieve the promotion of the general welfare in society. Second aim is to test whether the Indonesian authorities have provided alternatives to solve this problem and offered consultation and decision-making possibilities to outsiders. Therefore, the proportionality test will be relevant, particularly in considering the wider interest of the society. Furthermore, the proportionality test should be applied in order to limit the large margin of discretion of the state. Proportionality is used to test both the means and the negative effects of policies, and to assess the legitimacy of state’s aim.¹³² The legitimacy of the state’s aim has been discussed in Section 7.3.2.2.1. In assessing the compatibility of the limitation of outsiders’ access to public housing with Articles 4 and 11 ICESCR, the sub-sections below discuss the three elements of proportionality, namely the general welfare, necessity, and the balancing of interests.

¹²⁷ See also Saul, Kinley, and Mowbray (n 117) 250.

¹²⁸ See for example, arts. 8(2), 9(2) and 10(2) ECHR.

¹²⁹ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) chapter 11.

¹³⁰ *ibid.*

¹³¹ ECtHR, *Hatton v United Kingdom*, App no 36022/97 (8 July 2003).

¹³² Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 178-181.

1) The general welfare

The Indonesian highest legal norms, Pancasila and the Constitution, lay down the idea of general welfare to achieve social justice for all Indonesian citizens. Although Indonesia is not a welfare state *per se*, it does recognise the responsibility of the state to attain general welfare, which is also laid down in the Law on Social Welfare of 2009.¹³³ This law defines social welfare as a condition whereby the individual's material, spiritual and social needs are fulfilled, and which will enable citizens to live adequately and to develop themselves in order to be able to perform their social functions.¹³⁴ The law covers several fields, including social security and social protection for poor people who are living in inadequate conditions.¹³⁵ The Social Welfare Law lays down policies, programmes and activities targeting poverty alleviation, which include providing access to housing and settlement.¹³⁶

Based on the national regulations mentioned above, the goal of the Indonesian government is to achieve social welfare for all citizens without exception. Therefore, the local regulations curtailing the right of internal migrants to access public housing are inconsistent with the aims and purposes of the Constitution, and as such does not serve the purpose of promoting the general welfare in a democratic society. One may argue that giving preference to locally registered residents in accessing public housing can be regarded as serving the local community's general welfare. Yet, this fact will only create protectionist and exclusionist local policies, which is contradictory to the idea of general welfare of the society as a whole.

2) Balancing interests

As discussed in Section 7.2, every Indonesian citizen can only be registered in one municipality. They must apply for the modification of their residency status if moving to another city/municipality. This requirement falls under the general obligation of citizens¹³⁷ to report all changes in their circumstances/civil status, such as birth, death, marriage, and relocation of place of residence. To be in a position to provide for the maximum protection and recognition of the legal status of individuals, the registration procedure aims to keep the governments informed of regional population count.¹³⁸ However, the relevant provisions do not mention that such a registration will affect the availability of essential services. Due to the decentralised system, the national government delegates the provision of basic benefits to local governments. In this framework, the essential services are only available for local residents. Consequently, those who are not registered in the municipalities are not eligible for such services, and thus, access to rented public housing is restricted. The reason for such a limitation is to favour local residents, in order to ensure that they have more chances to access adequate housing given that

¹³³ Law No. 11 of 2009 on Social Welfare (*Undang-Undang No. 11/2009 tentang Kesejahteraan Sosial*) SG No. 12/2009

¹³⁴ *ibid* art 1 (1).

¹³⁵ *ibid* art 6.

¹³⁶ *ibid* arts 19 and 21.

¹³⁷ Law No. 24/2013 jo No. 23/2006 (n 40) art 3.

¹³⁸ *ibid*, Preamble paras 1 & 2.

they do not “compete” with outsiders.¹³⁹ Thus, the local governments promote the interests of local residents rather than those of the outsiders.

There is also a tendency to create a barrier for outsiders to such an access in order to slow down the urbanisation process.¹⁴⁰ If it becomes known that in a particular region, individuals can access basic services easily, others will migrate to that area. This migration will increase the density of the population. These reasons to limit access to housing can be categorised as mainly economic reasons. The local governments dislike having to increase their budget for housing in order to provide subsidies to people from other regions. Although ensuring budgetary stability can arguably contribute to the general welfare of a democratic society, such an effort may impact certain groups harder than the others. In this case, such a limitation could violate the Constitution and the other national laws discussed in the previous paragraphs.

It is understandable that local governments prefer to primarily fulfil the rights of local inhabitants, rather than those of migrants. However, the government should consider that the purposes/goals of the limitation can be balanced between the right to housing of local inhabitants and the right to housing of outsiders. One could ask whether the government has considered this balance, and whether this balancing of interests took place in the appropriate manner? As such, balancing interests requires the state to look at ways to refine eventual limitations,¹⁴¹ and consider the procedural aspects of decision-making, including consultation and the participation of this specific group.¹⁴²

In deciding whether migrants should have access to housing, it is most likely that they were not consulted. Even though, the local governments allowed a certain degree of public participation in adopting priorities development programmes at the local level,¹⁴³ the poor, including women and migrants, were often excluded.¹⁴⁴ This is mainly due to limited participation involving a small number of inhabitants, usually selected representatives of the community.¹⁴⁵ Moreover, this direct participation is only applicable for adopting development programmes and not for adopting the legislation implementing the programmes.¹⁴⁶

In legislation-making, public participation is scarce. The only possibility to involve the community is via a public hearing process which should be open to everyone. However, in fact, public hearings are limited to persons who received an invitation from the government. In addition, local governments are hesitant to involve the public in the decision-making processes

¹³⁹ Interviews with officials of Public Works and Housing Agency of Surakarta City, Surakarta 12 October 2016.

¹⁴⁰ *ibid.*

¹⁴¹ *Hatton v UK* (n 131) paras 122 and 127.

¹⁴² *ibid* paras 99 and 104.

¹⁴³ See *infra* Chapter 11 on the discussion of participation.

¹⁴⁴ Rasita Eka Purba, ‘Public Participation in Development Planning: A Case Study of Indonesian Musrenbang’ (2011) 5 *The International Journal of Interdisciplinary Social Science* 265; see also Ajay Datta, Harri Jones et al, ‘The Political Economy of Policy-Making in Indonesia: Opportunities for Improving the Demand and Use of Knowledge’ (2011) Working Paper 340, *Overseas Development Institute Website* <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7531.pdf>> accessed 6 June 2019.

¹⁴⁵ See Organisation for Economic Co-operation and Development, *Open Government in Indonesia* (OECD 2016) chapter 3 p 132 <https://www.oecd-ilibrary.org/governance/open-government-in-indonesia_9789264265905-en> accessed 6 June 2019.

¹⁴⁶ Emma Blomkamp, M. Nur Solikhin et al, ‘Understanding Policymaking in Indonesia: In Search of a Policy Cycle’ (2018) Working Paper 26 (*Knowledge Sector Initiative Website*) <https://www.ksi-indonesia.org/file_upload/Understanding-Policy-Making-in-Indonesia-in-Searc-06Feb2018141656.pdf> accessed 6 June 2019.

of the executive.¹⁴⁷ They have not yet adopted a clear mechanism to accommodate public involvement.¹⁴⁸ The local regulations containing the alleged discriminatory measures are considered as regulations that implement guidelines, thus approval from the local parliament is not obligatory.¹⁴⁹ Therefore, public participation is rarely found in adopting these regulations. It thus seems plausible that the governments have insufficiently considered the balance between the interests of locals and migrants in the decision-making procedures.

In terms of ameliorating the effect of housing policies, the governments, so far, have not offered alternatives accommodation to the poor migrants.¹⁵⁰ This forces the migrants to rely on the private rental housing market, which has not yet received sufficient attention from the government (see discussion on this matter in the sub section on necessity below).

3) Necessity

The policy requiring a local residence card to access public housing will certainly affect the outsiders' right to adequate housing. To assess the necessity of the policy, one should take into account whether less restrictive options are available.¹⁵¹ If the same goal can be achieved through other, less limiting means, then these should be favoured instead of further reaching limitation measures.¹⁵² Taking inspiration from the approach of the European Court of Human Rights, this may require assessing whether there is a pressing social need.¹⁵³ Although the European Court does not elaborate upon the meaning of this concept, a 'pressing social need' seems to relate to the weight and the importance given to an aim that needs to be protected and as such is 'pressing'.¹⁵⁴ In some cases, the Court refers to the states' margin of appreciation to make an "initial assessment of the reality of the pressing social need implied by the notion of 'necessity'".¹⁵⁵ In this context, the necessity test relates to the consideration of other choices of less restrictive means, and the weighing of the rights of individuals.

¹⁴⁷ Armen Yasir and Zulkarnain Ridlwan, 'Perumusan Kebijakan dan Peraturan Daerah dengan Mekanisme Konsultasi Publik' (2012) 6 (2) *Fiat Justitia Jurnal Ilmu Hukum* 1.

¹⁴⁸ *ibid.*

¹⁴⁹ Bloomkamp et al (n 146).

¹⁵⁰ *c.f.* with the decision of the African Commission on Human and People's Rights relating to the right to development of an indigenous community (Endorois). In this case the Commission emphasises that it is not sufficient for the Kenyan government only provided aid to the community affected by a certain policy involving the removal from traditional lands. By mentioning that empowerment is the result of the right to development, the Commission underscores that the Kenyan government should have considered providing other choices to improve the capabilities of the Endorois community in order to fully enjoy the right to development guaranteed under Article 21 African Charter on Human and Peoples' Rights. See African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, App no 276/03 (25 November 2009) para 283.

¹⁵¹ ECtHR, *Glor v Switzerland*, App no 13444/4 (30 April 2009) para 4; see also ECtHR, *Nada v Switzerland*, App no 10593/08 (12 September 2012) para 183.

¹⁵² ECtHR, *Nada v Switzerland*, *ibid.*

¹⁵³ See ECtHR, *Connors v the United Kingdom*, App no. 66746/01 (27 May 2004) paras 81–84; see also ECtHR, *Nada v Switzerland* (n 151) para 181.

¹⁵⁴ Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 *International Journal of Constitutional Law* 466; Laurens Lavrysen, 'System of Restrictions' in Pieter van Dick, Fried van Hof, Arjen van Rijn, Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5th edition, Intersentia 2018) 317.

¹⁵⁵ ECtHR, *Handyside v UK*, App no. 5493/72 (7 December 1976) para 48.

In the particular urban situation in Indonesia, the “pressing social need” is to secure the availability of services and housing for all locals at an affordable level. Therefore, it should be assessed whether the government has balanced this pressing social needs against the outsiders’ right to access affordable housing, and whether other choices were made available to them so that they can enjoy their rights to housing.

As the urbanisation will be ongoing in the future, an increasing number of people will migrate to cities, thus the need for accommodation will also increase. In this situation, the competition between locals and non-locals to find adequate and affordable housing will become increasingly problematic, for example in fulfilling the demand for housing. This might cause the housing prices in the private market to increase, making them unaffordable. Therefore, it would not be surprising to observe that local governments will accord ‘the pressing social need’ to protect the locals’ need for affordable rental public housing more weight by limiting access to such housing for the migrants.

Parallel to assessing this pressing social need, the authorities should have considered less restrictive means for these migrants to access affordable and adequate housing as the locals do. Currently, there are no other choices provided by local governments for migrants to access public housing.¹⁵⁶ The migrants heavily depend on the private rental housing market, which is mostly inadequate, even though the houses maybe affordable for the migrants.¹⁵⁷

As already mentioned, the local governments do not yet pay attention to the private rental housing market in spite of its growth. Moreover, there are no rules applicable as a standard of legal protection for tenants in the private market. Therefore, there are less legal protections for private housing tenants than public housing tenants. If the governments do not provide alternative accommodation and the private rental houses are limited, there is a possibility that outsiders would build shanty houses in illegal settlements. Such conditions will further cause the expansion of slums. This would contravene the objective of the national government, which is to eradicate slums in the coming years. In summary, there is indeed a pressing social need to provide affordable housing for all locals and to achieve the state’s aim to free the cities from slums. However, the government does not provide other alternatives for migrants so they must rely on the unregulated private rental housing market.

It can, therefore, be questioned whether it is necessary to make an application for the local registration a prerequisite for the orderly distribution of rented public housing, since there may be alternatives available to outsiders that are less restrictive. This is particularly the case given the difficulties internal migrants face or their possible reluctance to obtaining such a registration. It seems that there is no planning of alternative mechanisms for the equitable distribution of public houses. Moreover, there was and still is a lack of public consultation involving outsiders in the decision-making process on the solutions and their alternatives. In this context, the choice opted by the Jakarta government, that is to send the outsiders back to

¹⁵⁶ HRC, Report of the Special Rapporteur on Adequate Housing (n 13); see also Nibras Nada Naulifar, ‘Rusunawa Pasar Rumput Hanya Bisa Disewa Warga berKTP DKI’ 13 March 2019 (Kompas.com) <<https://megapolitan.kompas.com/read/2019/03/17/18520511/rusunawa-pasar-rumput-hanya-bisa-disewa-warga-ber-ktp-dki>> accessed 13 June 2019.

¹⁵⁷ UN Habitat, *A Policy Guide to Rental Housing in Developing Countries* (Quick Housing Policy Guides’ Series, Vol 1) (UN Habitat No Year) <<http://www.iut.nu/wp-content/uploads/2017/03/A-policy-Guide-to-Rental-Housing-in-Developing-Countries-2011.pdf>> accessed 31 May 2019.

their previous place of residents,¹⁵⁸ may not be considered to be an adequate solution. Possible solutions that could be conceived as alternatives to eliminate discriminatory practices against migrants are for example, reducing the complexity of the administrative registration procedures for migrants, providing a certain percentage of the available public housing for the outsiders, and regulating the private rental housing market so that outsiders in their capacity as tenants are legally protected. However, the local governments did not consider these options and they still maintain the discriminatory policies against the migrants without considering the necessity principle as discussed above.

It can be summed up that the local governments' economic reasoning for limiting access to public housing violates both the national and international standards. With a view to protect the locals, the local governments have a certain margin of discretion to determine the extent to which outsiders can benefit from access to housing. Although such discretion is allowed, states have to take precautionary measures in preventing the adverse impacts of a bias towards locality. If the local governments send outsiders to their hometown¹⁵⁹ without providing them with a sustainable solution, for example by providing a local identity card for migrants, the governments have not adopted preventive measures to reduce the adverse impacts of the policy. Moreover, from the interviews conducted with the local governments' housing officials,¹⁶⁰ one may conclude that the officials were not aware of the discriminatory impact of such local regulations to a particular group. They consider it to be a normal situation as it is their authority to decide as mandated by the national government.

Having discussed the three reasons that can be employed as a basis to consider a differential treatment for internal migrants as legally permissible, it can be concluded that such differential treatment for internal migrants cannot be justified. All regulations and measures applicable at both the international level and the national level, advocate for a non-discriminatory treatment for every inhabitant. In this regard, the local identity card requirement for the poor in need of adequate housing is inconsistent with IHR law. Therefore, local governments should consider and revise these criteria, and eliminate such practices, to provide equal opportunities for all citizens to qualify for access to public housing. The national government should have ultimate responsibility for housing the poor and should continuously monitor local practices. If the local governments do not act as required, the national government should take the appropriate actions to ensure that local governments eliminate discriminatory practices.

7.4 PRELIMINARY REFLECTIONS

Decentralisation in Indonesia was established to better provide the delivery of services to the people; however, this does not always seem to be successfully implemented. This may affect Indonesia's compliance with its human rights obligations, which was illustrated by the discussion on the effects of decentralisation of access to rented public housing for outsiders.

¹⁵⁸ HRC, Report of the Special Rapporteur on Adequate Housing (n 13).

¹⁵⁹ *ibid.*

¹⁶⁰ Interviews with housing officials of Jakarta and Surakarta (n 20).

Under the Indonesian Law on Local Governments, the national government delegates housing affairs to local governments. The central government lays down the general policy on housing and settlement and provides national funding for low-income groups as well as develops financial support systems to enable access to housing for the poor. Local governments may adopt their own local housing policies, but such policies cannot contradict national laws and policies. The housing legislation regulates the roles of the government at each level to achieve the goal of generating equal access to housing for all citizens, including the poor migrants.

This chapter investigated the practices in four Indonesian cities and found that the local governments' practices are contrary to the international obligations of the national government as well as the national norms contained in the *Pancasila* and the Constitution. This chapter examined the indirect discriminatory nature of the practices with reference to the IHR law standards mentioned in GC No. 20 and relevant literature. The standards are (1) neutral appearance of laws, policies and practices; (2) disproportionate effects on specific groups; and (3) targeting all people in general. Moreover, it examined whether the treatment may constitute a justified human rights interference. As stated in Article 4 ICESCR and GC No. 20, interferences should fulfil certain requirements, *i.e.*, be established by law, be compatible with the nature of the right to housing and be necessary to promote the general welfare.

Based on the above-mentioned requirements, it is possible to conclude that the local regulations giving preference to locally registered residents to access public housing may lead to indirect discrimination against outsiders. Although the local regulations in all four cities examined seem neutral and are applicable to all, such regulations affect the enjoyment of the human rights of outsiders in particular. Providing public housing *per se* without equitable distribution to those in need cannot be seen as a progressive realisation of the right to housing.

Limiting access for outsiders cannot be regarded as a permissible interference based on Article 4 ICESCR. Since the provisions contained in local legislation do not meet the Indonesia's human rights obligations, these regulations should be reviewed and repealed. The national government, in its capacity as the central authority, should monitor the local governments' practices more effectively. Monitoring is vital for ensuring that the right to housing is implemented in accordance with the applicable national and IHR standards. Monitoring relates to accountability as a process to achieve the full implementation human rights. Accountability as a process in relation to human rights and its existence in the implantation of the right to housing in Indonesia, will be further discussed in part III (Chapters 9, 10 and 11).

The next chapter will look at evictions that often occur in the name of development projects and their effects on the right to adequate housing. Forced evictions have been identified (in Chapter 5) as a possible indication of the violation of the right to adequate housing in Indonesia. The national government aims to free Indonesia from the presence of slums in 2019. To achieve this objective, local governments implement the slum-free programme at the local level through the clearance of slums and illegal settlements built on river banks. Moreover, the clearance of slums is often carried out to provide a space for development projects, such as dams, flood prevention systems as well as city beautification. Due to massive development projects, Jakarta, for example, experiences the most frequent number of evictions than any other city in Indonesia. For such reasons forced evictions are carried out to remove the inhabitants

and buildings. According to the UN human rights bodies, such as the Commission on Human Rights¹⁶¹ and the Committee on Economic Social and Cultural Rights,¹⁶² forced evictions constitute violations of human rights recognised in international instruments, including of the right to adequate housing.

¹⁶¹ Commission on Human Rights, Resolution 1993/77 (10 March 1993) on Forced Evictions, para 1.

¹⁶² CESCR, General Comment 7 (n 65) para 2.

CHAPTER 8

FORCED EVICTIONS IN INDONESIA: AN ISSUE BETWEEN HUMAN RIGHTS LIMITATIONS AND VIOLATION OF THE RIGHT TO ADEQUATE HOUSING ¹

8.1 INTRODUCTION

Chapter 8, as one part of the explorative and analytical part of this book, aims to examine the limitations on the enjoyment of the right to housing by Indonesian local governments. As discussed in Chapter 6, forced evictions became one of the drawbacks that hindered the fulfilment of the right to housing in Indonesia. This chapter adopts both normative and empirical legal methodologies. The normative legal research is used to explore the international norms and standards with regard to evictions and related issues, such as the limitation of human rights. Moreover, the empirical method, in the form of an interview, benefits this chapter from a practical point of view. The interview was conducted with the Legal Aid Institute in Jakarta whose work, advocating for eviction issues in Indonesia, contributed to research. The forced evictions discussed in this chapter happened within the timeframe of the field research (2015-2016) in Jakarta. Several other evictions may have occurred outside of this timeframe, yet they are excluded from this discussion. Since the characteristics of evictions are quite similar, the author selected the evictions in Jakarta as a sample, which represents the complex issue of evictions in Indonesia.

Modernisation and globalisation have driven all states in the world to foster infrastructural and organisational development.² Development has irrefutable and, to a certain extent, adverse effects. For example, a beautification process or urban expansion of a city will affect impoverished people, since this will eliminate shantytowns; thus, inhabitants living in such areas will be evicted. As observed, developments can uproot people from their homes, land and communities, particularly if a development policy renders inhabitants' livelihoods.³

Forced evictions, occurring in both developing and developed countries, have increased in number.⁴ As a result, large numbers of individuals and families have been displaced from their homes and lands without adequate alternative accommodation or shelter and legal protection.⁵ Forced evictions can happen in both rural and urban areas. Several common reasons

¹ An earlier version of this chapter has been published in E.D. Kusumawati, 'Between Public and Communal Interests: A Legality Issue of Forced Evictions Occurring in Jakarta' (2018) 8 (1) Indonesia Law Review 87. This chapter is an updated version by adding an analysis on justified evictions based on the Basic Principles and Guidelines of Evictions Based on Development Projects, which includes a brief discussion on human rights limitation enshrined in Article 4 ICESCR.

² The term of organisational development includes the development of politics, law, states' institutions, religion and culture. This organisational development in Indonesian known as "*suprastruktur*."

³ G Peter Penz *et al*, *Displacement by Development; Ethics, Rights and Responsibilities* (CUP 2011) 1.

⁴ United Nations Human Settlements Programme (UN HABITAT), *Forced-Evictions-Toward Solutions?, Second Report of the Advisory Group on Forced Evictions to the Executive Director of UN-HABITAT* (UN Habitat 2007) iv, 47, 97.

⁵ Gautam Bhan, *In the Public's Interest: Evictions, Citizenship, and Inequality in Contemporary Delhi* (USA: University of Georgia Press 2016) 96-97; see also a recent studies on evictions in all European countries conducted

serving as the causes for eviction are beautification, renewal of buildings, preparations for mega projects, such as sports events, highways, dams, and airports, mining or any other exploration activities.⁶

According to international human rights law, not all forced evictions are prohibited. In particular cases evictions are unavoidable, such as an expulsion of tenants living in a derelict building or a disaster area. Such evictions may fall under the exception to the prohibition of forced eviction and are considered a legal expulsion, since the primary reason for the evictions is to protect communities or individuals. States, at the domestic level, should adopt rules to regulate such activities to protect the evicted persons and communities. However, as a part of “human rights mainstreaming” both national regulations and national policies should be in conformity with the international human rights standards.⁷

As a developing country, Indonesia has experienced massive urbanisation over the years. People have migrated from their villages to cities and established informal settlements on riverbanks, or other places which are not suitable for human settlements. As a result, forced evictions of people living in informal settlements have become a long-standing problem in Indonesia.⁸ In addition, evictions as a result of development projects have also occurred. Poverty has severely hit Indonesia as 28 million people,⁹ out of a population of 251 million people, still live below the poverty line.¹⁰ Due to its large population and massive urbanisation, whereby a lot of people have migrated from their villages to the big cities of Java Island, have made the island overpopulated. As a result, land and houses are scarce and unaffordable, which forces poor people to live in inadequate houses, *e.g.* under bridges, on riverbanks, and on ex-railway tracks. These types of settlements are categorised as informal or “illegal”; thus, they are vulnerable to eviction.

For example, in 2006, the Jakartan government forcefully evicted people living in illegal settlements. In that year, at least 15 mass evictions occurred.¹¹ The security forces demolished homes and destroyed properties with little notice, without due process or fair compensation. At that time, people living in slums feared that the government security forces could come and bulldoze their homes at any time.¹² The reasons for justifying the evictions

by Human European Consultancy, School of Law, National University of Ireland Galway, and FEANTSA, *Pilot project: Promoting Protection of the Right to Housing - Homelessness Prevention in the Context of Evictions*. VT/2013/056. Brussels: European Union, 2016 <<http://www.feantsa.org/download/ke-02-16-339-en-n-174396796745918750.pdf>> accessed 1 June 2017

⁶ Paul D Ocheje, “In the Public Interest”: Forced Evictions, Land Rights and Human Development in Africa’ (2007) 51 *Journal of African Law* 173; see also Nathan Einbinder, *Dams, Displacement and Development: Perspectives from Rio Negro, Guatemala* (Springer 2017) 19-28.

⁷ Damilola S. Olawuyi, ‘Mainstreaming Human Rights Under National and International Law: Legal and Epistemic Duestion’ (2013) 3 *Indonesia Law Review* 213.

⁸ Human Rights Watch, ‘Condemned Communities: Forced Evictions in Jakarta’ (2006) <<https://www.hrw.org/reports/2006/indonesia0906/indonesia0906webwcover.pdf>> 8-17, accessed 20 November 2015.

⁹ The National Statistical Agency, ‘Profil Kemiskinan di Indonesia’ Maret 2016, *Berita Resmi Statistik*, No. 66/07/Th. XIX (BPS, 18 July 2016) <https://www.bps.go.id/website/brs_ind/brsInd-20160718115646.pdf> accessed 10 July 2017.

¹⁰ The UN Habitat website, available at http://urbandata.unhabitat.org/explore-data/?countries=ID&indicators=slum_proportion_living_urban,population,urban_population_cities. Based on the national census in 2010, the National Statistical Agency also predicted that the Indonesian total population in 2015 will reach 255.417.00 million, see at <<http://www.bps.go.id/>> accessed 20 November 2015.

¹¹ Human Rights Watch, ‘Condemned Communities: Forced Evictions in Jakarta’ (n 8).

¹² *ibid.*

were the need to develop infrastructure projects, such as the flood prevention system, the airport and to achieve the national programme of eradicating slums in 2019.¹³

Public interest is likely to be the foremost reason of numerous forced evictions happening in Indonesia. However, when carrying out an eviction, the government should also take into consideration the community's interest. Public interest and the interest of the affected community are often in conflict. Hence, a careful consideration of all interests, and the manner in which an eviction was conducted, will determine the legality of a forced eviction. Also, in the case of a necessary clearance, the government should be accountable to its citizens, particularly in providing redress and remedy for any human rights violations triggered by the evictions.

This chapter investigates the legality/justification of the forced evictions which occurred in Jakarta. It will critically examine the reason of "public interest" raised by the authorities as to determine whether the forced evictions are contrary to the international obligations to which Indonesia has subscribed.

This chapter will be structured as follows. While Section 8.1 introduces the topic and the background of the problem, Section 8.2 provides some stories of evictions, where the facts, causes and eviction procedures will be presented. Following the description of the evictions, Section 8.3 delineates the norms and standards relating to evictions enshrined in both international law and Indonesian law. Section 8.4 discusses the possible human rights limitations that can be invoked by states but are subjected to rigid requirements under the international law. Section 8.5 forms the core of this chapter by analysing the evictions carried out by the Indonesian local governments as to whether such evictions can be justified or amount to a human rights violation. Section 8.6 draws the conclusions of this chapter.

8.2 EVICTIONS IN JAKARTA: CAUSES AND EFFECTS

Jakarta is home to 10,177,900 people¹⁴ and is the largest and most populous city in Indonesia. As a metropolis, Jakarta is seen as a segregated city where the rich live in luxurious high-rise apartments while the less fortunate live in immense slums. More than 20 percent of its settlements are slums. Most of the undocumented residents have lived in the informal settlements for years without any objection from public entities. They also receive government public services such as electricity and, to some extent, also pay taxes. In particular cases, they are allowed to live in the area based on an agreement with a state-owned companies, for example in Duri Tambora the community has a deal with the PT KAI, the Indonesian railroad company.¹⁵

During a visit of the UN Special Rapporteur on the right to adequate housing in 2013, the Rapporteur had been informed that the government planned to evict 200,000 people from riverbanks and slum areas within five years,¹⁶ due to a project called "Normalisation of the

¹³ *ibid.*

¹⁴ As of 2015, data is gathered from the National Statistical Agency <<http://www.bps.go.id/linkTabelStatis/view/id/1274>> accessed 20 August 2015.

¹⁵ UNGA, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik, Addendum, Mission to Indonesia' (26 December 2013) UN Doc A/HRC/25/54/Add.1 (Mission to Indonesia) para 16.

¹⁶ *ibid.*

Ciliwung River” to prevent Jakarta from flooding.¹⁷ However, the Special Rapporteur had notified the government about the potential harm of such evictions since no alternative accommodation was available for the affected people. The legal basis of such project is the Local Regulation No.1/2012 on Spatial Planning of Jakarta 2030, Governor Regulation No 163/2012 as amended by the Decision of Gubernur DKI Jakarta No 21/2014 on (Plan on Land Procurement for Public Interest to build an embankment of Ciliwung River from the Manggarai Floodgates to Kampung Melayu (*Penguasaan perencanaan /peruntukan tanah bagi kepentingan umum rencana trace kali ciliwung dari Pintu Air Manggarai-Kampung Melayu*).

In 2015, approximately two years after the UN Special Rapporteur visit, the Government of Jakarta relocated people living on the banks of the Ciliwung River, located in Kampung Pulo, East Jakarta. This area suffers from regular floods in every monsoon season. Kampung Pulo is also blamed for causing floods in many areas of Jakarta, since the poor settlements built by the residents obstructed the river, thus reducing its flow. The flooding causes enormous economic losses yearly.

The direct cause for this eviction is the government’s decision to start the river revitalisation programme. Therefore, riverbanks should be cleansed of its slums and informal settlements. The Government of DKI Jakarta claimed that the cleansing would prevent flooding in the future. In addition to the river revitalisation, the government planned to add green areas, such as a city park or city forest.

Based on information found in the local media,¹⁸ “The Jakarta Post” interviewed the local residents, where the issue of eviction had been proclaimed for years, but as it had always been postponed, people did not care anymore.¹⁹ Eventually in August 2015, more than 1,500 households, or around 3,400 people, in Kampung Pulo, Jatinegara district, were evicted from their homes.²⁰

For the people affected by the programme, the government had offered affordable rental accommodation in Jatinegara Barat, East Jakarta. The low-cost rental accommodation in the form of multi-storey housing is located 600 meters from Kampung Pulo. The multi-storey housing has 520 housing units which will accommodate approximately 3000 persons.²¹ While most of the people accepted the offers and left, some had refused for reasons such as the units being unaffordable for them. However, there is no data on the precise number of the people who accepted, refused, and did not receive the alternative accommodation. The affected persons claimed compensation for their houses, as almost all the houses on the riverbanks were permanently built. However, the Governor negated these requests and insisted that the

¹⁷ This programme is a national programme that involves several ministries and local authority which is the Greater Jakarta Province. The plan has started in 2012. See the note of Public Discussion on the dissemination of this project in Dian Tri Irawaty, ‘Diskusi Normalisasi Sungai Ciliwung 31 Juli 2012’ *Rujak Centre for Urban Studies* (Jakarta, 10 August 2012) < <https://rujak.org/diskusi-normalisasi-sungai-ciliwung/> > accessed 28 January 2019.

¹⁸ This section on the stories of the causes and effect of the Jakarta evictions serves as an illustration. This section will not discuss the evictions in all details. Hence, several of part of the stories rely on media reports.

¹⁹ _____, ‘Eviction Looms for Kampung Pulo Locals’ *The Jakarta Post* (Jakarta, 11 April 2011), <<http://www.thejakartapost.com/news/2011/04/11/eviction-looms-kampung-pulo-locals.html>> accessed 20 November 2015.

²⁰ _____, ‘Violent Eviction of Poor in Kampung Pulo’ *The Jakarta Post* (Jakarta, 10 August 2015) <<https://www.thejakartapost.com/news/2015/08/20/violent-eviction-poor-kampung-pulo.html>> accessed 20 November 2015.

²¹ This capacity is based on the assumption if one unit accommodates one household with six members.

community had illegally built homes on the state's land, and that providing compensation for the evicted could be regarded as corruption. As a result of this disagreement, the inhabitants rejected the eviction and blocked the Jatinegara Barat Street, triggering traffic congestion in the area. They pushed security officers and tried to stop bulldozers from entering their settlements, and in doing so, a clash became unavoidable. Moreover, they threw stones at the officers who, then, allegedly responded with tear gas. To control the crowd, the government employed public order officers, military forces and police who armed with water cannons. As a result of this riot, ten people were arrested. The reason behind this resistance was that they were still waiting for the outcome of the lawsuit they had filed with the Court.

Preceding the eviction, the Government of Jakarta had issued several warnings to the community; the third warrant was received on 6th August 2015.²² On August 13th, the residents a lawsuit to the Administrative Court against the East Jakarta Public Order Agency (*Satuan Polisi Pamong Praja*) claiming that the warrant should be dropped.²³ However, before the Court issued its judgment, the government had forced people to leave their homes. Following the eviction that took place on August 20th 2015, around 417 residents have moved to the low-cost apartments provided by the local governments.²⁴ This accommodation will later be equipped with stores to facilitate the economic activities of the residents. The remaining households consisted of migrants with no Jakarta residence card or were Jakarta residence card holders that refused to live in rented public housing. Nonetheless, the precise data on the people without the card is unavailable.

In September 2016, the Government of Jakarta evicted a large number of people living on the bank of the Ciliwung River in the Bukit Duri Area. Earlier in 2016, the government also evicted people living in Kalijodo (West Jakarta) and Pasar Ikan-Luar Batang (North Jakarta). Kalijodo was a red-light district in Jakarta that was demolished in February 2016; it will be converted into a city park. Around 3000 people, consisting of roughly 1,300 households, were evicted from Kalijodo. Only 300 families (1,000 inhabitants) who held the Jakarta identification card received alternative accommodation in the public housing in Rawa Bebek, while another 1,000 families that had no identification card were left without any solution; hence, they became homeless.²⁵ This caused them to build new slums under the highways.

Two months following the Kalijodo eviction, in April 2016, the Government evicted people living in slums in Pasar Ikan (Fish Market), Luar Batang. The reason behind this eviction was due to the spatial planning of the city, which plans to use the area to mitigate and prevent floods during high tide, by installing sheet piles on the riverbanks.²⁶ In addition, the area will

²² The first warrant was on June 11st and the second warrant followed on the 15th of June 2015.

²³ _____, 'Kampung Pulo Leaders Tell Residents to Keep Calm, United' *The Jakarta Post* (Jakarta, 20 of August 2015), <<http://www.thejakartapost.com/news/2015/08/20/kampung-pulo-leaders-tell-residents-keep-calm-united.html>> accessed 25 August 2016.

²⁴ _____, '417 Warga Kampung Pulo Telah Tempati Rusun Jatinegara Barat' *Liputan 6* (Jakarta, 24 August 2015), <<http://news.liputan6.com/read/2300652/417-warga-kampung-pulo-telah-tempati-rusun-jatinegara-barat>> accessed 25 August 2016.

²⁵ _____, '3,000 Kalijodo Residents to be Left Homeless' *The Jakarta Post* (Jakarta, 17 February 2016), <<https://www.thejakartapost.com/news/2016/02/17/3000-kalijodo-residents-be-left-homeless.html>> accessed 25 August 2016.

²⁶ _____, 'Pasar Ikan residents Resist Eviction Await Compensation' *The Jakarta Post* (Jakarta, 18 April 2016), <<http://www.thejakartapost.com/news/2016/04/18/pasar-ikan-residents-resist-eviction-await-compensation.html>> accessed 25 August 2016.

be revitalised for water tourism in Sunda Kelapa and for the fish market. Pasar Ikan was home to 1,728 households.²⁷ Not all of the evicted persons received temporary housing and they did not receive any compensation. Similar to the Kampung Pulo eviction, some people refused to live in the rented multi-storey housing, as there was too much distance between the accommodation and their workplace, and there was no security of tenure. Moreover, a large number of them were not offered any alternative housing, due to the lack of subsidised rented housing (*rusunawa*).²⁸ The Jakarta government has insufficient accommodation to provide for the communities affected by the development²⁹ and the government only provides accommodation for people holding a Jakarta identification card.

The last eviction that will be discussed is the forced eviction occurred in the Bukit Duri Area on 28 September 2016 and was carried out by the Government, while a class action lawsuit on behalf of the residents was still under consideration before the Court of Central Jakarta.³⁰ The residents claim that the government has acted against the law; hence, the government's actions falls under the tort law stipulated in the Civil Code. The government did not wait for the Court to deliver its judgement and instead carried out the evictions. The residents stated that they did not receive a third notice, as the law stipulates that eviction notices should be sent three times. In October 2017, the Court ruled that the government has acted against the law and thus is obliged to pay compensation to the inhabitants in the amount of 800 million IDR.³¹ The High Court agreed to this decision; nonetheless the government filed a cassation before the Supreme Court and at the time this chapter was written, the Supreme Court has not reached its verdict.

8.3 FORCED EVICTIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW AND INDONESIAN LEGISLATION

Forced evictions have been a concern of the international community for decades. The adverse effects of forced evictions have rendered people homeless and neglected. Forced evictions often result in violations of human rights.³² The UN Commission on Human Rights categorises forced eviction as “a gross violation of human rights, particularly the right to adequate housing.”³³ The

²⁷ _____, '176 KK di Pasar Ikan Daftarkan Diri untuk Pindah Rusun' *Kompas.com* (Jakarta, 6 April 2016), <<http://megapolitan.kompas.com/read/2016/04/06/16575621/176.KK.di.Pasar.Ikan.Daftarkan.Diri.untuk.Pindah.Rusun>> accessed 4 September 2016.

²⁸ Gathered from several resources.

²⁹ Dewanti A Wardhani, 'City Forces Eviction despite Housing Backlog' *The Jakarta Post* (Jakarta, 24 August 2015) <<https://www.thejakartapost.com/news/2015/08/24/city-forces-eviction-despite-housing-backlog.html>> accessed 12 February 2019; see also Evi Mariani, 'Gusur, Rusunawa, dan Ketidakadilan Ruang' *Medium.com* (Jakarta, 4 September 2016) <<https://medium.com/cahaya-tanah-gusuran/gusur-rusunawa-dan-ketidakadilan-ruang-6ff33877bb6>> accessed 12 February 2019.

³⁰ *Masenhah et.al v Kementerian Pekerjaan Umum dan Perumahan Rakyat Cq. Direktorat Jenderal Sumber Daya Air Cq. Kepala Balai Besar Wilayah Sungai Ciliwung Cisadane (BWSCC), and Gubernur DKI Jakarta*, Case No. 262/Pdt.G/ClassAction/2016/PN.Jkt.Pst (Central Jakarta District Court, judgement, 25 October 2017) jo Case No. 192/PDT/G/2018/PT. DKI (Jakarta High Court, judgement, 21 October 2018).

³¹ The present author does not have access to the judgement of the first instance Court and only has access to the High Court judgment that was retrieved from the Supreme Court website. However, the High Court ruling does not mention in detail the legal consideration of the case.

³² United Nations Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 7 on the Right to Adequate Housing (Art 11.1): Forced evictions' (20 May 1997) UN Doc E/1998/22 (General Comment 7), para 2.

³³ United Nations Commission on Human Rights, Resolution 1993/77 'Forced Evictions' (10 March 1993) para 1; see also United Nations Sub-Commission on the Protection and Promotion of Human Rights, Resolution 1998/9

United Nations Committee on Economic, Social, and Cultural Rights (The CESCR) has defined forced evictions as “the permanent or temporary removal against the will of individuals, families and/or communities from their homes and/or land, without the provision of or access to appropriate forms of legal protection.”³⁴ It includes “any eviction that is not carried out in accordance with international law and standards, regardless of whether the evicted persons hold legal title to the land and regardless of whether the eviction took place with the use of force.”³⁵ Therefore, it should be noted that not having a legal basis of ownership of land, or legal title to their houses, does not exclude the applicability of international standards to eviction.³⁶

Based on the definitions, one can observe that evictions can also be permissible if: (1) it is not against the will of individuals, (2) if the government provides the emergency shelter as well as legal protection for them, and (3) the government complies with international standards. The CESCR has established requirements for carrying out an eviction in the General Comment No. 7 on Forced Evictions. Moreover, the UN Commission on Human Rights has adopted the Basic Principles and Guidelines on Development-Based Evictions and Displacement.³⁷ The detailed requirements on justified evictions enshrined in these two instruments have been discussed in Chapter 2 (Section 2.6). Although the Basic Principles and Guidelines are not legally binding, it serves as a complementary instrument to the General Comment No. 7, which is also not legally binding. The Guidelines could be used by states to ensure that the evictions are carried out in compliance with human rights standards. In certain circumstances, it may be necessary to impose limitations on the right to adequate housing, but only in strict compliance with article 4 ICSCR. This article affirms that limitations are possible and are subject to certain conditions, such as that it must be (1) determined by law, (2) compatible with the nature of human rights, and (3) serve the purposes of promoting the general welfare in a democratic society.³⁸ These three requirements will be discussed in Section 8.4.

In the case of impending evictions, states should also comply with relevant international human rights laws as well as the general principles of reasonableness and proportionality that were stipulated in the General Comment No. 16 of the Human Rights Committee on Article 17 of the ICCPR. These principles underline that an interference with one’s home is allowed only if it is envisaged by law in accordance with the Covenant’s purpose, that is to protect the civil and political rights of the human being, and the interference should be reasonable and be based on legislation.³⁹

‘Forced Evictions’ (20 August 1998) UN Doc E/CN.4/SUB.2/RES/1998/9, para 1; United Nations Commission on Human Rights, Resolution 2004/28 ‘Prohibition of Forced Eviction’ (16 April 2004) UN Doc E/CN.4/RES2004/28 para 1.

³⁴ UN CESCR, General Comment 7 (n 32) para 3.

³⁵ UNGA, Mission to Indonesia (n 15) para 56.

³⁶ Human Rights Watch (n 7) 30.

³⁷ UNGA, ‘Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled “Human Rights Council”, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, *the Basic Principles and Guidelines on Development-Based Evictions and Displacement*, A/HRC/4/18 (5 February 2007) Annex I.

³⁸ International Covenant on Economic, Social and Cultural Rights (adopted in 16 December 1966, entered into force 3 January 1976) UNTS 993 (ICESCR) art 4.

³⁹ UN Human Rights Committee (HRC), ‘CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation’ (8 April 1988) HRI/GEN/1/Rev.9 (Vol. I) para 4.

In addition to the international standards on forced eviction, Indonesia's domestic laws guarantee the right to adequate housing, as discussed in Chapter 4. However, Indonesia currently has not yet enacted an anti-eviction law or guidance on evictions. Nevertheless, observing that Indonesia is bound to several international human rights instruments, and that it has also adopted domestic legislation affirming the right to housing, the Indonesian government should indeed respect the international standards on eviction. By accepting the international obligations enshrined in international law, the Government of Indonesia is accountable to the human rights institutions established by international law. Moreover, the government is accountable to the other state parties of international treaties, as well as to the public for its actions and policies.

8.4 FORCED EVICTIONS IN INDONESIA: JUSTIFIED OR VIOLATION OF THE RIGHT TO ADEQUATE HOUSING?

Mass evictions are a long-standing problem in Indonesia, as is affirmed by the UN Special Rapporteur on the right to adequate housing in her report on the Special Mission to Indonesia in 2013.⁴⁰ Prior to the UN report, the Human Rights Watch also reported on and condemned the evictions occurring in Indonesia in which armed forces and private parties were often involved; such evictions allegedly violated the human rights of the communities.⁴¹

Based on the basic principles enshrined in the ICESCR, General Comment No. 7, and Basic Principles and Guidelines for Eviction based on Development projects, as discussed in Chapter 2 as well as Section 8.3, a justified eviction must fulfil several requirements. These requirements are that evictions should: (1) be authorised/determined by law; (2) be compatible with the nature of human rights, (3) be undertaken solely for the purpose of promoting the general welfare, (4) be reasonable and proportional, (5) be carried out in accordance with international human rights standards, and (6) full and fair compensation and rehabilitation must be provided. It can be noted that the first three requirements for a justified eviction are similar to the requirements for the permissible limitation of the enjoyment of human rights, as stipulated in Article 4 ICESCR. This similarity means that human rights limitations may apply to forced evictions. Nevertheless, such evictions may not be justified if it does not fulfil the other three elements. All of the six elements for a justified eviction will be discussed below:

8.4.1 Legality of law and policies limiting the exercise of human rights based on public interests

The legality of policies becomes the first requirement for assessing whether an eviction can be justified. An interference with human rights should be “determined by law.” The legal norm that limits human rights should (1) be accessible and be foreseeable/predictable,⁴² (2) contain adequate safeguards against abuse as well as actually stating the grounds upon which the right

⁴⁰ UNGA, Mission to Indonesia (n 15) para 56.

⁴¹ Human Rights Watch (n 8).

⁴² Christian Tomuschat, ‘Democracy and the Rule of Law’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 493.

can be limited,⁴³ and (3) shall not be arbitrary, unreasonable or discriminatory.⁴⁴ The paragraphs below assesses these requirements in the context of evictions and the “eviction policy” adopted by the local government of Jakarta.

The evictions that occurred in Kampung Pulo, Bukit Duri and Kalijodo were due to the prohibition of construction on the riverbanks. All of these three settlements were built on the riverbanks of Ciliwung and Angke Rivers. The prohibition on the construction of housing on the riverbanks has existed for decades. These regulations aim to protect and conserve riverbanks and the water, for example Law No. 11/1974 on the Water Management and Government regulation No 35/1991 on Rivers.⁴⁵ All regulations stipulate that all permanent constructions within 3-5m from the perimeter of a river are prohibited.⁴⁶ These regulations also state that rivers are state-owned, meaning that the state is responsible for the usage and management of the rivers.⁴⁷ As for the legal basis at the local level, the Jakarta government has adopted the local regulation on Public Order No. 8/2007.⁴⁸ This law prohibits people from building houses in public spaces, such as on riverbanks, under highways, bridges, parks, or alongside railway tracks.⁴⁹ Failing to comply with this could lead to an imprisonment for a maximum of 90 days, or a penalty up to a maximum of 30 million IDR.⁵⁰

Establishing a legal basis for evictions, the government adopted several local regulations for the River Normalisation project. This local legislation includes Local Regulation No. 1/2012 on Spatial Planning of Jakarta 2030, Governor Regulation No 163/2012 as amended by the Decision of Governor of DKI Jakarta No 21/2014 on the Plan on Land Procurement for Public Interest to build an embankment of Ciliwung River from the Manggarai Floodgates to Kampung Melayu (*Penguasaan perencanaan /peruntukan tanah bagi kepentingan umum rencana trace kali Ciliwung dari Pintu Air Manggarai-Kampung Melayu*). All of this legislation, both national and local, can limit the exercise of human rights in cases of a need to serve a general public interest. Public interest in Indonesia is governed by Law No. 2/2012 on Land Acquisition for Development in the Public Interest. The categorisation of public interest will be specifically discussed in Section 8.4.3 that relates to the promotion of general welfare.

⁴³ Cf. *Klass and Others v Federal Republic of Germany* (1979-1980) 2 EHRR 214 para 50; *Roman Zakharov v Russia* [GC], no 47143/06, 4 December 2015, paras 236, 270, 303; *Szabó and Vissy v Hungary*, no 37138/14, 12 January 2016, paras 59 & 86.

⁴⁴ Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, UN Doc E/CN.4/1987/17 (8 January 1987) 49.

⁴⁵ These regulations have been annulled by Law No 7/2004 on Water Resources and Government Regulation No 38/2011 on Rivers. However, in 2015 the Indonesian Constitutional Court delivered its judgment stating that the Law No 7/2004 was against the Constitution; therefore, the law was not applicable anymore and the previous law, Law No. 11/1974 was reapplied since February 2015. See the Indonesian Constitutional Court, *Pimpinan Pusat Muhammadiyah et al*, Registration No 85/PUU-XI/2013, judgement 18 February 2015.

⁴⁶ Government Regulation No 35/1991 on Rivers (*Peraturan Pemerintah No. 35/1991 tentang Sungai*) arts 5 & 26, for a certain location such as in urban areas, the riverbanks can be decided differently, for example article 11 of Government Regulation No 38/2011 on Rivers limit the riverbanks by 3 m from the perimeter of a river.

⁴⁷ Government Regulation No 35/1991 (n 46) arts 3 & 4.

⁴⁸ Similar regulation also exists in several districts and municipalities, due to decentralisation, the local governments have responsibilities to enact their laws that should be in line with the Constitution and national regulations.

⁴⁹ Indonesia, Local Regulation of DKI Jakarta No. 8 /2007 on Public Order (*Peraturan Daerah Provinsi DKI Jakarta No.8/2007 tentang Ketertiban Umum*) LG No. 8/ 2007, arts 16 (1) and 20.

⁵⁰ *ibid*, arts 61 paras (2) and (3).

All the legislation mentioned above is published in the State Gazette of the Republic of Indonesia and is also available on the website of the national and local governments.⁵¹ As Indonesia also adheres to the principle of “everyone should know the law” (*presumptio iures de iure*), all Indonesians are expected to be aware of a newly adopted law once it is published. Having regard to the vast area of Indonesia, this principle cannot be easily implemented without a proper dissemination of the legislation of the government. The circulation of new law could be conducted by the government, in cooperation with universities or NGOs, to circulate the information. Once new legislation is published in the State Gazette and disseminated, the legislation is deemed to be accessible.

The next element in assessing the legality of a law is its foreseeability/predictability, meaning that a law needs to be as clear and precise as possible. Individuals should be able to adjust their conduct on the basis of what the law requires them to do.⁵² The Basic Agrarian Law and the Law on Land Acquisition for Development in the Public Interest are clear enough for it to be understood that if the state needs individuals’ land for a development based on a public interest, the state can take ownership of the land on the condition that compensation is offered and the procedural guarantees found in the Law No 2/2012 are followed. Moreover, national and local regulations have been clear on the prohibition of constructing temporary buildings on riverbanks.

Moreover, the local regulations adopted for the Normalisation project have a clear intention, to clear up all riverbanks relating to the project from any buildings and to order the local Public Order Authority to carry out the clearances. However, these regulations do not further regulate how and when the authorities will conduct the clearance. There is a possibility that the procedure will use the one outlined in the Land Acquisition Law. Yet, from the regulations, it is not directly clear what the authorities should do in the event of evicted people refusing to vacate their homes or land. So far, the Land Acquisition Law only regulates the procedure of the acquisition, mechanisms of compensation and remedies. In case of an infringement or violation of human rights, no clear rules can be identified from such a law.

The law on land procurement sets out numerous safeguards to protect land owners from the potential arbitrariness of the government, beginning with the due process in the construction’s project planning process, to compensation being provided to people affected by the development projects.⁵³ This regulation also allows any affected people to challenge the policy before the domestic courts.⁵⁴

It can be concluded that legislation that limits human rights for the public interest is accessible, foreseeable and provides safeguards from arbitrariness conducted by governments. Nonetheless, this is not the case for the local regulations on the clearance of riverbanks. The regulations, although accessible, do not fulfil the elements of foreseeability, safeguards and arbitrariness required for a law to legally limit human rights.

⁵¹ These website are called peraturan.go.id and *Jaringan Dokumentasi dan Informasi Hukum* (JDIH) respectively.

⁵² See Human Rights Council, ‘General Comment No. 34 Article 19: Freedoms of Opinion and Expression’ (12 September 2011) UN Doc CCPR/C/G/34, para 25; see also *Sunday Times v UK* (1979-1980) 2 EHRR 245 para 49.

⁵³ Law No. 2/2012 on Land Acquisition for Development in the Public Interest (*Undang-Undang No 2/2012 tentang Pengadaan Tanah Bagi Pembangunan Untuk Kepentingan Umum*) SG No. 22/2012, arts 31-36.

⁵⁴ *ibid* art 38.

8.4.2 Compatibility with the nature of the right

The requirement of “compatibility with the nature of the right” relates to states’ implementation of the international obligations enshrined in the ICESCR. These obligations include the obligations to respect, protect and fulfil economic, social and cultural rights. As a part of the obligation to respect the right to housing, states are, in principle, obliged to refrain from conducting any measure that would impede the exercise of such rights. The state is obliged to refrain from forcibly evicting a community. Such obligations are immediate in nature. The 1987 Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (the Limburg Principles) observe that compatibility with the nature of the rights requires that a limitation shall not be interpreted or applied so as to jeopardise the essence of the right concerned.⁵⁵ This has led the CESCR to observe that, with regard to the right to housing, legitimate and legal evictions should not leave individuals in outright homelessness.⁵⁶

In the Jakarta evictions, individuals affected who were legally registered in Jakarta were provided by the government with alternative accommodation in the form of rented public housing. People who did not have the local identity card, who are mostly migrants, were left alone to look for an alternative accommodation to stay or return to their place of origin. Even though the Jakarta regulation states that people affected by the development programme are prioritised to stay in rented public housing,⁵⁷ it excludes a person who does not hold a Jakarta identity card.⁵⁸ In other words, the evictions have made a particular group homeless.

Under the international human rights regime, states hold the obligation to protect the most vulnerable groups in the society. The right to adequate housing should be applied in a non-discriminatory manner, including no discrimination based on place of residence.⁵⁹ Particularly, these evictions have caused the migrants’ homelessness. They had no place to go, while no other solution was available for them. Emergency shelters can be offered for example temporarily, so that the migrants may have sufficient time to look for alternative accommodations following their eviction.

The alternative given to only the registered residents is considered as a differential treatment that is incompliant with international human rights standards. Furthermore, the Basic Principles discussed in the previous section state that the protections offered in the time of evictions are applicable to “all vulnerable persons and affected groups, irrespective of whether they hold title to home and property under domestic law.”⁶⁰ This is also applicable for evictions

⁵⁵ Limburg Principles (n 108) para 56.

⁵⁶ UN CESCR, ‘General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions’ (20 May 1997) UN Doc E/1998/22 (General Comment 7) para 16; see also Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 257-258.

⁵⁷ Jakarta, Governor Regulation No. 111/2014 on the Occupation Mechanism of Modes Rented Multi-storey Housing (*Peraturan Gubernur No. 111/2014 tentang Mekanisme Penghunian Rumah Susun Sederhana Sewa*) arts 2, 3.

⁵⁸ See discussion in Chapter 7.

⁵⁹ See discussion on indirect discrimination in Chapter 7.

⁶⁰ UNGA, Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 37) para 21 note (d); see also UNGA, Mission to Indonesia (n 15) para 56.

that serve a legitimate public interests, such as prevention of risks,⁶¹ which parallel the reasoning behind the Jakarta evictions.

In this regard, the government has failed in providing protection to its most vulnerable groups and, at the same time, has demonstrated discriminatory practices by excluding migrants from alternative accommodations. These evictions resulted in an adverse impact on migrants, which severely impacts their right to housing. Therefore, the evictions carried out by the Jakarta government for the Ciliwung River Normalisation project do not fulfil the requirements for the compatibility of international obligations related to the nature of the right to housing.

8.4.3 Promoting general welfare

General welfare refers both to people's well-being and to a system which provide services, such as social security, for people.⁶² This sub section's discussion refers to the general welfare meaning which relates to people's well-being. This meaning goes beyond the satisfaction of basic needs and depends on several factors, such as development.⁶³ Development of public interests is one mean to achieving both individual and community well-being.⁶⁴ The term 'public interest' has been widely used in various disciplines, including in the legal context; nevertheless, its meaning is not well-defined and varies according to its context and subjects.⁶⁵ However, Mike Feintuck noted that the definitions of public interest share some common elements.⁶⁶ These elements are as follows: the notion of a community,⁶⁷ the function to secure the development and cohesion of communities,⁶⁸ a collection of individual interests,⁶⁹ and the relation to general welfare.⁷⁰ Thus, public interests relate to human rights values, especially in the link between human rights and human duties.⁷¹ All these elements show that the concept of public interests refers to the idea of community, general welfare, human dignity and a sustainable social order within communities.⁷² These elements aim to not only advance a

⁶¹ UNGA, Mission to Indonesia (n 15) *ibid*.

⁶² Paul Spicker, *The Welfare State: A General Theory* (Sage 2000) 72-73.

⁶³ *ibid* 75, 84-85.

⁶⁴ *ibid* 75.

⁶⁵ A. Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon 1994) 29 as cited in Mike Feintuck, *The Public Interests in Regulation* (OUP 2004) 29-38.

⁶⁶ Mike Feintuck, *The Public Interests in Regulation* (OUP 2004) 38.

⁶⁷ G. Niemayer, "Public Interest and Private Utility" in C.J. Friederich (ed), *Nomos V: The Public Interest* (New York: Atherton Press, 1962) cited in Feintuck (n 66) 38. This term was criticised by Virginia Held (1970) which stated that the negative effect of using the term of community, particularly that it may clash with the term of "state". The State has interest and it may mirror the interest of those who are in power, thus this type of public interest might become the interest of a specific group, and does not entirely reflect the spirit of community.

⁶⁸ John Bell, 'Public Interests: Policy or Principle' in Roger Brownsword (ed), *Law and the Public Interests*, Proceeding of the ASLP Conference 1992 (Franz Steiner Verlag Stuttgart 1993) as cited in Feintuck (n 66) 30.

⁶⁹ Feintuck (n 66) 30; see also A.J.M. Milne, 'Public Interest, Political Controversy and the Judges' in Roger Brownsword, *Law and the Public Interests*, Proceeding of the ASLP Conference 1992 (Franz Steiner Verlag Stuttgart 1993) as cited in Feintuck (n 66) 39.

⁷⁰ E. S. Griffith, "The Ethical Foundations of the Public Interest" in C.J. Friederich (ed), *Nomos V: The Public Interest* (New York: Atherton Press, 1962) cited in Feintuck (n 66) 39.

⁷¹ C.W. Cassinelli, *The Public Interests in Political Ethics* in C.J. Friederich (ed), *Nomos V: The Public Interest* (New York: Atherton Press, 1962) cited in Feintuck (n 66) 39.

⁷² Feintuck (n 66) 41.

particular group's interest, such as majority groups, but also promote minorities' and future generations' interests.⁷³

Therefore, public interests is defined as "considerations affecting the good order and functioning of the community and government affairs, for the well-being of citizens."⁷⁴ Furthermore, for the purpose of clarity and lucidity, the term public interest should be defined as a regulation applicable to society. Hence, citizens will realise and understand what kinds of interests are categorised as "public". A community's interest refers to the interest of a particular community living in the same area or village. To a certain extent, this meaning is somewhat narrower than general interests. A community's interest is distinguishable from the public interests that play beyond the interests of an individuals, or at least a specific group, particular sector or geographical division of a community.⁷⁵ Community interests will only advance the interests of a particular group. For the purpose of the discussion in this article, community interests refer to the interests of the evicted community versus the interests of government who acted on behalf of public interests, which is *e.g.* revitalising the Ciliwung River in order to free Jakarta from future flooding.

In Indonesia, all types of the right to property, including property of a particular piece of land, have a social or public function. Therefore, in certain cases, people have to allow the government to expropriate their land (with compensation upon the takeover) if the land is needed in the public interest.⁷⁶ For the purpose of taking land in the public interest, the central government has adopted Law No. 2/ 2012 stipulating Land Acquisition for Development in the Public Interests (Land Acquisition Law). It categorises public interest, as follows:⁷⁷

- a. National defence and security;
- b. Public roads (highways, tunnel, railway track and train station and their facilities);
- c. Dams, irrigation, drinking water facilities, sanitation and sewage;
- d. Ports, airports and bus stations;
- e. Oil and gas infrastructure;
- f. Electrical installations;
- g. Communication networks and its facilities;
- h. Landfill and waste processing;
- i. Hospitals, either for central or local government;
- j. Public safety facilities;
- k. Grave yards;
- l. Public facilities, open spaces and parks;
- m. Natural and cultural heritage;
- n. Public offices;
- o. Slums improvement and development of rented public housing;
- p. Educational facilities;

⁷³ *ibid.*

⁷⁴ The Ombudsman of New South Wales, "Fact Sheet on Public Interest", <https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0014/3713/FS_PSA_16_Public_interest.pdf> accessed 5 November 2015.

⁷⁵ *ibid.*

⁷⁶ Law No. 5/1960 on Basic Agrarian Law (*Undang-Undang No. 5/1960 tentang Peraturan Dasar Pokok Agraria*) SG No. 104/1960, art 6.

⁷⁷ Law No. 2/2012 (n 53) art 10.

- q. Sports facilities; and
- r. Public markets and public parking yards.

The limitation in the exercise of human rights on behalf of public interests is also enshrined in the Constitution and the Indonesian Human Rights Act. These regulations limit the enjoyment of one's rights by being responsible for respecting others' human rights.⁷⁸ Furthermore, the Constitution emphasises that a limitation of rights may be imposed in order to recognise, respect and fulfil the right and freedom of others; nonetheless, a limitation should be authorised by law and should take into consideration morality, security and public order in a democratic society.⁷⁹

The Constitution and the Human Rights Law do not explicitly state public interest as a reason for a limitation; nevertheless, they provide a reference to the public order in a democratic society. In the literature, public order refers to "the conditions of peace, safety, and health that must exist in society and which governments (and other governing bodies) should strive to achieve in order to uphold the constitutional rights of the people and to facilitate that society's harmonious development."⁸⁰ The references to public order within Indonesian law could be classified as public interests since they relate to a broader concept of community. Public order is a principle that serves as a basis for developing cohesion within society and, to a certain extent, related to the general welfare of a society.

Therefore, it can be concluded that the justified limitations on human rights based on public interests exist in Indonesian law. Such limitations can be imposed upon any human right that is recognised in Indonesia's legal system, including the right to housing. Thus, an eviction can be categorised as a legal eviction if it is directed to a general welfare and carried out within the guidelines provided by both the international standards and, if applicable, the domestic law. Finally, a forced eviction based on the public interest should not neglect the interests of the affected community; this could be achieved by respecting the principles on forced eviction.

As discussed in Chapter 7, the CESCR Committee does not provide an interpretation of the definition of general welfare, as stated in Article 4 ICESCR. Nonetheless, in the Basic Principles and Guidelines on Forced Evictions Based on Development Projects (Basic Principles), the general welfare refers to the steps taken by states in fulfilling international

⁷⁸ Secretariat General of the Constitutional Court of Republic of Indonesia, *The 1945 Constitution of the Republic of Indonesia*, Jakarta, 2003. The authorised translation to English of the Constitution can be found in the website of the government of Indonesia <<http://peraturan.go.id/inc/view/11e58ce2b70ac2c094ce313132313436.html>> art 28J, see also Law No. 39/1999 on Human Rights (*Undang-Undang No. 39/1999 tentang Hak Asasi Manusia*) SG No. 165/1999, arts 69 and 70.

⁷⁹ Law No. 39/1999 (n 78) arts 70 and 73.

⁸⁰ French Decree, 22 December 1789, art.2, 9, as translated by E. Hendrickx and D. van Ryckeghem, '*Conflict in Society: Policing in Partnership? Community Policing and Public Order Policing, an Integrated Approach*' Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 4, 24 June 1999, <<http://www.csvr.org.za/index.php/publications/1449-conflict-in-society-policing-in-partnership-community-policing-and-public-order-policing-an-integrated-approach.html>> accessed 20 November 2015; as also cited by Mwanawina Ilyayambwa, 'When Human Rights Congregate With Public Order Policing: A South African Perspective' (2012) 19 *International Journal of Humanities and Social Science* 140 <http://www.ijhssnet.com/journals/Vol_2_No_19_Special_Issue_October_2012/15.pdf> accessed 20 November 2015.

human rights obligations, particularly the urgent need to protect the most vulnerable groups in the society.⁸¹

Within the meaning of general welfare under the Basic Principles, the government has failed in protecting the right to housing of the affected communities. The people that were affected by this programme were categorised as poor, who could not afford to live in adequate housing settlements and therefore they resorted to living in illegal settlements on the riverbanks. If they are evicted from their place to live, not only the right to housing is infringed, but also the right to property and social bond will be rooted out.

However, a contra argument may be raised that the government intended to achieve a broader general welfare that is to protect all of Jakarta's inhabitants, including those who live on the riverbanks, against flooding. Therefore, to prevent flooding a good flood prevention system should be developed. Furthermore, the development needs to clear the riverbanks from settlements but maintain the interest of the affected community. To balance these two interests, the government should consider elements of proportionality, which will be discussed in the next sub-section.

8.4.4 Proportionality and reasonableness of evictions

Proportionality related to human rights was first applied by the German Federal Constitutional Court to resolve conflicting provisions in the German Basic Law which, on the one hand, gave freedom and rights to the people, but, on the other hand, also gave the power to the parliament to limit this freedom.⁸² This principle aims to protect against the arbitrary limitation of human rights.⁸³ If authorities adopt measures that interfere with certain human rights or freedoms, the measures must be proportionate to in pursuing their aim.

Proportionality in human rights consists of three elements: adequacy, necessity and proportionality *stricto sensu* (balancing inquiry).⁸⁴ In other words, a set of questions to assess the proportionality of a government action infringing human rights is:⁸⁵ 1) Is the action adequate to further a legitimate aim (adequacy), 2) Was the measure necessary? 3) Do the benefits of the measure outweigh the harms to the rights-bearers?⁸⁶

The legitimate aim can be broadly defined,⁸⁷ such as national security, public order, public safety, public morals, public health, the protection of the rights and freedoms of others or the economic well-being of the country.⁸⁸ This broad definition gives a broad margin of discretion to states to decide as to whether an action is legitimate. The evictions aim to retain

⁸¹ UNGA, Basic principles and Guidelines on Development-Based Evictions and Displacement (n 37) para 21 note (d).

⁸² Bernhard Schlink, 'Proportionality (1)' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 718-737.

⁸³ *ibid*; see also Aharon Barak, 'Proportionality (2)' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 738-755.

⁸⁴ Jan Sieckmann, 'Proportionality as a Universal Human Rights Principle' in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer 2018) 11-12.

⁸⁵ Katherine G. Young, 'Proportionality, Reasonableness and Economic and Social Rights' in Vicki J. Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers New Challenges* (CUP 2017) 248-272.

⁸⁶ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 340-370.

⁸⁷ Saul, Kinley, and Mowbray (n 56) 250.

⁸⁸ See for example, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) arts 8(2), 9(2) and 10(2).

the normal function of the river so that it can function to hold rainwater and prevent Jakarta from flooding in the future. The legal basis of the eviction is a development project for public interests enshrined in the Land Acquisition Law No. 2/2012. The category of public interest under Indonesian law has been discussed in Section 8.4.3 and, therefore, it can be concluded that the reasoning behind the evictions pursues a legitimate aim, which is for the public interest and public safety. Although the reason has fulfilled a legitimate aim, was it an adequate method? Will removing people help to prevent flooding? Due to its location which below sea level, Jakarta is used to flooding. The flooding has been experienced by the inhabitants ever since the Dutch governed this city, which was known as Batavia.⁸⁹ Currently, the flooding is worsening which mainly caused by the combination of the rise of sea level and the sinking of the land surface, due to excessive extraction of land water in Jakarta.⁹⁰ Following several forced evictions and the development of a flood prevention system, the area liable to flooding was significantly reduced.⁹¹ However, flooding cannot be resolved entirely. At the end of April 2019, Jakarta experienced heavy floods that affected most parts of the city.⁹² This fact proves that only removing people is not adequate to prevent the floods in Jakarta. A more comprehensive and integrated plan, mainly involving spatial planning and enforcement, is crucial.⁹³

The second question of the proportionality test: was the measure necessary? The necessity test relates to alternative options, as to whether the authority has other choices that would be less harmful than the measures taken.⁹⁴ From the government's perspective, eviction and resettlement would be the most effective means to vacant the riverbanks, particularly since it is prohibited to construct permanent buildings on the riverbanks.

With regard to alternatives, it might be possible to establish a “*kampung susun*” or “stacked *kampung*” on the riverbanks. The people prefer this model rather than relocating to the multi-storey housing. A stacked *kampung* refers to “several rows of houses that are built on top of each other with each level connected by ramps and social areas that resemble similar spaces in the real *kampung*.”⁹⁵ The “*kampung susun*” allows them to be more active, similar to the lifestyle of a real *kampung*. This idea has been put forward before the evictions were carried out; the affected community accepted this offer, yet, in the end, the idea was not realised as the

⁸⁹ Christopher Silver, A Case of Ecological Planning: Urban Flooding in Old and New Jakarta (5) Citygreen <https://www.nparks.gov.sg/-/media/cuge/ebook/citygreen/cg5/cg5_15.pdf> accessed 1 May 2019.

⁹⁰ *ibid.*

⁹¹ See for example: ____, ‘Dulu Diprotes, Normalisasi Kali Ciliwung Mulai Dirasakan Manfaatnya, Banjir Kampung Pulo Berkurang’ *Tribunnews.com* (10 Februari 2016) <<http://www.tribunnews.com/metropolitan/2016/02/10/dulu-dipotes-normalisasi-kali-ciliwung-mulai-dirasakan-manfaatnya-banjir-kampung-pulo-berkurang>> accessed 1 May 2019.

⁹² ‘Torrential rain triggers flooding, evacuations in Jakarta’ *ChannelNewAsia.com* (26 April 2019) <<https://www.channelnewsasia.com/news/asia/torrential-rain-triggers-flooding-evacuations-in-jakarta-11481398>> accessed 1 May 2019.

⁹³ See Silver (n 89).

⁹⁴ Barak (n 86) 317-339; see also Laura Clerico, ‘Proportionality in Social Rights Adjudication: Making It Workable’ in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer 2018) 25-48.

⁹⁵ Dames Alexander Sinaga, ‘What Is Kampung Susun and Why Do Jakarta's Urban Activists Love It?’ (*JakartaGlobe*, 15 March 2018) <<https://jakartaglobe.id/context/kampung-susun-jakartas-urban-activists-love/>> accessed 30 January 2019; see also Tito Murbiantoro et al, ‘Model Pengembangan Hunian Vertikal Menuju Pembangunan Perumahan Berkelanjutan’ (2009) 4 (2) *Jurnal Permukiman* 72 <<http://jurnalpermukiman.pu.go.id/index.php/Jp/article/view/183/159>> accessed 30 January 2019.

authority was of opinion that the project would be too time consuming and would require an excessive budget.⁹⁶

The second alternative would be *in situ* resettling. From the experiences with the informal settlements in Kampung Tongkol, North Jakarta, people were willing to retreat 5 meters from the waterside; therefore, a 5-meter wide for an inspection route between the settlements and the river was created.⁹⁷ A retreat is feasible because of the space created between the river and the settlements. Nonetheless, for some settlements additional space simply does not exist, making such arrangement impossible. In such case, resettlement is needed. This experience suggests that the government could explore other methods, such as *in situ* resettling, if the location allows for such a modification. The government, in this case, chose to resettle people to rented public housing and forcibly evicted the people from the riverbanks which, to a certain extent, can be regarded as unnecessary.

The next element of proportionality is the proportionality in a strict sense. This element focuses on the relation between the benefit in fulfilling the policy's purpose and the harm caused by limiting a human right for achieving the objective.⁹⁸ It may be too soon to judge Jakarta's evictions in regard to proportionality in a strict sense. The reasons for the evictions are to revitalise Jakarta's rivers, to free Jakarta from slums, and to further provide adequate housing for the poor. Based on these three reasons only, the evictions could be proportional in a more narrow sense.

To assess proportionality, a further examination of the consequences for the affected communities shows that the evictions were not proportional in a strict sense. Two observations lead to this conclusion. Firstly, evictions caused the most harm to the migrants without residence cards, because this group was excluded from the government's offer of alternative accommodation. The evictions made these migrants homeless. Secondly, the people who moved into the rented public housing also experienced difficulties. These difficulties included the search for jobs and the adaptation to a new way of life. Many people became jobless following the evictions.⁹⁹ While the households' expenses in the current accommodation are increasing if compared to those when they lived in informal settlements and in the same time they lost their jobs; thus, the affected communities could not afford to pay the rental fees of the housing.¹⁰⁰ The inability to pay persistent caused rents to be in arrears, which then could cause eviction from the public housing. In addition, although they live in adequate housing in multi-storey housing, this way of life is more individual compared to their previous way of life, that was more communal. Living in a multi-storey housing, particularly in the first year after the

⁹⁶ Interview with a representative of an NGO 'Ciliwung Merdeka' Jakarta 16 September 2016, see also ____, 'Editorial: If Only Ahok Would listen' Jakarta Post (22 August 2015) <<https://www.thejakartapost.com/news/2015/08/22/editorial-if-only-ahok-would-listen.html>> accessed 1 May 2019.

⁹⁷ Interview with an NGO 'Urban Poor Consortium' Jakarta, 10 September 2016.

⁹⁸ Barak (n 86) 344, see also Mosha Cohen-Eliya and Gila Stopler, 'Probability Thresholds as Deontological Constraints in Global Constitutionalism' (2010) 49 (1) Columbia Journal of Transnational Journal 75, 102.

⁹⁹ Many of the members of the affected community have their own small groceries shops or bike/motorcycle workshops at their house. Therefore, when they were evicted from their places, they do not have these occupations anymore. See detail in Alldo Felix Januardy and others, *Mereka Yang Terasing: Laporan Pemenuhan Hak Atas Perumahan Yang Layak Bagi Korban Penggusuran Paksa Jakarta Yang Menghuni Rumah Susun* (Lembaga Bantuan Hukum Jakarta 2016) 20-21.

¹⁰⁰ *ibid* 53-59.

evictions, has proven to be hard for residents, due to the challenges mentioned above demonstrating that relocation does not necessarily help them to live a better life in the future.¹⁰¹ The rearrangement of urban settlements to prevent flooding and the cleaning of unhealthy slums do not necessarily require the eviction of people or resettlement of communities in more modern housing complexes, particularly in urban Jakarta where people live in a more communal manner. The participatory approach taken by community leaders and NGOs has resulted in a plan to build '*kampung susun*'s so that the government can build a dam and people can have a decent livelihood based on their communal values.¹⁰² However, the government had refused this plan and continued to evict people. Based on these two observations, the Jakarta evictions can be considered to be disproportionate in a strict sense since, the evictions cause more harm to the affected people than the benefit of the policy.

Moving on now to the meaning of the principle of reasonableness. Some experts argue that the principle of reasonableness in the common law system is somewhat similar to the principle of proportionality.¹⁰³ Unlike the proportionality principle that has some "generally agreed" upon elements, reasonableness has not.¹⁰⁴ A decision can be reasonable if a proper consideration has been taken into account prior to the adoption of such decision and all relevant factors have been properly balanced.¹⁰⁵ In the field of economic, social and cultural rights, the South African Constitutional Court has developed 'a reasonableness test'. The Court ruled that in order to be reasonable, government measures should not (amongst other things) leave out or exclude a significant sector of a community, particularly the neediest and vulnerable groups.¹⁰⁶

Based on this standard, the Jakarta evictions can be regarded as unreasonable since not all of the relevant factors were considered. Firstly, moving the slum dwellers to multi-storey housing would eradicate the *kampungs*' social lives. Urban Jakarta mostly consists of informal settlements; therefore, the settlements constitute a significant element of the community that provides accommodation for the poor. For this reason, the government could have opted for an alternative approach such as to improve or upgrade the conditions of the *kampungs*, rather than eliminate them altogether. Clearly, the government avoided the more reasonable alternative. Furthermore, it is proven that resettling groups to the rented public housing is not deemed to be the best option, as people were experiencing rent in arrears and struggle to look for new jobs.

Secondly, as discussed previously, migrants without a Jakarta residence card were excluded from their enjoyment of the alternative accommodation. The number of affected

¹⁰¹ E.D. Kusumawati, 'Unsafe River Bank Houses? A Context of Human Rights Issues on Freedom from Poverty, Development Programmes, and Accountability Mechanisms in Indonesia' (2018) 2 *Journal of Southeast Asian Human Rights* 389.

¹⁰² Rita Padawangi, 'In Search of Alternative Development in Post-Reformasi Jakarta' in Jorgen Hellman, Marie Thynell, and Roanne van Voorst (eds), *Jakarta: Claiming Spaces and Rights in the City* (Routledge 2018).

¹⁰³ Juan Cianciardo, 'The Principle of Proportionality: the Challenges of Human Rights' (2010) 3 (1) *Journal of Civil Law Studies* 177; see also E. Thomas Sullivan and Richard S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (OUP 2008) 38-39.

¹⁰⁴ See Barak (n 86) 373; see also T. R. Hickman, 'The Reasonableness Principle: Reassessing Its Place in the Public Sphere' (2004) 63 *Cambridge Law Journal* 166.

¹⁰⁵ Robert Alexy, 'The Reasonableness of Law' in G. Bongiovanni, G. Sartor, and C. Valentini (eds), *Reasonableness and Law* (Springer 2009) 5.

¹⁰⁶ The South African Constitutional Court, *Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46, 4 October 20000, paras 42-44.

migrants in every eviction is significant.¹⁰⁷ Therefore, leaving migrants behind without any offer of temporary shelter should be considered to be unreasonable and discriminatory.

8.4.5 Carried out in accordance with international human rights standards

General Comment No. 7 and the Guidelines for Forced Evictions, as discussed in Chapters 2 and Section 8.3, lay out numerous steps in conducting an unavoidable eviction, starting from the phase prior to, during and post evictions.

International standards require a genuine consultation with the community affected. In 2012, the Government of Jakarta had conducted several meetings with the residents who would be affected by the policy. The government, at that time, offered an alternative solution. The inhabitants would be moving into “*kampung susun*.” This solution could be understood as the inhabitants living in a *kampung* will likely have strong relationships between each member of the community. This way of life is much different from the vertical storey housing that tends to be more individualist and lacks collective sense. A *kampung susun* would uphold their sense of community and safeguard the economic activities of the residents against interruption. At that time, the government promised that there would not be an eviction and people could move voluntarily. Numerous meetings were also conducted by the government to discuss the compensation that will be received by the residents. Eventually, no agreement had been concluded between the people and the government; in the end, evictions erupted into violence and, without any compensation for their lost homes, residents were only offered alternative accommodation in a rented public housing, which was insufficient in accommodating their ways of life.¹⁰⁸ The affected communities were allowed to stay in the public housing for two years initially. After the two years lapsed, the rental agreement with the government can be extended, depending on the tenants’ performance and the authority’s consideration. The non-compensation decision was based on the fact that the inhabitants were living on state land. Thus, the government categorised the inhabitants as illegal settlers, which did not entitle them to compensation.

Neither the national nor the Jakartan government have a specific legislation regulating forced evictions. As for the procedure prior to evictions, the government often employs the procedure enshrined in the Land Acquisition Law that obliges the government to consult and inform the affected residents.¹⁰⁹ In case communities refuse to move and insists on remaining in the location, the government usually sends eviction notices (*Surat Perintah Penggusuran – SP*). There is no legislation stipulating the number of eviction notices to be given to the affected communities. The government’s practices show that the notices are sent out three times. Following the final notice, the government will provide an order to demolish the houses (*Surat Perintah Bongkar*) and buildings in the targeted area. Nevertheless, these procedures are often violated.

¹⁰⁷ See discussion on Section 8.2 of this chapter.

¹⁰⁸ See discussion on section 8.4.4 of this chapter.

¹⁰⁹ Law No 12/2012 (n 53) arts 16, 17, 19-21; see also President Regulation No. 71/2012 on the Implementation of Land Acquisition for development in the Public Interest (*Peraturan Presiden No. 71/2012 tentang Penyelenggaraan Pengadaan Tanah bagi Pembangunan untuk Kepentingan Umum*) SG No. 156/2012, arts 12-15.

In certain cases, such as in the Pasar Ikan eviction, the residents were not provided enough time between the notices and the eviction to move to the alternative accommodation.¹¹⁰ In the Kampung Pulo eviction, the people did not receive official notices of demolition; instead, they received a short message service (SMS) from the head of the district.¹¹¹ This notice may be deemed to have been inappropriate based on international standards. An eviction notice should contain a detailed justification for the decision, such as (a) an absence of reasonable alternatives; (b) the full details of the proposed alternative; and (c) if no alternatives exist, all measures should be taken and foreseen to minimise the adverse effects of evictions.¹¹² In addition, a notice should provide sufficient time to enable those subject to evictions to collect their property and assess its value in case the property becomes damaged.¹¹³

At the national level, the government has adopted regulations on land acquisition for the public interest. These regulations are Law No. 2/2012 on Land Acquisition for Development in the Public Interest,¹¹⁴ the Presidential Regulation No. 71/2012 on the Land Procurement Process for Development in Public Interests,¹¹⁵ and a regulation adopted by the National Land Agency (*Badan Pertanahan Nasional* – BPN) No. 5/2012 on the Technical Guidance on Land Procurement.¹¹⁶ These regulations clearly stipulate procedures and measures that should be performed by the government in acquiring land occupied or owned by individuals for the sake of public interest. Such measures range from planning, to preparation and execution. In the case of unavoidable evictions, the government must provide compensation for the people if they possess a proof of ownership of land or buildings.¹¹⁷ In case they have no available proof but they have been living in the area for years, the witnesses' statements of two people living in the same area could be sufficient to proof the tenure of related land.¹¹⁸ Nonetheless, the Government of Jakarta showed a tendency to avoid these regulations and did not apply them in the Jakarta eviction cases, as the government stated that the residents were illegal squatters who occupied the state's land that was unsuitable for settlements; hence, these people had to be evicted without compensation.

The evictions which occurred in Kampung Pulo and Bukit Duri raised two crucial issues. The first is that when the government executed the evictions, the complaints brought before the Jakarta Administrative Court and the Central Jakarta Court were still under consideration and the courts had not yet reached their verdicts. Based on international standards, ignoring a legal process is strictly prohibited.¹¹⁹ Based on these guidelines, when the

¹¹⁰ Alldo Fellix Januady, Julio Castor Achmadi and Cindy Iqbalini Fortuna, 'Seperti Puing: Laporan Penggusuran Paksa Di Wilayah DKI Jakarta Tahun 2016' (2017) 46-47.

¹¹¹ _____, 'Pemprov DKI Jakarta Harus Miliki SOP Penggusuran' *CNN Indonesia* (Jakarta, 24 August 2015), <<http://www.cnnindonesia.com/nasional/20150824190041-20-74186/pemprov-dki-jakarta-harus-miliki-sop-penggusuran/>> accessed 25 August 2016.

¹¹² The Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 37) para 41.

¹¹³ *ibid* para 42.

¹¹⁴ Law No. 2/2012 (n 53).

¹¹⁵ Presidential Regulation No. 71/2012 (n 109).

¹¹⁶ Regulation of the Head of the National Land Agency-BPN No 5/2012 on Technical Guidances for the Implementation of Land Acquisition (*Peraturan Kepala Badan Pertanahan Nasional No. 5/2012 tentang Petunjuk Teknis Pelaksanaan Pengadaan Tanah*).

¹¹⁷ Presidential Regulation No. 71/2012 (n 109) arts 23, 24 and 25.

¹¹⁸ *ibid* art 26.

¹¹⁹ The Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 37) para 36.

Government of Jakarta carried out the evictions, it did not respect these norms and the due process of law.

Although the General Comments of the CESCR and the guidelines are soft law, which has no binding power as such, the UN member states have accepted the authoritative interpretation of the ICESCR, provided by the CESCR and other UN human rights bodies. Since Indonesia does not have any specific regulation on forced evictions as of yet, these documents can be beneficial to assess the government's compliance with international human rights norms when the government carries out unavoidable evictions.

The second issue may be the use of force in controlling the crowd. In the case of the Kampung Pulo eviction, the government used force to restrain the people from attacking the authorities and resisting the government's demolition of their houses. An escalating clash between the authorities and the residents was unavoidable. The inhabitants tried to protect their homes by forming human barricades, without any protective shields, and setting tires on fire to prevent the bulldozer from ruining their settlements. On the other hand, the officials at the location carried self-defence equipment, such as firearms, knives, and batons. In addition, they also had access to tear gas and water cannons. The officials wore protective helmets, held riot shields for protection, and some wore protective padding. As reported by numerous Indonesian media outlets,¹²⁰ the government deployed approximately 2,200 officers, including members of the Indonesian Army, the police and the Public Order Institution. This number was large compared to the number of the residents, which was only around 300 people. Thus, the power of the two parties was imbalanced, especially in terms of the number of officials and their equipment.

General Comment No. 7 and the Guidelines do not specify how government forces may be employed during evictions as to comply with human rights standards. The only element mentioned in the two instruments above is that the use of force must be proportional and only if it is necessary, with reference to the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,¹²¹ and any national or local code of conduct consistent with international law and human rights standards.¹²² One of the utmost principles is the requirement for the officials, as far as possible, to apply non-violent methods before resorting to the use of force and firearms when carrying out their duties.¹²³ Moreover, they may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.¹²⁴ The Indonesian government has not yet adopted a particular procedure for evictions. As numerous evictions took place on an involuntary basis and many instances of violence occurred, it would be advisable to clearly regulate the use of force in such situations.¹²⁵

¹²⁰ For example: Jakarta Post, Kompas, and Republika.

¹²¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials were adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990 and welcomed by the UN General Assembly in Resolution 45/166 (18 December 1990).

¹²² The Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 37) para 48.

¹²³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 121) para 4.

¹²⁴ *ibid.*

¹²⁵ LBH Jakarta, 'Saatnya Membuat Regulasi Penggusuran Sesuai dengan Standar HAM: Belum Ada Satupun Peraturan yang Melindungi Warga Tergusur dari Pelanggaran Hak dan Kekerasan' RISALAH KEBIJAKAN 09 November 2015 / Volume II, 3 <http://www.bantuanhukum.or.id/web/wp-content/uploads/2015/11/Risalah-Kebijakan_Regulasi-Penggusuran_Merged.pdf> accessed 10 December 2015.

8.4.6 Availability of full and fair compensation and rehabilitation

In the aftermath of an eviction, states have to provide just compensation and sufficient alternative accommodation as well restitution, if possible. These measures should be taken immediately and without any discrimination,¹²⁶ irrespective of whether they hold a title to their property. For slum dwellings, case by case consideration in providing compensation is recommended.¹²⁷ Compensation should be given for any losses of personal, real or other property or goods and any economically assessable damage, including material damages and loss of earnings.¹²⁸

The government did not provide any compensation for the material damages to property and loss of earnings to those who were evicted from the riverbanks. The Indonesian legislation states that compensation will only be provided if the people can present their ownership of the land or houses; yet, almost all of the inhabitants in the poor urban areas do not possess such a title. Therefore, they are not entitled to receive compensation. However, Article 36 of Law No. 12/2012 stipulates that compensation could be in the forms of cash, alternative land, resettlement, share ownership, or other forms agreed upon by the parties. Therefore, providing alternative shelter can also be interpreted as resettlement, which can be categorised as one type of compensation mentioned in Article 36.

In the case of the Kampung Pulo settlement, the houses were built permanently on state land and in areas that are forbidden for settlements. This issue was raised by the government, which based its opinion on both national and local regulations.¹²⁹ However, the government should also consider several aspects, such as the fact that these residents also purchased their houses from other residents, they had already lived in the Kampung Pulo for a long time, and they built and renovated their houses as they thought the houses were their assets. The fact that the residents paid taxes for electricity and other applicable taxes had made them assume they were not illegal residents. Additionally, the DKI Jakarta government should also be held responsible for the establishment of shanty towns, particularly by letting the residents live in informal settlements for generations without taking any action to warn or to forbid them from living in such areas.

In addition, the Jakarta government did not provide compensation for the affected community in the Kalijodo eviction. Although the residents of Kalijodo had been living in the area for years, they did not possess the specific proofs of ownership as stipulated in the national regulations. As a result, the government did not recognise the proofs that the residents brought and refused to provide compensation.

In the Kalijodo eviction, similar to the Kampung Pulo eviction, the government provided temporary accommodation for the inhabitants; however, the housing was only provided for the residents with the Jakarta identity card and no solution was offered for those who do not hold such a card. They were given a choice either to return to their place of origin or to stay in Jakarta with no alternative accommodation provided. As housing is unaffordable,

¹²⁶ UNGA, the Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 37) paras 52, 59.

¹²⁷ *ibid* para 61.

¹²⁸ *ibid* para 60.

¹²⁹ Local Regulation of DKI Jakarta No 8 /2007 (n 49) arts 12c, 13a, and 20.

letting people stay without having a roof above their head is definitely not a solution; instead, this will lead to the establishment of new informal settlements which are vulnerable to eviction threats.

In addition, although a specific consideration could apply for compensation in informal settlements, such as what happened in Jakarta, the government should also consider other losses experienced by the affected communities. Many of their belongings, such as beds, wardrobes or other household stuff, were ruined during the eviction. The damage on belongings may vary since it depends on whether the inhabitants received sufficient notices to safeguard their belongings. Most importantly, numerous economic activities, such as small shops “*warung*” owned by the inhabitants, were also destroyed. These shops provide the families an opportunity to earn a living. As an opportunity of earnings can be one form of compensation, the government should take such loss into account in considering compensation for the affected communities.

Following the evictions, the Jakarta government provided the affected communities with alternative rented vertical housing, which rarely occurs in the forced evictions of informal settlements.¹³⁰ Nevertheless, the multi-storey housing supplied by the government is entirely modern and there is no sense of community within these spaces. The nature of these modern buildings is in sharp contrast to the lifestyles with which the affected individuals are familiar with. The people used to live in rows of houses which provided them with the sense of a close bond with each member of society. The multi-storey housing is considered to be more individual and does not reflect the cultural values of the communities. The government distributed the housing units through a lottery system. Therefore, a community may end up being divided between different blocs or floors. This separation uproots ties between the communities.

Although preserving cultural values is not directly addressed in General Comment No. 7 and the Guidelines, it is a part of the essential elements of the right to adequate housing, *i.e.* cultural identity, as outlined by the ICESCR in General Comment No 4.¹³¹ The General Comment states that the implementation of the right to housing should be culturally appropriate. This means that the building materials used for the construction of the buildings and the supported policies “must appropriately enable the expression of cultural identity and diversity of housing.”¹³² Staying true to cultural identity does not necessarily preclude the modernisation of buildings in favour of the traditional and cultural structure; nevertheless, “modernisation in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed.”¹³³ Although the CESCR has yet to further develop the precise obligations relating to cultural considerations in its general comments and concluding observations,¹³⁴ states have a positive obligation to take into account culturally appropriate element of housing for its citizens despite

¹³⁰ Benjamin Davy and Sony Pellissery, ‘The Citizenship Promise (Un)Fulfilled: The Right to Housing in Informal Settings’ (2013) 22 International Journal of Social Welfare 68 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/ijsw.12033>> accessed 30 May 2017.

¹³¹ CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23, para 8(g).

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ Yvonne Donders, ‘Protecting the Home and Adequate Housing: Living in a Caravan or Trailer as a Human Right’ (2016) 5 International Human Rights Law Review 1, 19.

their wide margins of appreciation in implementing such obligations.¹³⁵ In this case, if Indonesia insisted on moving the affected people to a modern building, such building must, as far as possible, accommodate or reflect the communal way of life of the community.¹³⁶ The government must incorporate elements of the affected people's cultural identity into high-rise buildings. This could be achieved by (upon consultation with the affected members) designing collective places for social gatherings for members of the community resettled in multi-storey housing. Each member could still keep their bonds with the other members of the community, even if they were living in a modern high-rise building.

Based on the aforementioned facts, it is challenging to decide whether or not the evictions, which occurred in Jakarta between 2015 and 2016, were in conformity with human rights standards. The fact that the primary reason for the evictions was for the general welfare of all Jakarta residents shows that there was a public-interest reasoning behind the evictions. To some extent, genuine consultations were also held, although not in every case of eviction. Other administrative requirements, such as eviction notices, due notices as well as offering equal alternative settlements were not, or only partially, fulfilled. All of the procedures taken by the local authority show that the government did not fully comply with all of the standards established at the international level.

Moreover, no compensation was paid, excessive violence was possibly used, and the authorities did not wait for the verdicts of the courts. These issues indeed may lead to a violation of the right to housing.¹³⁷

Furthermore, the government-provided rented public housing did not accommodate the cultural values of the residents. Moreover, the distribution of alternative housing discriminated towards the non-Jakarta people. In addition, lack of participation from the people affected by the development policy has caused failures in achieving the designed aims and has triggered serious damage, both material and non-material. Therefore, the government should focus more on empowering people in the development of housing policy.¹³⁸ In the case of evictions, participation is needed to decide the design of future houses and their living space in order to enable sustainable solutions for slums and the residents in Jakarta without abandoning their shared social, cultural and communal norms.

8.6 PRELIMINARY REFLECTIONS ON PART II

The above discussions demonstrate that the Jakarta forced evictions have raised numerous human rights issues, primarily the right to adequate housing. For example, the evacuation of the Kampung Pulo and Bukit Duri residents from the Ciliwung Riverbanks led to questions on its legality. The local government of Jakarta only provided the alternative accommodation for

¹³⁵ *ibid* 20-25. Donders analysed the elements of cultural adequacy based on the cases brought before the European Committee on Social Rights that has heard cases relating to housing discrimination faced by the Roma, gypsies and travellers communities.

¹³⁶ General Comment 4 (n 131).

¹³⁷ Davy and Pellissery (n 130) 75-76.

¹³⁸ KOMNAS HAM, Press Release, 'Penggusuran Kampung Pulo, Jatinegara, Jakarta Timur oleh Pemerintah Provinsi DKI Jakarta' (*KOMNAS HAM*) <[https://www.komnasham.go.id/files/20150824-penggusuran-kampung-pulo-jatinegara-\\$XLX384.pdf](https://www.komnasham.go.id/files/20150824-penggusuran-kampung-pulo-jatinegara-$XLX384.pdf)> accessed 1 December 2015.

the resettlement programme to Jakarta resident card holders. In addition to the discriminatory nature in providing shelters for the affected communities, the due process of the evictions did not fully comply with the other obligations enshrined both in international and national laws. This includes the situation where buildings were demolished, while the accountability processes were still under consideration in the local courts. In addition to due process, there were also issues on the excessive use of violence to suppress the residents and on the lack of compensation.

Evictions based on development and public interests can be justified by law; however, the affected community's interest must also be equally considered when weighing the interests of the public. Although an eviction can be justified, and therefore can limit the exercise of specific human rights, an eviction should be carried out under the principles of international human rights law. In the case of inevitable evictions and no standard operating procedure (SOP) available at the local level, the government should comply with the standards enshrined in the international or national regulations to minimise the human rights violations.

To reduce the vulnerability of the people living in slums or squatters towards forced evictions, involving them in the planning and development of their environment might be a better solution than carrying out forced evictions. In addition, in the case of a justified eviction, an effective monitoring system in the aftermath of an eviction, for example the development of the affected area, is also needed to ensure that the public interest argued by the government is indeed "public" in nature and will not transform into a "private" interest. Mainstreaming transparency, consultation in city planning and empowerment of people will work better to prevent evictions and human rights violations in the future.

From the last five chapters (Chapters 4-8) of this book, it can be concluded that the Indonesian governments, at both the national and local levels, have adopted several programmes to achieve the right to housing, which indicates that Indonesia is (partly) compliant to its international human rights obligations. However, several drawbacks exist. For example, in providing subsidised rented public housing, local governments limit the distribution of public housing to a particular group. The governments have also provided low-cost rented multi-storey housing; nonetheless, numerous units are now owned by the rich rather than the low-income groups. These practices indicate that monitoring the governments' programmes is crucial to ensure that the programmes achieve their planned purposes.

In addition, as found in the Chapters 7 and 8, the governments have not fully complied with their international obligations, such as in their discriminatory practices against the migrants in accessing public housing and carrying out illegal evictions. Furthermore, in the case of an infringement of the human right to housing, states have to provide a mechanism to hold the responsible parties to account for their action. A mechanism should include a forum, as well as redress and remedies, to compensate the harm.

In light of the deficiencies that are found in Indonesian housing law, policies and its compliance with the fulfilment of the right to adequate housing, an in-depth and thorough analysis on accountability might reduce such gaps. As a continuous process, accountability can advance the implementation of human rights. The accountability process starts with decision-making processes with communities' involvement, to enforcement measures for any infringements that occur.

Part III of this book will provide a discussion on accountability in the field of human

rights, and how it can be employed to improve the implementation of human rights. To attain such aims, Chapters 9, 10 and 11 will examine the available literature on accountability and how it can be employed in order to respect, protect and fulfil human rights, particularly the right to adequate housing.

PART III

An Analytical Framework of Accountability as A Process to Assess the Fulfilment of the Right to Adequate Housing in Indonesia

CHAPTER 9

ACCOUNTABILITY AS A PROCESS TO STRENGTHEN THE IMPLEMENTATION OF HUMAN RIGHTS

9.1 INTRODUCTION

Part 3 of this book, which is comprised of three chapters (9, 10 and 11), investigates the concept of accountability as a process that could possibly assist governments in realising human rights, particularly the right to adequate housing. The aim of the practice of accountability in modern life is to control governmental power, in order to prevent abuse and to keep the power in line with the established rules. Therefore, accountability can promote and strengthen the implementation of human rights. The discussion of accountability in human rights discourse can be found more often in civil and political rights, whereas its discussion in terms of economic, social and cultural rights is infrequent. Despite the growing body of research on accountability in the field of the right to health, there is a lack of literature which has investigated the role of accountability with regard to the right to housing. In addition, most human rights literature mainly discusses accountability as a forum that can pass judgment for violations of human rights and their perpetrators.

Chapter 9 aims to provide the basis for the need for accountability to become a process in realising human rights. Accountability as a constructive process means that there is a mechanism that continuously evolves from the decision making-stage, to a stage involving redress and remedies, as well as a stage in which enforcement measures can be adopted should any violation occur. First, an attempt to better understand accountability, by looking closely at the evolving meaning of accountability in different discourses, will be provided in Section 9.2. It also briefly describes the three main theories on accountability, namely the principal-agent theory, the stewardship theory and the relational theory. These theories explain the actors, either seniors, subordinates or both, that can be held accountable for their unlawful actions. Subsequently, Section 9.3 discusses the two concepts emanating from literature on accountability and their intersections. These are ‘accountability as a mechanism’, and ‘accountability mechanisms’. Accountability as a mechanism refers to (institutional) arrangements under which an actor can be held accountable, while an accountability mechanism relates to the procedure through which an actor can be held accountable. Furthermore, Section 9.3 discusses more specific different types of accountability mechanisms that can be generally found at the national level. Following the discussion on the variety of accountability approaches and considering the lack of guidance on how accountability can function in the human rights discourse, Section 9.4 suggests the concept of accountability as a constructive process in advancing human rights. While accountability as a mechanism functions only after an unlawful act has been conducted by an actor (*ex post facto*), accountability as a process contributes in a more comprehensive manner to preventing actors from infringing rights, to holding actors into account for the infringements, and to providing remedies and redress. Accountability as a constructive process works in a circle; it consists of several elements, i.e.

people's participation in the decision-making process, monitoring procedures, accountability mechanisms, and the availability of redress and remedies and enabling enforcement measures.

9.2 UNDERSTANDING ACCOUNTABILITY

9.2.1 The emergence of accountability

The term 'accountability' emerged with the rise of modern states in Europe in the late middle ages,¹ and survived the transformation from monarchical to parliamentary rule, then to popular sovereignty.² Since then, the use of the word accountability in literature has been growing and reached its peak usage between the years 2000-2005.³ If the word accountability is traced back, it has Anglo-Norman root (*eg: acompte, aconté*)⁴ with close ties to bookkeeping.⁵ Melvin J. Dubnick has observed that it was during the reign of William I of England that the term and concept were first introduced.⁶ In 1085, William obliged all the owners of properties in his realm to list their property in order to render a count of their possessions. The aim was not only for taxation, but also as a basis for Royal Governance. Although as a type of census, this system was not sufficient as a foundation for an administration.⁷ This listing system then evolved and functioned as a centralised administrative government under the kingdom of England. In the following centuries after William I, the word accountability moved away from its etymological root, as *a count* that closely related to bookkeeping or financial administration, to a broader concept of public accountability. Furthermore, it became a promise of fair and equitable governance.⁸

Accountability, which at first served as a means to enhance the effectiveness and efficiency of public governance, has become an aim of public governance itself. The use of this word reached its peak and obtained a common place in public administration literature from the year 2000 to 2005, within in the awakening issue of good governance. Accountability related to good governance was used for the first time in the United States, and then quickly spread to Europe and other countries worldwide.⁹

9.2.2 Different meaning of words related to accountability

The word accountability sometimes relates to several words such as transparency, responsiveness, controllability, and responsibility. The latter is frequently used interchangeably

¹ M.J. Dubnick, 'Seeking Salvation for Accountability' (the 2002 Annual Meeting of the American Political Science Association, Boston, 29 August-1 September 2002) 3

<<http://mjdubnick.dubnick.net/papersrw/2002/salv2002.pdf>> accessed 1 February 2019.

² *ibid* 9.

³ Melvin J. Dubnick, 'Accountability as a Cultural Keyword' in Mark Bovens *et al* (eds), *The Oxford Handbook of Public Accountability* (OUP 2014) 23-24.

⁴ Mel Dubnick, 'Clarifying Accountability: An Ethical Theory Framework' in Noel Preston, Charles Shampord and Carol-Anne Bois (eds), *Public Sector Ethics: Finding and Implementing Values* (Routledge 1999).

⁵ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 448.

⁶ Dubnick, 2002 (n 1) 7-9.

⁷ Reinhard Bendix, *Kings or People: Power and the Mandate to Rule* (University of California Press 1978) 185.

⁸ Bovens 2007 (n 5) 449.

⁹ *ibid*.

with accountability. To emphasise its difference with accountability, which will be discussed in further detail in this section, each of these terms will be briefly discussed below:

a. Transparency

Transparency means that citizens can have access to information about commitments that the state has made and whether the state has fulfilled these. Access to information at all levels of societies is the key element of transparency.¹⁰ These include rules and procedures on how a decision is adopted, what is being conducted, how and why actions occur, who is involved, and by what standards decisions are made. All of these elements must be open to scrutiny and comprehensible by the people. By all these means, transparency may be appraised as a part of accountability, or at least as a requirement to hold a public official accountable.¹¹

b. Responsiveness

Along with accountability, responsiveness relates to the social contract between the state and the people.¹² In this regard, the state needs to respond to the real needs of its people. The response should be effective and efficient, which indeed is not an easy task. The state should consider all people's expectations including their locality, for instance their cultural traditions that might influence their expectations.¹³ This responsiveness will result in anchoring policies, strategies and programmes, as well as resources, all leading to the improvement of public services.

c. Controllability

Accountability is also comparable to controllability. To control means to have power over someone else. Therefore, an official possessing control usually holds a higher position than the agent. Several experts use the word control when it comes to accountability. For example, Arthur Lupia states that an agent is being held accountable to his/her principal, if there is a degree of control from the principal to the agent.¹⁴

The process of control is also crucial in accountability; control will guide the officials to implement a policy through appropriate measures. However, control is not the same as accountability; it is only an element of accountability. In this regard, accountability is a broader concept than the concept of control.

¹⁰ Peter Dyrberg, 'Accountability and Legitimacy: What is the Contribution of Transparency?' in Anthony Arnall and Daniel Wincott (eds), *Accountability and legitimacy in the European Union* (Studies in European Law series, OUP 2002) 81-96.

¹¹ *ibid.*

¹² Department of Social and Economic Affairs, *Responsive and Accountable Governance*, (World Public Sector Report, the United Nation 2015) 11 <<http://workspace.unpan.org/sites/Internet/Documents/UNPAN95253.pdf>> accessed 02 February 2019.

¹³ *ibid.* 27.

¹⁴ Arthur Lupia, 'Delegation and its Perils' in K. Strom *et al* (eds), *Delegation and Accountability in Parliamentary Democracies* (OUP 2003) 33-54.

d. Responsibility

The term responsibility is considered as the root or source of the term of accountability.¹⁵ Responsibility is indeed a different concept, nonetheless they are often intertwined. Responsibility in this chapter refers to a set of duties or obligations assigned by the nature of the work, function, and position;¹⁶ therefore, it relates to a job description and the roles in certain jobs. In this regard responsibility is something that should be carried out because somebody has been asked to do so by his/her superiors in the chain of command.¹⁷ In addition to the relation with roles and functions of a job, responsibility also encompasses process, outcomes and the consequences derived from that job.¹⁸

In this regard accountability is broader than responsibility. Accountability obliges officials to provide an explanation to a body or to the public on all aspects relating to their roles. Moreover, accountability implies a requirement of transparency and to answer all questions and criticisms raised against them. These processes will result in several consequences for the official, both in positive and negative ways. If the body or the public is satisfied with the officials' work, then they will be rewarded. On the other hand, it can bring negative consequences, such as punishments or sanctions, in the case of dissatisfaction.

Some literature has recognised that all of these terms are related to one another, especially with the emergence of good governance and the new public management (NPM) in the 1980s. The NPM's school of thought suggests that managing public affairs would be best performed through the application of private enterprise management principles and practices. The emergence of the NPM was triggered by the urge to improve the quality of public service delivery with less cost. Nonetheless, due to the very strict efficiency-based approach of the NPM, public service delivery deteriorated in the 1990s.¹⁹ Subsequently, there was a development in public administration that emphasises the participation and interests of the public, as well as the need for public officials to uphold strong responsiveness, equity, transparency, and accountability.

The emergence of public governance has resulted in all of the terms listed above being frequently used in the field of governance. Furthermore, all these words relate to each other, especially when discussing the role of the government in social, political and economic development, and all also related to the meaning of accountability.

9.2.3 The meaning of accountability in scholarly literature

The following paragraphs will discuss the meaning of accountability stemming from English

¹⁵ See Carol Harlow, 'Accountability in the English Speaking World' in Gordon Anthony *et al* (eds), *Values in Global Administrative Law* (Hart Publishing 2011) 173-192; in her work Harlow cited a previous work of O'Beaud who stated that accountability equates to classical meaning of responsibility and democratic legitimacy.

¹⁶ Vincent E. Barry, *Moral Issues in Business* (Wadsworth 1979).

¹⁷ Anthony Barker, 'Accountability and Responsibility of Government and Public Bodies' (2001) 72 (s1) *The Political Quarterly* 132, 138.

¹⁸ Thomas Bivins, 'Responsibility and Accountability' in Kathy Fitzpatrick and Carolyn Bronstein (eds.), *Ethics in Public Relations: Responsible Advocacy* (Sage Publications Inc. 2006) 20.

¹⁹ United Nations Committee of Experts on Public Administration, 'Revitalizing Public Administration as a Strategic Action for Sustainable Human Development: an Overview' (30 January 2004) UN Doc E/C.16/2004/2.

dictionaries, experts, and its meaning according to several fields of study.

The contemporary meaning of accountability provided for in the Oxford Dictionary is similar to being accountable to somebody or something, means “to be responsible for your decisions or actions and expected to explain them when you are asked”.²⁰ This definition emphasises an action of answerability for an action that has been taken; there is no further explanation on to whom that the clarification should be addressed to and who can ask for an explanation. Meanwhile, the Merriam Webster dictionary provides the meaning of accountability as “an obligation or willingness to accept responsibility or to account for one’s actions and responsibility as being the cause or explanation; able to answer for one’s conduct and obligations”.²¹ Based on this definition, one can conclude that accountability is not only receiving responsibility, but also accounting for wrongdoing. Legal dictionaries, such as Black Law Dictionary, relates the word accountable to the words “responsible and answerable.”²²

The meaning of accountability varies and is dependent on the field of study.²³ There is no single definition that has been generally approved and accepted by scholars as they have developed their own types of accountability, elaborated upon them, and tried to compete with the other conceptions of accountability.²⁴ Political scientists, for example, tend to relate accountability with the power owned by Government, political parties, etc., whilst public administration experts tend to focus more on the type of accountability in public service provisions and the related regulations on public services.²⁵

According to Owen E. Hughes, the basic notion of accountability is that “those acting on behalf of another person or group, report back to the person or group, or are responsible to them in some way”²⁶, whilst James Cutt and Vic Murray state that the essence of accountability is the obligation to render an account for a responsibility that has been given.²⁷ Based on this definition one can understand that there are two parties involved in the accountability. The first is the responsible party who is given the mandate and the second is the party who delegates its responsibility.

The differences in the meaning of accountability have underlined the understanding of the term in each different field. In theoretical research, accountability has a discipline-specific meaning; for example, auditors discuss accountability in relation to a financial or numerical matter, political scientists understand it as a political imperative, and legal scholars view

²⁰ A.S. Hornby, *Oxford Advanced Learner’s Dictionary of Current English* (Sixth edition, OUP 2000) 9.

²¹ Merriam Webster Dictionary, online version <<https://www.merriam-webster.com/dictionary/accountability>> accessed 1 February 2019.

²² Bryan A. Garner (ed), *Black’s Law Dictionary* (Ninth Edition, West 2009) 21.

²³ Thomas Schillemans, *The Public Accountability Review: A Meta-Analysis of Public Accountability Research in Six Academic Disciplines* (University School of Governance 2013) <http://dspace.library.uu.nl/bitstream/handle/1874/275784/2013%20The%20Public%20Accountability%20Review_Schillemans.pdf?sequence=1> accessed 1 February 2019; see also Mark Bovens, Robert E. Goodin, Thomas Schillemans, ‘Public Accountability’ in Mark Bovens, Robert E. Goodin, Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP 2014) 4.

²⁴ Bovens, Goodin, Schillemans, *ibid*.

²⁵ Schillemans 2013 (n 23)10-12.

²⁶ Owen E. Hughes, *Public Management and Administration; an Introduction* (Third Edition, Palgrave Macmillan 2003) 237.

²⁷ James Cutt and Vic Murray, *Accountability and Effectiveness Evaluation in Non-profit Organizations* (Routledge 2000) chapter 1.

accountability as a constitutional arrangement, while philosophers treat it as a group of ethics.²⁸

In public administration and politics, accountability is broadly defined. It serves as an umbrella term covering other (similar and related) concepts, such as transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity.²⁹ Certain scholars such as Lenahan O'Connell and Jonathan G.S. Koppell have even used the term accountability interchangeably with good governance or righteous conduct.³⁰ O'Connell, following Robert D. Behn's observation on the three dimensions of accountability³¹ i.e. finances, performance, and fairness, stated that accountability can be found in inexpensive and high quality public services, or government programmes which are delivered in considerate and thoughtful ways.³²

Another scholar, Koppell,³³ introduces five dimensions of accountability, namely transparency, liability, controllability, responsibility, and responsiveness. Furthermore, according to Mark Bovens,³⁴ these dimensions are categorised as umbrella concepts themselves; that is that each dimension has an extensive explanation and operationalisation in each field. Therefore, defining accountability related to these elements is immensely broad and is difficult to measure empirically. Bovens's observation is in line with W.B. Gallie and Elizabeth Fisher who stated that accountability in a broad sense is a concept which is still essentially contested as there is no general agreement on the standards for an accountable manner;³⁵ also that the standards can differ per area, depending on time, place, and the role of officials or government.³⁶ Amanda Sinclair also stated that the definition of accountability is dependent on the ideologies, motifs and language of one's times.³⁷

Furthermore, according to Bovens, the broad interpretation of the meaning of accountability is not analytical in nature, nevertheless it tends to be an evaluative concept.³⁸ Bovens introduces a narrow perspective on accountability: accountability as a relationship between actor and forum.³⁹ This interpretation is also called as 'accountability as a mechanism' (see discussion in Section 9.3). Accountability as a relationship is not in an evaluative sense, but closer to a sociological sense, implying a relationship between individuals or organisations involved in governance. Accountability is not only a political word, but it also means a definite

²⁸ Amanda Sinclair, 'The Chameleon of Accountability: Forms and Discourses' (1995) 20 (2-3) *Accounting, Organization and Society* 219, 220.

²⁹ Richard Mulgan, "'Accountability': an Ever-Expanding Concept?" (2000) 78 *Public Administration* 555; see also Bovens 2007 (n 5) 449.

³⁰ Bovens 2007 (n 5) 449.

³¹ Robert D. Behn, *Rethinking Democratic Accountability* (Brookings Institution 2001).

³² Lenahan O'Connell, 'Program Accountability as an Emergent property: The Role of Stakeholders in a Program's field' (2005) 65 *Public Administration Review* 85.

³³ Jonathan G.S. Koppell, 'Pathologies of Accountability: ICANN and the Challenge of Multiple Accountabilities Disorder' (2005) 65 *Public Administration Review* 94, 95-99.

³⁴ Bovens 2007 (n 5) 450.

³⁵ Elizabeth Fisher, 'The European Union in the Age of Accountability' (2004) 24 *Oxford Journal of Legal Studies* 495, 510.

³⁶ W.B. Gallie, 'Essentially Contested Concepts' in M. Black (ed), *The Importance of Language* (Ithaca 1962) 121-146, as quoted by Bovens, 2007 (n 5) 450.

³⁷ Sinclair 1995 (n 28) 220.

³⁸ Bovens 2007 (n 5) 450. In his other works, Bovens introduces this broad concept and calls such concept as 'accountability as a virtue'. However, this concept will not be discussed in this book. See Mark Bovens, 'New Forms of Accountability and EU-Governance' (2007) 5 *Comparative European Politics* 104.

³⁹ *ibid.*

practice of account giving, or “answerability” for measures undertaken.⁴⁰ Therefore, a specific social relation between actors, forums and account holders exists in accountability.⁴¹ The definition of accountability according to Bovens⁴² and other scholars such as Patricia Day and Rudolf Klein,⁴³ Romzek and Dubnick⁴⁴ is “a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.” In the definition above, seven elements of accountability as a social relation can be recognised, i.e. the relationship between an actor and a forum, the obligation of the actor, explaining and justifying, conduct; the forum posing questions, judgement, and consequences.⁴⁵

Another expert, Helen Potts proposes the notion of accountability as a process in the area of right to health.⁴⁶ As a process, accountability works in a continuous circle, which starts from the decision-making of policy, incorporation and implementation of the decision in the public sphere, moving to the continuous monitoring process by both internal and external monitoring institutions. Following the monitoring, accountability mechanisms are needed to serve as a forum for explanation and justification. Ultimately, there is the need to adopt provisions for remedies or redress if a violation of human rights occurs.⁴⁷ Thus, we can conclude that Potts’ idea of accountability is broader than Bovens’. The notion of emphasising accountability as a process comprises of accountability as a mechanism.

9.2.4 General theoretical perspectives of accountability

There are three main theories on accountability available, namely the Principal-agent (agency) theory, the Stewardship theory, and the Relational theory. These theories of accountability have their own followers who stem from different research fields. The agency theory is currently the most widely applied theory in the field of accountability; however, due to its limitations, the latter two theories have been developed.⁴⁸ The three theories will be discussed in the paragraphs below:

a. The Principal-agent theory

The core element of this theory can be summarised in a question: “who is accountable to whom?” The agency theory relates to some individuals or groups labelled as “agents” who take

⁴⁰ Peter Newell and Shaula Bellour, ‘Mapping Accountability: Origins, Contexts and Implications for Development’ (Institute of Development Studies Working Paper 168, 2002) 1-2.

⁴¹ Bovens 2007 (n 5) 450, see also C. Pollit, *The Essential Public Manager* (Open University Press/Mc Graw-Hill 2003) 89.

⁴² Bovens 2007 (n 5) *ibid*.

⁴³ Patricia Day and Rudolf Klein, *Accountabilities: Five Public Services* (Tavistock Publications 1987) 4-5.

⁴⁴ B. S. Romzek and M. J. Dubnick, ‘Accountability’ in J. M. Shafritz (ed), *International Encyclopaedia of Public Policy and Administration*, Vol. 1: A–C (Westview Press 1998).

⁴⁵ Bovens 2007 (n 5) 452.

⁴⁶ Hellen Potts, ‘Accountability and the Right to Highest Attainable Standard of Health’ in Paul Hunt and Tony Gray, *Maternal Morality, Human Rights and Accountability* (Routledge 2013) 122-123; Hellen Potts, ‘Accountability and The Right to the Highest Attainable Standard of Health’ (Human Rights Centre, University of Essex 2008) 13 <<http://repository.essex.ac.uk/9717/1/accountability-right-highest-attainable-standard-health.pdf>> accessed 30 January 2019

⁴⁷ *ibid*.

⁴⁸ *ibid* 16.

actions on behalf of other people or groups, called “principals”. The principal will adopt decisions which should be implemented by the agents through various actions or measures.

How the principals structure the motivation for the agent is an aspect at the core of the theory. The agency theory is more or less about control in terms of how the principals control the agents when conducting their tasks.

In modern democratic states, the citizens are the primary principals. They transfer their will, in the form of sovereignty, to the representatives, who then delegate the drafting of laws and policies, including the implementation of these, to the Government. Furthermore, the ministries, which are appointed by the governments, will continue to entrust their mandate to other bodies that are under their authorities. The last links in the chain of the delegation process are the public servants, who directly serve the citizens. Ultimately, the citizens will assess the conduct of the government and will pass judgement. All steps in this process, from the delegation of mandate to parliament, to the invoking of accountability by the citizens, are collectively known as the “democratic chain of delegation” in which each principal in the chain has the task of monitoring the implementation of the public duty delegated to the agents, and also calling the agents to answer and explain their conduct.⁴⁹

The agency theory is best applicable to states that use a presidential system, since this system does not have multiple numbers of delegations and offers a unidirectional relationship between delegation and accountability.⁵⁰ Despite its advantages for a certain system, the principal agent theory exhibits several limitations, such as its inadequacy in explaining behaviour, and insufficiency when analysing accountability of one actor to another.⁵¹ These limitations exist particularly when there are dependent relationships between actors which might result in the problem of influencing the behaviour between one another.⁵² The behaviour of principals and agents is influenced by their respective interests which might vary from one type of actor to another.⁵³

Furthermore, a government system consists of elements, factions, and units with having a different focus or agenda. Since the principal’s and agent’s roles within the government may be viewed as hierarchical, the relationships between elements in a government system can be complex. This may result in situation when the different elements of government can be both principal and agent simultaneously.⁵⁴ This double role will further complicate their performance.

This theory is additionally insufficient when attempting to comprehend the complicated structure of a certain development occurring in a state, such as welfare reform or privatisation.⁵⁵ Within this process, one element of the government system will enter into a contract with a private actor resulting in a principal (a government element) – agent (a private actor)

⁴⁹ Kaare Storm, ‘Delegation and Accountability in Parliamentary Democracies’ (2000) 37 *European Journal of Political Research* 261.

⁵⁰ *ibid.*

⁵¹ Sean Gailmard, ‘Accountability and Principal-Agent Theory’ in Mark Bovens, *et al* (eds), *The Oxford Handbook of Accountability* (OUP 2014) 91.

⁵² *ibid.*

⁵³ David A. Breaux *et al*, ‘Welfare Reform, Mississippi Style: Temporary Assistance for Needy Families and the Search of Accountability’ (2002) 62 *Public Administration Review* 92, 94.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

relationship.⁵⁶ The accountability of this arrangement depends on the contract, while the other arrangements will depend on government oversight, administrative rules, and other mechanisms. Moreover, this theory is also insufficient when assessing the organisational performance of non-profit organisations contracted by states,⁵⁷ as these organisations do not fully act as agents of states and they have their own goals and relationships with their members. Furthermore, the development of states' watchdog agencies, such as ombudsmen, judicial commissions, and national human rights institutions, to oversee other states' agencies, without having any hierarchical power relation, also complicate the role of this theory in explaining accountability. The principal-agent theory bases the accountability between a principal and an agent on their hierarchical relationships. If there are no hierarchical elements, accountability cannot be claimed. In other words, this theory cannot explain the reason why a government element should be accountable for its actions.

b. The Stewardship theory

The stewardship theory was claimed as a development of the agency model that stemmed from dissatisfaction with the egocentric behaviour of the agents and the arising from disagreements or conflicts of interest between principals and agents. This theory recognises that a form of agency exists. However, the interests and motives of the agents in the principal-agent theory are somewhat different in this theory. Agents who act as stewards will not be concerned about fostering their own economic interest but will act in the best interests of the institutions.⁵⁸ This means that the agents are willing to serve in achieving the goals set by their principals. Hence, the agents act as stewards to the principals' interests.⁵⁹ The stewardship theory applies the postulate of stewardship.

This theory examines the relationships and behaviours within an institution or organisation, with an emphasis on collective, pro-organisational, and contractual behaviour. These elements are considered as higher values placed as a collective goal of the institutions rather than in the interest of agents.⁶⁰ Agents will not concern themselves with fostering their individual goals, though will act as stewards to achieve the best interests of the organisation.⁶¹ In this theory, the contractual relationships between principals and agents are based on trust, reputation, mutual goals, and involvement.⁶² The two-way relationship will result in an alignment between the parties, ultimately achieving the common goals of the organisation.⁶³

⁵⁶ *ibid.*

⁵⁷ Lehn M. Benjamin, 'Bearing More Risk for Results: Performance Accountability and Non-Profit Relational Work' (2008) 39 *Administration and Society* 959.

⁵⁸ James H. Davis, F. David Schoorman and Lex Donaldson, 'Toward a Stewardship Theory of Management' (1997) 22 *Academy of Management Review* 20.

⁵⁹ *ibid.*

⁶⁰ David M. Van Slyke, 'Agents or Stewards: Using Theory to Understand the Government-Non-Profit Social Service Contracting Relationship' (2006) 17 *Journal of Public Administration Research and Theory* 157, 164.

⁶¹ Davis, Schoorman and Donaldson (n 58) 21; see also Andre Keay, 'Stewardship Theory: is Board Accountability Necessary?' (2017) 59 *International Journal of Law and Management* 1292.

⁶² Van Slyke (n 60).

⁶³ *ibid.*

c. The Relational theory

Accountability usually only follows up on an allegation made by someone or a party who can authorise a reward for positive actions or punishments for negative actions. In the latter case, a causal link between the accounted person and their negative effects should be established. Providing an account of their actions, most of the time, is due to a request from another party holding power established by the formal legal system. This process can bring consequences to the accountable actors.⁶⁴

Judith Butler suggests another way in which a party will feel obliged to explain its conduct without feeling forced to do so, if they enter into a relationship.⁶⁵ It nurtures the feeling of maintaining the relationship, through the accountable actors through providing explanations in the form of a narration or a storytelling, without necessarily having a fear of judgments by their principal and constituents. The purpose of the narration is to build trust, which will further strengthen the relationship. The emphasis of building trust in a relationship regarding accountability has been extensively employed in contemporary business life.⁶⁶

To understand the relational approach of accountability, one must realise the context of a relationship in which responsibilities and duties are developed.⁶⁷ Individuals in an organisation unite, including with the institution itself, therefore they need to comprehend the consequences of their roles in the organisation, including the effects, expectations, and perceptions.⁶⁸

All these theories have their own advocates and may might work best in certain situations and conditions. However, due to the developments of governance, such as the emergence of regional governance and privatisation, the strict implementation of these theories is not able to explain the relationships of accountability between the different actors in these types of arrangements.⁶⁹ This has led to new types of accountability relationships emerging, further complicating the layers of accountability and combinations of co-existing institutions.⁷⁰ The theories discussed above can be used to explain which parties are accountable in a single country, with a representative system where there is strong categorisation between principals and agents. However, none of these theories can be used to explain how accountability regimes work across multiple institutions, actors, and their relationships, and how they are organised.⁷¹

9.2.5 Summary of accountability

Although, as mentioned before, the meaning of accountability differs from one field to another, it can be argued that accountability is related to a process of being held answerable before a

⁶⁴Mollie Painter-Morland, 'Redefining Accountability as Relational Responsiveness' (2006) 66 Journal of Business Ethics 89, 93.

⁶⁵J. Butler, *Giving an Account of Oneself* (Fordham University Press 2005) 3-40.

⁶⁶Painter-Morland (n 64).

⁶⁷ibid 94.

⁶⁸ibid.

⁶⁹See for example Bovens 2007 (n 38); see also Johan P Olsen, 'The Institutional Basis of Democratic Accountability' (2013) 36 West European Politics 447.

⁷⁰Olsen ibid.

⁷¹ibid.

certain authority for one's conduct.⁷² Moreover, there is a consensus on the meaning of accountability which is shown in the definitions discussed above, i.e.

- 1) Accountability relates to a process of providing answers (answerability) to the parties which provide a legitimate mandate to the answerable party;
- 2) Accountability is a relational concept: between at least two parties;
- 3) Traditionally, accountability is "retrospective ex-post" and focuses on the behaviour of agents.⁷³ The behaviours in performing the given tasks are then being judged by the forum. The ex-post facto means that accountability requires an actor to account for his/her past actions;
- 4) Accountability is not a singular process, but rather a layered and continuous process that can be directed to different audiences, for a variety of processes and results, and through different means or mechanisms.

From the discussion on the meaning of accountability, two different terms emerged. These terms are: 'accountability as a mechanism' and 'accountability mechanisms.' The literature on accountability seems to frequently use these terms which might trigger confusion for the reader. The subsections below will provide the meanings of these terms.

9.3 ACCOUNTABILITY AS A MECHANISM AND ACCOUNTABILITY MECHANISMS

Before continuing to discuss accountability, a further clarification regarding accountability as a mechanism and accountability mechanisms is crucial. In the literature on accountability and human rights, these two terms are often used interchangeably⁷⁴, although the two terms have different meanings.⁷⁵

Bovens as a public administration scientist, defines accountability as a mechanism⁷⁶ which refers to a social relation between actors and a forum which involves the obligation to justify their actions.⁷⁷ Accountability functions through institutional relations or arrangements through which an actor can be held accountable by a forum, whereby the actor is obliged to explain and to justify his or her conduct.⁷⁸ Furthermore, the forum can pose questions, allow a

⁷² Mulgan (n 29); see also G.W. Jones, The Search for Local Accountability, in Steve Leach (ed), *Strengthening Local Government in the 1990s* (Longman 1992) 49-78.

⁷³ Schillemans 2013 (n 23) 13.

⁷⁴ See for example Sandro Cabral and Maria-Fatima Santoz, 'Accountability Mechanisms in Public Services: Activating New Dynamics in a Prison System' (2018) 21 *International Public Management Journal* 795.

⁷⁵ See for example in the study conducted by Yi Zhang, *Advancing the Right to Health Care in China – Towards Accountability* (Intersentia 2018).

⁷⁶ In his works, Bovens divides accountability into two concepts; namely accountability as a virtue and accountability as a mechanism. Nevertheless, this thesis focuses more on the concept of accountability as mechanism, thus, will not discuss the first concept. See (n 38).

⁷⁷ Mark Bovens, *New Forms of Accountability and EU Governance* (OUP 2002) 106; see also Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 *West European Politics* 946, 947-949; Carol Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law' in Gordon Anthony *et al* (eds), *Values in Global Administrative Law, Essays in Honour of Spyridon Flogaitis and Gerard Timsit* (Hart Publishing 2011) 178.

⁷⁸ Bovens 2010 *ibid* 951.

certain degree of debate, and pass judgments that could lead to an actor facing or receiving consequences. The consequences can be in the form of sanctions, in the cases of malfunction or misconduct (negative consequences), or could be a reward in the case of excellent or adequate performance (positive consequences).⁷⁹

The relationship between actors and the forum in terms of accountability as a mechanism can be derived from the relationship between actors, for example between the principals and agents within a certain institution. Accountability as a mechanism, which is seen as a relationship between actors and forums, derives from a narrow interpretation of accountability.⁸⁰ This narrow interpretation generates various types of relationships in accountability. Furthermore, Bovens argues that the relationship in accountability depends on the nature of the forum, actor, obligation, and conduct.⁸¹ For example, accountability relationships that are based on the nature of the forum can be divided into: political, legal, administrative, professional, and social relationships. According to Bovens, the relationship between actors and forums will result in an accountability mechanism. However, Bovens does not go further into explaining the meaning of accountability mechanisms.

In fields, such as law, governance and human rights, an accountability mechanism refers to a forum,⁸² or sometimes to a procedure,⁸³ in which the responsible actors can be held accountable for their misconduct. The existing accountability mechanisms vary from political, legal, to social accountability.⁸⁴ The types of accountability mechanisms will be discussed in the next section.

9.4 CATEGORIES OF ACCOUNTABILITY MECHANISMS

In daily life, an actor, either as agent or principal, can face multiple calls for accountability in the society. They have to account for their actions to a variety of forums which have different expectations, different rules and norms, and consequently, deliver different judgments.⁸⁵

There are two categories of accountability mechanisms which are broadly recognised in

⁷⁹ *ibid.*

⁸⁰ See discussion on the meaning of accountability in a broad term in Section 9.2.3.

⁸¹ Bovens 2007 (n 5) 461.

⁸² See for example: Stian Øby Johansen, 'Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient' (2017) 66 *International and Comparative Law Quarterly* 181; see also Asian Development Bank, 'Accountability Mechanism' (ADB website) <<https://www.adb.org/site/accountability-mechanism/main>> accessed 3 February 2019; 'Establishing Effective Accountability Mechanisms for Human Rights Violations' (2012) XLIX *UN Chronicle* <<https://unchronicle.un.org/article/establishing-effective-accountability-mechanisms-human-rights-violations>> accessed 3 February 2019.

⁸³ Anne C.L. Davies, *Accountability: A Public Law Analysis of Government by Contract* (OUP 2001) 73-87; see also Potts 2008 (n 46) 13-14.

⁸⁴ See for example United Nations General Assembly, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Leilani Farha' (22 December 2014) UN Doc A/HRC/28/62; see also Alison L. Young, 'Accountability, Human Rights Adjudication and the Human Rights Act 1998' in Nicholas Bamforth and Peter Leyland, *Accountability in the Contemporary Constitution* (OUP 2013).

⁸⁵ Mark Bovens, 'Public Accountability' in Ewan Ferlie, Laurence E. Lynn Jr., and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (OUP 2005) 186.

the literature i.e. internal vs. external and horizontal vs. vertical accountability.⁸⁶ In addition to these two, there is a third category of mechanism, introduced by the World Bank, which is the diagonal accountability mechanism.⁸⁷ The difference between these mechanisms lies within the sources of the accountability relationship,⁸⁸ the degree of control owned by the principals over the agents⁸⁹, and the spatial direction of the accountability relationship.⁹⁰

The sources of accountability relationships lead to accountability mechanisms either internally or externally.⁹¹ For example, in governmental bureaucracy, the subordinates are accountable to their superiors. Therefore, the accountability sources in this case stem from within the organisation itself. Thus, such a mechanism is called internal accountability. Whereas, external accountability occurs when the power to call into account stems from outside the organisation, such as administrative officials being called into account by an ombudsman, if they discriminate against people while providing public services.⁹²

The second distinction, the degree of control, will generate either vertical or horizontal mechanisms. Bovens stated that these types of accountability are differentiated by the nature of the obligation that the officials have, in relation to the forums in which they can be held accountable.⁹³ Vertical accountability takes place when the degree of control stems from the superior to the subordinate, while horizontal accountability occurs when two different groups of state agents do not have a relationship in the form of superior and subordinate.⁹⁴ Horizontal accountability is contingent upon the legally empowered state's agencies willingly accepting the mandates, and being able to take actions derived from their mandates. These may include overseeing and delivering criminal sanctions or impeaching other states' agents, in the case of unlawful omissions.⁹⁵ For example, by requiring bureaucrats and officials to explain a certain phenomenon occurring within governance, vertical accountability is created, as the politicians or legislatures are holding them accountable. Horizontal accountability occurs when officials have to appear before the courts to justify their conduct due to claims brought against them.

Moving on to diagonal accountability, one can see that this type seeks to directly engage society in the workings of horizontal accountability institutions.⁹⁶ The aim is to strengthen the watchdog function of civil organisations which is sometimes weakened or does not function properly. However, this new type of accountability does not seem to be well explored in literature compared to the other two, which have been studied for a longer period. The World

⁸⁶ See for example Mark Schacter, 'When Accountability Fails: a Framework of Diagnosis and Action' (2000) 9 Policy Brief (Institute on Governance Ottawa).

⁸⁷ Rick Staphenurst and Mitchell O'Brien, 'Accountability in Governance' World Bank Publication, 3-4, <<http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>> accessed 9 July 2016.

⁸⁸ Barbara S. Romzek and Melvin J. Dubnick, 'Accountability in the Public Sector: Lessons from the Challenger Tragedy' (1997) 47 Public Administration Review 227.

⁸⁹ Staffan I Lindberg, 'Mapping Accountability: Core Concept and Subtypes' (2013) 79 International Review of Administrative Sciences 202.

⁹⁰ Andreas Schedler, Larry Diamond, and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999).

⁹¹ Lindberg (n 88).

⁹² Bovens 2010 (n 77).

⁹³ Bovens 2007 (n 5) 461.

⁹⁴ Charles D. Kenney, 'Horizontal Accountability: Concepts and Conflicts' in Scott Mainwaring and Christopher Welna (eds), *Democratic Accountability in Latin America* (OUP 2003) 57.

⁹⁵ Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' (1998) 9 Journal of Democracy 112.

⁹⁶ Staphenurst and O'Brien (n 87).

Bank is one of the advocates of diagonal accountability, as it also encourages the direct participation of civil society as a tool to strengthen the social accountability of the government towards society. Bovens also mentions diagonal accountability in one of his studies, in which he categorises it as a mechanism that has no hierarchical relation between the actor and forum, thus such mechanisms do not have the “formal power” to force the actors into a compliance.⁹⁷ According to Bovens, ombudsmen and auditors fall under the diagonal type. In contrast to Bovens, O’Donnel mentions that such state’ agencies that hold actors accountable for their misconducts also fall under the category of the horizontal accountability.⁹⁸

Based on the discussion above, one can argue that a certain type of accountability fits into either one or two accountability mechanism categories. For instance, political accountability can be both vertical and horizontal. The horizontal mechanism can be imposed upon the states’ agents, whilst the vertical one is requested from citizens and or civil society organisations. Another type of accountability mechanism that can be categorised as horizontal are those mechanisms related to the checks and balances principle in the distribution of power, such as judicial, executive and legislative powers. In line with the need for limiting the government’s power, a variety in the types of accountability mechanisms have been introduced. This variety can be seen in the development of quasi-judicial accountability mechanisms, for example the establishment of ombudsmen, human rights bodies, anti-corruption bodies, auditors *etc.* These types of mechanisms may fall under the horizontal type, as there is no direct relationship between actors and the forums. See figure 9.1 below.

⁹⁷ Bovens, 2005 (n 85) 197.

⁹⁸ O’ Donnel (n 95).

Figure 9.1. Accountability mechanisms based on the nature of obligation between forums and actors (vertical, horizontal and diagonal accountability) — adapted from Bovens⁹⁹ with some modifications.¹⁰⁰

Figure description:

Colours	Actors and Stakeholders	Types of Accountability Mechanisms
Accountable actors/Agents	N/A
Superiors/Principles	Vertical
Monitoring and Accountability bodies	Horizontal
Stakeholders	Diagonal

⁹⁹ Bovens, 2005 (n 85).

¹⁰⁰ The author does not agree with Bovens' categorisation that puts ombudsmen under the diagonal type of accountability, due to their usually limited mandate i.e. they cannot provide a binding decision and do not have any power relation with the actors. Bovens' categorisation is also at odds with another expert's (Guillermo O'Donnel) categorisation of horizontal accountability. According to O'Donnel, under horizontal accountability, officials are accountable to the legally empowered state' agencies, which will take actions stemming from their mandate, including to oversee and to deliver criminal sanctions or to impeach the other states' agents in the case of unlawful omission. Ombudsman and, generally, national human rights institutions are state agencies that can be regarded as quasi-judicial mechanisms. Therefore, the author categorises these two state agencies as horizontal accountability mechanism bodies. The diagonal accountability applies to all types of social participation in monitoring the work of the government, such as civil society organisations and the media.

Based on the discussion in the previous sections, a summary of the various types of accountability approaches, based on a narrow interpretation of accountability, i.e. accountability as a social relation, is presented in the box below:

Text Box 9.1: Categories of Accountability, adapted from Bovens¹⁰¹

Based on the nature of the forum

- Political accountability
- Legal accountability
- Administrative accountability
- Professional accountability
- Social accountability

Based on the nature of the obligation

- Vertical accountability
- Diagonal accountability
- Horizontal accountability

9.5 ACCOUNTABILITY AS A PROCESS FOR THE REALISATION OF HUMAN RIGHTS

Accountability is believed to be a vital element in advancing the good governance of a state. Evaluating on-going activities through accountability would encourage officials to perform at their best in providing enhanced public services.¹⁰² In a democratic society, good governance is crucial in achieving the smooth delivery of public services to all people. The protection of human rights is one of the essential elements of good governance.¹⁰³ Accountability relating to human rights is often related to democracy and public participation in governments' policies.¹⁰⁴ Thus, securing accountability is beneficial in advancing the protection of human rights. For example, allowing people to be involved in an accountability role in a resettlement programme may assist to ensure that the programme will accommodate the needs and human rights of the affected community.¹⁰⁵ In addition, accountability mechanisms, either legal or non-legal, benefit communities in situations of human rights infringements, to hold actors accountable, and to enable the community to receive remedies for such violations. As a process, in order to achieve its goal, accountability should be effective. The effectiveness of accountability requires several essential elements.

According to Bovens' definition, accountability consists of three main elements¹⁰⁶ i.e. giving an account, questioning or debating the related events, and an evaluation or passing of a

¹⁰¹ Bovens 2007 (n 5) 461.

¹⁰² Staphenhurst and O'Brien (n 87).

¹⁰³ Hans-Otto Sano, 'Good Governance, Accountability and Human Rights' in Hans-Otto Sanno, Gudmundur Alfredsson and Robin Clapp (eds), *Human Rights and Good Governance: Building Bridges* (Martinus Nijhoff Publishers 2002).

¹⁰⁴ *ibid.*

¹⁰⁵ See an example describing participation process in Section 9.5.1.

¹⁰⁶ Bovens 2005 (n 85); and Marks Bovens, *The Quest for Responsibility, Accountability and Citizenship in Complex Organizations* (CUP 1998).

judgment from an accountability institution. As Bovens believes that accountability is an institutional arrangement, his elements on accountability cover merely the process of accountability before a forum, starting from providing answers for problems raised, to the passing of judgments by the forum. Therefore, these accountability elements refer to a retrospective nature, in which an actor accounts for their past misconduct related to their responsibility.

Accountability, in fact, refers to a process that covers not only the process of being held accountable, but also refers to prior conditions that serve as a background to the events and moreover, it refers to conditions post the events. Helen Potts defines accountability mechanisms as a part of accountability itself. She concludes that accountability mechanisms along with other elements, such as monitoring, participation, and remedies and redress, form a continuous circle of accountability as a process.¹⁰⁷ Potts proposes her idea in the field of the right to health, in which she argues that rendering the concept of accountability as a continuous process will advance the implementation of human rights.

The inclusion of participation by Potts in deciding a policy is relevant as an element of accountability as a process. In relation to human rights in public services, participation of the society in decision making, such as designing and adopting a policy, will significantly influence the implementation of the policies. The same applies for the role of monitoring as element of accountability as a process.

The elements of remedies and redresses also serve a vital role in accountability relating to human rights. These elements ensure that the people affected by a human rights violation will receive remedies or redresses in some forms, which can enable for the restoration and repair of the affected conditions following the violation.¹⁰⁸ Therefore, accountability is not only the process of blaming and shaming for a governments' misconduct, but also a process of developing a dynamic entitlement and a relationship between the government and its people within broader relationships that form governance systems, including the human rights system.¹⁰⁹ Furthermore, L.P. Freedman uses the term of "constructive accountability" to pose a broader meaning of accountability that does not seek fault and sentencing, but searches for better solutions and what can be improved in implementing public policies. In this regard, an accountability mechanism is only one of the elements in constructive accountability.

Due to the divergence in accountability literature, this dissertation will follow Freedman's and Potts' constructive accountability definition entailing a continuous process, and to a certain extent, employ Bovens' definition of accountability as an institutional arrangement as one element of constructive accountability. Although Potts proposes accountability as a process in the field of the right to health, the present author argues that such a continuous process can also

¹⁰⁷ Potts 2008 (n 47) 13-14; see also Helen Potts, 'Accountability and the right to the highest attainable standard of health' in Paul Hunt and Tony Gray (eds.), *Maternal Mortality, Human Rights and Accountability* (Routledge 2013) 122, 124.

¹⁰⁸ Dinah Shelton, *Remedies in International Human Rights Law* (2nd ed, OUP 2005) 7; see also Lisa Yarwood, *State Accountability under International Law: Holding States Accountable for a Breach of Jus Cogens Norms* (Routledge 2011) 13-14; Katie Boyle and Edel Hughes, 'Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights' (2018) 22 *International Journal of Human Rights* 43.

¹⁰⁹ L.P. Freedman, 'Averting Maternal Death and Disability: Human Rights, Constructive Accountability and Maternal Mortality in the Dominican Republic: a Commentary' (2003) 82 *International Journal of Gynecology and Obstetrics* 111.

be applied in the field of the right to housing, given the fact the right to health and the right to housing are similar in nature in terms of international obligations imposed on states.

Therefore, combining the three experts' perspectives on accountability, the present author proposes accountability as a broader process that will advance the implementation of the right to housing. The elements that exist within accountability as a process related to human rights are monitoring, mechanisms, remedies, and societal participation. However, there is a missing element that is not embedded in the notion of accountability as a process, proposed by Potts. This element is related to enforcement measures. As a pivotal aspect to execute the decisions of accountability mechanisms, enforcement measures need to be added to advance the human rights fulfilment. Enforcement measures in this particular section refers to the execution or implementation of the decisions of accountability bodies. Each of these elements will be discussed in the following paragraphs:

9.5.1 Community participation

Community participation plays an important role in accountability, especially if it relates to basic human needs. In modern democracies, the participation of society is also crucial and should ideally be present in every step of accountability as a process. Public participation can ensure the legitimacy of policies that will lead to a more sustainable policy implementation, as the policies are developed or generated based on societal needs.¹¹⁰ An example of community participation is the participation involving families living in Seven Towers, Belfast. Residents in Seven Towers experienced degrading living conditions such as, pigeon waste built up behind ventilation partitions, overcrowding, mould, and leakage in the bathrooms. These problems have been unresolved for years. These conditions caused health related issues, particularly for children and people with existing health problems. Under the Participation and Practice of Rights Project (PPR) programme, the residents set up indicators to tackle issues in their apartments, and influenced the institution responsible for social housing (Northern Ireland Housing Executive-NIHE) to address such issues. The group met with the NIHE on a quarterly basis to discuss the progress they made, and submitted a report to the Ministry responsible for housing (Ministry for Social Development).¹¹¹ This example demonstrates the importance of participation to improving their living conditions.¹¹²

9.5.2 Monitoring

Monitoring is a very crucial stage of an accountability process, particularly concerning human rights implementation. At this stage, indications of the working programme or policy can be identified for both its benefits and weaknesses. Most importantly, monitoring is an ongoing and continues cycle within the implementation of a policy or a programme. It is a vital step to

¹¹⁰ Ariel Frisancho, 'Citizen Monitoring to Promote the Right to Health Care and Accountability' in Paul Hunt and Tony Gray (eds.), *Maternal Mortality, Human Rights and Accountability* (Routledge 2013) 17.

¹¹¹ Seven Towers Monitoring Group, 'Fourth Report on Progress of Human Rights Indicators' PPR Website <https://www.pprproject.org/sites/default/files/documents/st_fourth_progress_report.pdf> accessed 1 July 2019.

¹¹² Participation and Practice of Rights Project (PPR), 'Transcript of the First Housing Hearing' (13th June 2007) PPR Website <https://www.pprproject.org/sites/default/files/documents/housing_transcript.pdf> accessed 1 July 2019. This example of participation has also been discussed in Potts (n 46) 11.

provide early warning on any possible misconduct. In other words, a monitoring procedure also functions to prevent infringements or violations. Thus, monitoring is not only an *ex post facto* issue but also continuous in that it should be integrated into a policy-making process and its implementation. As a *post facto* issue, the monitoring process results in critics and inputs. These results can be used to enhance future policies by continuing useful and positive aspects or to eliminate negative factors that caused the policy to not function or that hindered its implementation.

Relating to accountability in human rights, the supervisory process plays two critical roles.¹¹³ First, it comprises the information needed by the government to decide the sectors which are to be focused on in achieving the realisation of human rights. Secondly, monitoring provides information for human rights holders in order to claim their rights, and moreover, to hold the government accountable if any act or omission occurs, which either the government has not complied with or it has not fulfilled its human rights obligations.

As the party which adopted policies, the government has the obligation to monitor the programme. The community should be able to easily access the outcomes of the monitoring procedure, such as reports and recommendations. Such access is related to the rights to information which urges the government to fulfil the principle of transparency, while it exercises its power. Therefore, all results of the monitoring procedures should be made publicly available.

However, the government is not the only party that can supervise the policy implementation; monitoring can also be carried out by the state's monitoring bodies such as the national human rights institution, ombudsman or ombudsperson, civil society organisations, or individuals. Supervision carried out by parties other than the government will have added advantages, particularly in terms of independence and impartiality of the monitoring result. For example, in the PPR project discussed above, the group of residents also monitored the progress made by the NIHE and the Ministry for Social Development.¹¹⁴ In addition, the group submitted its report to an independent panel of international housing law experts, who conducted a hearing with the residents of Seven Towers and approved of the approach of the residents.¹¹⁵

9.5.3 Accountability mechanisms

Mechanisms in accountability refer to the processes or procedures in which society can hold to account the government through institutional arrangements.¹¹⁶ Through these processes, on the one hand, communities, both in groups or individuals, have the chance to ask for an explanation from the officials relating to a policy or programme that might not be in compliance with its purposes or targets. On the other hand, the government, represented by the officials, must provide an answer explaining what is inquired about by its people. In order to have a significant value in human rights implementation, accountability mechanisms should be accessible by all levels of society and, additionally, be effective in dealing with the communities' queries.

¹¹³ Potts 2008 (n 46).

¹¹⁴ Seven Towers Monitoring Group (n 111).

¹¹⁵ Evidence Hearing on the Right to Housing, 'Findings of the International Panel' (13 June 2007) PPR Website <<https://www.pprproject.org/sites/default/files/documents/findings.pdf>> accessed 1 July 2019.

¹¹⁶ Bovens 2010 (n 77).

Accountability mechanisms are commonly provided at the national level. The types of available accountability mechanisms vary. Each type depends on its designated functions and its suitability with the specific needs of a state.¹¹⁷ In almost every state, several accountability mechanisms are often found and available at a national level, which are judicial, quasi-judicial, administrative, political, and social mechanisms. A judicial accountability mechanism entails a legal investigation or a review before a court, with respect to a government's act or omissions in the field of human rights. For example, domestic courts in South Africa and India have interpreted constitutional rights, and decided cases on human rights infringements, often in favour of the plaintiffs.¹¹⁸ In the example of the Grootboom case, as discussed in Chapter 2, the South African Constitutional Court adjudicated on right to adequate housing. In addition, in the field of the right to health, the Supreme Court of India emphasised that the government could not advance an argument based on a financial crisis as a reason to elude from its obligation to provide emergency care.¹¹⁹

A quasi-judicial accountability mechanism is a special form of procedure placed between judicial and administrative reviews that provides recommendations for states concerning human rights issues. This review is conducted by, for example, national human rights institutions, national ombudsman, etc. Administrative accountability assessments are usually conducted internally by the institution related to the programmes, while political accountability refers to the function of the representative bodies of the people to, for example, inquire into the government's use of public funds and to monitor the implementation of certain programs concerning human rights. The last type of accountability mechanism: the social accountability correlates to the role of civil society, as in actively being involved as a watchdog of their government, in adopting and implementing programmes related to public interests.¹²⁰

Furthermore, some of these mechanisms may also have monitoring functions. For example, quasi-judicial institutions, such as ombudsmen and national human rights institutions (NHRIs) are mandated to supervise the implementation of public policies conducted by governments.¹²¹ For example: The Indonesian NHRI is mandated to supervise the implementation of human rights by the Indonesian government.¹²² It also can receive individual communications with regard to complaints related to human rights infringements conducted by states' agents or private parties.¹²³

In addition to the national mechanisms, the international community, through international

¹¹⁷ Lindberg (n 89).

¹¹⁸ See for example the Grootboom Case in The Constitutional Court of Republic of South Africa, *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT 11/00) [2000] ZACC 19 Judgement of 4 October 2000.

¹¹⁹ Supreme Court of India, *Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor* (1996) 4 SCC 37, pp 9-10.

¹²⁰ Lindberg (n 89); see also Beate Kohler-Koch, 'How to Put Matters Right? Assessing the Role of Civil Society in EU Accountability' (2010) 33 *West European Politics* 1117.

¹²¹ See United Nations General Assembly Resolution 48/134 (20 December 1993) on Principles relating to the Status of National Institutions (The Paris Principles); see also Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa* (Hart Publishing 2007) 5; Rachel Murray, 'National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness' (2007) 25 *Netherlands Quarterly of Human Rights* 189.

¹²² Law No. 39/1999 on Human Rights (*Undang-Undang No. 39/1999 tentang Hak Asasi Manusia*) SG 165/1999, arts 76 and 89 (3).

¹²³ *ibid* art 90.

human rights arrangements such as the UN human rights bodies, and regional arrangements, for example the European Union, the African Union, and the Inter-American States, also provide several accountability mechanisms. Nonetheless, accountability procedures available at an international level often can only be employed if all of the national accountability mechanisms have been reasonably exhausted. This is the so-called “exhaustion of local remedies” rule found in various individual complaints procedures in several human rights treaties. A detailed discussion on the accountability mechanisms relating to human rights available at an international level will be provided in the next chapter.

9.5.3 Remedies and redress

Remedies act as an essential element when redressing human rights violations, including the right to housing. Under the Universal Declaration of Human Rights (UDHR), remedies are considered as a right granted to everybody by competent national courts, for acts violating human rights guaranteed by the constitutions or the law.¹²⁴ The government should ensure that effective remedies are available for those whose human rights are violated.

Remedies have two different elements, which are procedural and substantial.¹²⁵ Being procedural, remedies refer to the process investigated and decided by the states’ or competent international bodies, *i.e.* courts, national human rights institutions, administrative agencies and other bodies appointed for such matters. Substantial remedies refer to the result of the proceedings that provides the claimants, whose human rights have been violated, the chance to repair their conditions, such as living conditions, to a level similar to prior to the violation.¹²⁶ For example, rulings of regional human rights monitoring bodies may provide access to indigenous land following an eviction of a community from their ancestral land.¹²⁷ The common forms of substantive remedies range from restitution, compensation, rehabilitation, to satisfaction. Moreover, it can also be realised in the form of a guarantee from the perpetrator, that they will not engage in human rights violations in the future (guarantee of non-repetition), an award of damages, declaratory relief, injunctions or orders, and attorney’s fees and costs.¹²⁸

According to Dinah Shelton, the practice of the European Court of Human Rights and the Inter-American Court, seems to suggest that under the international law, restitution is one of the form of remedies that should be advanced first in terms of human rights violations.¹²⁹ In this context, restitution refers to re-establishment of the situation which existed before the wrongful act (the human rights violation) was committed.¹³⁰ It could involve for example, the amendment

¹²⁴ Universal Declaration of Human Rights (Adopted 10 December 1948) UN Doc A/RES/3/217A.

¹²⁵ Dinah Shelton, *Concepts and Theories of Remedies in International Human Rights Law* (OUP 2006) 7.

¹²⁶ *ibid.*

¹²⁷ See for example Inter-American Court of Human Rights, *Moiwana Village v Suriname*, judgement, IHCHR Series C No. 145 (15 June 2005) paras 120, 128, 212 and 233; African Commission on Human and People’s Rights, *Center for minority Right Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 276/03, judgement 25 November 2009, paras 156, 210 and Recommendations 1(b).

¹²⁸ Shelton (n 125).

¹²⁹ *ibid.*, 274-275.

¹³⁰ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001), Supplement No. 10 (A/56/10), chp IV.E.1, art 35.

of a new regulation that impedes the human rights of people or particular groups.¹³¹ The term compensation is related to the economic loss of the victims. The loss should be assessable as a result of a human rights violation, either as direct or indirect, claimed before the authorised bodies. With compensation being awarded to the victims, it may be perceived that money can be used to 'commodify' human rights.¹³² Nonetheless, this is not necessarily the case. However, it serves as a symbol of the vindication of rights, and the amount is calculated as closely as possible to the harm experienced by the victims.¹³³ Needless to say, the compensation is sometimes incapable of fully restoring the conditions of the previous life to the victims.

Rehabilitation involves the action of restoring the individual's health and reputation after the trauma he or she experienced in the case of a breach of human rights law. It does not only address the individuals, but also targets families, groups, communities and moreover, society as a whole. Moreover, rehabilitation could potentially involve a request to provide basic public services such as clean water and sanitation.¹³⁴

9.5.4 Enforcement measures for the decisions of accountability mechanisms

Enforcement measures for human rights particularly for violations and the infringement of economic, social and cultural rights, have been controversial in nature.¹³⁵ The domestic courts and other mechanisms have attempted to adjudicate economic, social and cultural rights at a local level,¹³⁶ yet the measures to enforce such rulings and decisions still significantly depend on the authorities in question and their political will.¹³⁷

Enforcement measures often take a long time to be implemented or it might also occur that the authorities do not execute a court's ruling.¹³⁸ Particularly, this occurs when a decision involves a certain amount of money to compensate the harm experienced by the victims of human rights violation, such as, for example, in the famous case of *Kedung Ombo* in Indonesia. In 1993, the Indonesian Supreme Court decided that the government had to pay a substantial amount of money to the villagers whose land was acquired to build the Kedung Ombo Dam.¹³⁹ Despite the Court's legally binding decision, the government did not obey the ruling, forcing the villagers to seek help from a district court to execute the decision.¹⁴⁰ Difficulties might

¹³¹ Potts 2008 (n 46) 126.

¹³² Shelton (n 125) 293.

¹³³ *ibid.*

¹³⁴ The Constitutional Court of Republic of South Africa, *Grootboom and Others v Government of the Republic of South Africa and Others* (CCT38/00) [2000] ZACC 14 Judgement of 21 September 2000, paras 1 & 2.

¹³⁵ See Boyle and Hughes (n 108).

¹³⁶ See International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Human Rights and Rule of Law Series No 2 (ICJ 2008).

¹³⁷ The problems of execution or delivery of results are becoming increasingly complex if the courts are at a regional or international level. See Hellen Keller and Cedric Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2015) 26 *European Journal of International Law* 829.

¹³⁸ International Commission of Jurist, 'Judicial Enforcement of Economic, Social and Cultural Rights' (Geneva Forum of Judges and Lawyers, Geneva 2014) <<https://www.icj.org/wp-content/uploads/2015/07/Universal-Judicial-Enforcement-ESCR-Geneva-Forum-Series-2-Publications-Conference-Report-2015-ENG.pdf>> accessed 3 February 2019.

¹³⁹ See for example Simon Butt, 'The Eksekusi of the Negara Hukum: Implementing Judicial Decisions in Indonesia' in Timothy Lindsey (ed), *Indonesia: Law and Society* (The Federation Press 1999) 249.

¹⁴⁰ Butt (n 139) 250.

arise because the court as an adjudicative body does not have competence to decide matters related to the executive's or legislature's functions. Consequently, judicial bodies cannot force the government to comply directly, particularly if the decisions involve the amendment of legislation or state budget.

Taking into account the issue of separation of powers, the present author argues that enforcement measures should also be established to ensure that the results of accountability mechanisms are implemented within a reasonable timeframe, by employing states' resources. Based on an observation made by the International Commission of Jurists, up to present day, no enforcement mechanisms have been established to preserve such purposes.¹⁴¹ The execution of decisions of an accountability mechanism, often relies on the willingness of governments. In most cases, the governments ignore the decisions, or are unable to comply in a timely manner due to the procedural bureaucracy relating to the government's expenditure, particularly if compensation is involved.¹⁴² These conditions can bring uncertainty to the plaintiffs as in some countries, such as Indonesia, there is no time limit to when the governments should pay the compensation. It often happens that the executions of court orders are ignored, inadequately organised, or not carried out due to unpreparedness on the governmental side.¹⁴³ An example of this is the execution process of the case of *Sangga Kalenggo v the Government of South Sulawesi* in Indonesia.¹⁴⁴ The case relates to unlawful land expropriation of a communal property. The case was decided by the Indonesian Supreme Court in 2011 in which the Court ordered the defendant to pay 4.2 billion IDR and a fine/penalty of 100.000 IDR/day for delaying the payment.¹⁴⁵ As of 2018, there has been no indication that the Government has paid the compensation.¹⁴⁶

The questions that may arise from this scenario are: what if the authorities do not implement the court orders? How can the victims of human rights violations pursue their interests further? Does invoking contempt of court for non-implementation of court orders assist the affected communities?¹⁴⁷ These questions are challenging to answer. At this moment, domestic courts (and other accountability bodies) usually lack coercive powers to force governments to comply with these bodies' orders. These conditions represent a lacuna in the law.¹⁴⁸ This dissertation will not attempt to answer such questions, but will highlight these issues to emphasise the need to establish measures to guarantee the implementation of court orders to fill the lacuna.

¹⁴¹ International Commission of Jurists 2008 (n 136); see also International Commission of Jurists 2014 (n 138).

¹⁴² This fact also can be found in the adjudication of the right to housing at the international level (see further discussion in this regard on the housing-related cases against Spain in Chapters 10 and 11).

¹⁴³ International Commission of Jurists 2008 (n 136) 79.

¹⁴⁴ Mahkamah Agung Republik Indonesia, *ST Haerani et al (Sangga Kalenggo's inheritors v the Government of South Sulawesi)*, Case No 617 K/Pdt/2011 judgment of 20 March 2012 *jo* Kendari District Court, Case No 20/PDT.G/2009/PN.Kdi judgement of 12 April 2010.

¹⁴⁵ Kendari District Court, *ibid* p 36.

¹⁴⁶ '6 Tahun Gubernur Abaikan Putusan Pengadilan, Masyarakat dan Daerah Rugi Rp 4,53 Miliar' (21 July 2018) ZonaSultra.com < <https://zonasultra.com/6-tahun-gubernur-abaikan-putusan-pengadilan-masyarakat-dan-daerah-rugi-rp-453-miliar.html> > accessed 3 July 2019.

¹⁴⁷ Contempt of court can be broadly categorised into two types being disrespectful to legal authorities in the courtroom and wilfully failing to obey a court order. Non-payment of the court judgment falls under the second type.

¹⁴⁸ International Commission of Jurists 2008 (n 136) 92.

Based on the discussion above, the five elements of accountability function in a circle and are correlated to each other, whereby the result of each element will influence the next stage or process. The monitoring process may reveal the negative effects of the lack of human rights implementation. The outcomes of this monitoring can provide feedback for the improvement of future policies. Together, these elements will create a comprehensive accountability framework in fulfilling human rights including the right to housing.

The accountability framework relating to human rights starts early in planning and designing policies, then continues in implementing and monitoring the programme. In this framework, the element of participation should exist in every stage. Therefore, accountability is essentially a process which stems from the involvement of communities to result in benefits for the community. The relation of the five elements of policies concerning human rights can be described as follows in the figure below:

Figure 9.2: The accountability process, adapted from Helen Potts's model on accountability as a process on the right to health¹⁴⁹

9.6 PRELIMINARY REFLECTIONS

This chapter has attempted to discuss the literature concerning accountability, addressing it from a general perspective and then focusing on theories and types of accountability. The meaning of accountability has evolved from its literal meaning that is bookkeeping, into its modern meaning: responsibility and answerability for misconduct. Bovens introduces the concept of accountability as a mechanism which emphasises the relations between actors and

¹⁴⁹ Potts 2008 (n 46) 14.

forums. Accountability as a mechanism has a few elements, i.e. (1) a relationship between an actor and a forum; (2) an obligation of the actors to explain and to justify their conduct; (3) a forum that can pose questions, deliver judgement and consequences.

However, Bovens definition of accountability as mechanisms only involves the post facto elements, which is opposite to the accountability of human rights advocated by Potts and Freedman. The latter focuses more on accountability working as a continuous process, starting from societies' participation in the decision-making process, monitoring, accountability mechanisms, to availability of redress and remedy. In the field of human rights, accountability works *ex-ante* and *post-facto* in a continuous cycle. Therefore, Bovens' two elements of accountability, namely forum and sanctions, can also be considered as part of the accountability related to human rights.

Defined as a process, accountability will function in a more constructive way in the implementation of human rights. The term 'constructive' refers to the results of monitoring or accountability mechanisms should be used to improve the previous policies on human rights. Therefore, accountability in this dissertation is defined as a continuous process involving the elements of accountability to facilitate a constructive implementation of the rights to adequate housing. Moreover, this chapter suggests that the enforcement measures should be an element of accountability as a process, to ensure that remedies and redress can be implemented effectively. As indicated by a few cases discussed in the previous section, this element is proven to be the weakest part of the adjudication process of economic, social and cultural rights. Therefore, this element demands a careful consideration from all of the actors involved in accountability as a process, including the government and the monitoring bodies.

Based on the elements of accountability as a process delineated in this chapter, Chapter 10 will be focusing on the relationship between accountability as a process for the realisation of human rights and analysing the existence of accountability as a process for the right to adequate housing at the international level.

CHAPTER 10

ACCOUNTABILITY AS A CONSTRUCTIVE PROCESS FOR THE REALISATION OF THE RIGHT TO ADEQUATE HOUSING

10.1 INTRODUCTION

Having introduced the meaning of accountability and its types from a more general perspective, this chapter analyses the relation between accountability and the realisation of human rights, particularly the right to adequate housing.

The extent to which accountability has been discussed in international human rights discourse is somewhat limited. Most of the time, the discussion is only on the accountability of states regarding human rights atrocities in the field of civil and political rights.¹ Although the international community agrees that if a serious breach of human rights occurs, the perpetrators should be held accountable. There are, however, no universal mechanisms available for such a process. Discussions on how accountability can be upheld for the violation of economic, social and cultural (ESC) rights is very limited. As mentioned in Chapter 1, several studies have been conducted in the field of accountability and the right to health, yet similar research on the right to housing is still lacking.

The purpose of this chapter is twofold. First, it clarifies the meaning of accountability that is used in a human rights context. While no international human rights instruments mention accountability, several UN human rights bodies have suggested that accountability is needed to advance the realisation of human rights.² What did these bodies mean by accountability? Did they mean accountability as a process or just accountability mechanisms?

Second, it will explore and analyse the elements of accountability as a process for the right to housing at an international and national level. Special attention will be dedicated to examining the international accountability mechanisms available in the context of accountability as a process, which is not only used when there is a violation but also to prevent violations of the right to adequate housing. Though the international mechanisms function as a supplementary mechanism to the ones that are provided at the national level,³ the international forums are crucial when holding an actor accountable for human rights violations, if the national forums fail to protect such rights.

¹ Several authors have written books or articles on the accountability of states in the case of human rights violations over the past few decades, such as tragedy occurred in Rwanda, or accountability of the international institutions in performing their tasks, such as the UN in the Srebrenica Case. For example, see Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (OUP 2001) and Jan Wouters, Eva Brems, Stefaan Smis, Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010).

² See for example Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 9 Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights' (3 December 1998) UN Doc E/C.12/1998/24; United Nations General Assembly (UNGA), 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Leilani Farha' (22 December 2014) UN Doc A/HRC/28/62 (Report of the UN Special Rapporteur 2014).

³ Report of the UN Special Rapporteur 2014 (n 2) para 40.

To address these aims, Section 10.2 starts by interpreting the meanings of accountability referred to by the UN bodies in their General Comments and comparing them with accountability as a process as discussed in Chapter 9. Section 10.3 provides an analytical framework of accountability as a process as a basis for exploring the various elements of accountability in Section 10.4. Furthermore, Section 10.5 discusses these elements as found at the international level, in greater detail. Section 10.6 highlights the essential aspects of Part III (Chapters 9 and 10) and lays the foundation for the discussion in Chapter 11 on accountability as a process in the decentralised Indonesian context.

10.2 THE RELATIONSHIP BETWEEN ACCOUNTABILITY AS A PROCESS AND HUMAN RIGHTS

It is believed that accountability relates to power. Accountability aims to control the power of a state and to limit the abuse of power by the state. This idea of controlling states' power is also present in international law regimes, which seek accountability and regulate a states' exercising of power over their people.⁴ This is also applicable to the human rights regime.⁵

According to Lisa Yarwood, accountability in the context of human rights refers to two processes: determination of liability and decision of redress.⁶ States prioritised the development of accountability by increasing and expanding the forums, either legal, quasi-legal or political bodies, to hold perpetrators accountable.⁷ The establishment of the European Courts, the Inter-American Court of Human Rights, the Universal Periodic Review Mechanism (UPR)⁸ introduced by the Human Rights Council (HRC) can serve as examples. The establishment of the UPR has shown that human rights accountability is not only legal in nature, but also political.

Moreover, accountability in human rights is linked to good governance principles, such as transparency and participation, as in Resolution No. 7/11 adopted by the HRC on the Role of Good Governance in the Promotion and Protection of Human Rights. The Resolution states that principles, such as a "transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people", is the best foundation for good governance.⁹ The Council acknowledges that good governance is an indispensable condition for the fulfilment of every human right.¹⁰ Another Resolution adopted by the Commission on Human Rights that also resembled the importance the notion of good governance and

⁴ International Law Association, 'Final Report on Accountability of International Organizations' (Conference, International Law Association Conference, Berlin, 2004) 4-6 <<http://www.ila-hq.org/en/committees/index.cfm/cid/9>> accessed 22 March 2018.

⁵ See for example Michael Freeman, *Human Rights an Interdisciplinary Approach* (Polite Press 2002) 15.

⁶ Lisa Yarwood, *State Accountability under International Law: Holding States Accountable for a Breach of Jus Cogens Norms*, Routledge Research in International Law (Routledge 2011) 20-21.

⁷ Yarwood (n 6).

⁸ The Universal periodic review is a quite new mechanism formed by the HRC of the United Nations in 2008. It aims to review the fulfilment of the human rights' legal obligations by the member states.

⁹ United Nations Human Rights Council (UNHRC), Resolution 7/11, 'The Role of Good Governance in the Promotion and Protection of Human Rights' (27 March 2008) para 4.

¹⁰ *ibid*.

accountability in human rights, is Human Rights Resolution No. 2005/68 on the role of Good Governance in the Promotion and Protection of Human Rights.¹¹

Again, in 2007, the HRC adopted a Resolution on Globalization and its Impact on the Full Enjoyment of All Human Rights that acknowledges accountability, along with the other principles such as equality, participation, non-discrimination at both an international and national level, respect for diversity, tolerance and international cooperation and solidarity, as the fundamental principles that “underpin the corpus of human rights.”¹² The same reference was also taken by the UN General Assembly, acknowledging that accountability is crucial in ensuring the full enjoyment of human rights in the era of globalisation.¹³

The linkage between accountability and transparency was made by the Committee in Economic, Social and Cultural Rights (the CESCR) in its General Comment No. 19 on the Right to Social Security. It mentions that in order to be effective, the national social security strategy and plan of action and its implementation should be based on the principles of accountability and transparency.¹⁴

Yarwood concludes that the relationship between accountability and human rights, as shown in the resolutions adopted by UN human rights bodies and the General Assembly, establish accountability as a legal principle.¹⁵ However, this may be contested since the resolutions are not legally binding. As a recommendation, they recognise the importance of accountability, but the implementation of accountability in ensuring the fulfilment of human rights relies on the domestic willingness of each member state.

Although the references of the UN Human Rights bodies do not create a legal obligation, these references are still useful to acknowledge the elements related to accountability in the context of human rights; in particular transparency, non-discrimination, equality, participation, and empowerment. These essential elements are more or less similar to those proposed by Helen Potts in the field of right to health, as discussed in Chapter 9. Additionally, the elements are also related to good governance principles in which accountability is recognised as one of the principles of good governance, that have been developed by international institutions such as the United Nations Development Programme (UNDP), the World Bank, and the United Nations Centre for Human Settlements (UNCHS).¹⁶ Although these institutions have advanced these principles slightly different, common elements can be found. The World Bank provides extensive literature on accountability related to public governance, such as in a financial

¹¹ United Nations Commission on Human Rights, Resolution No. 2005/68, ‘The Role of Good Governance in the Promotion and Protection of Human Rights’ (20 April 2005) UN Doc E/CN.4/RES/2005/68, para 4.

¹² UNHRC, Resolution 4/5, ‘Globalization and its Impact on the Full Enjoyment of All Human Rights’ (30 March 2007) para 4.

¹³ United Nations General Assembly (UNGA), Resolution A/RES/67/165, ‘Globalization and its Impact on the Full Enjoyment of All Human Rights’ (13 March 2013) para 20, adopted in the Sixty-seventh session on 20 December 2012, see also UNGA, ‘Preliminary Report of the Secretary General on Globalizations and its impact on the Full Enjoyment of all Human Rights’ (31 August 2000) UN DocA/55/342, para 8.

¹⁴ United Nations Committee of Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 19: The Right to Social Security under Article 9’ (4 February 2008) UN Doc E/C.12/GC/19, para 70.

¹⁵ Yarwood (n 6) 24.

¹⁶ The UNDP: participation, equity, transparency, accountability, rule of law, responsiveness, consensus efficiency and effectivity, and strategic vision.

The World Bank: participation, transparency, accountability, sensitivity, cost of effectiveness

The UNCHS: decentralisation, participation, equity, transparency, accountability, citizenship, efficiency, strategic vision, sustainability, and security

context, elections, democratic parliament, or political context. These publications confirm that good governance, including accountability, will improve the living conditions of the people.

Although in literature, there are limited references to accountability *per se* as a contributing factor to the better implementation of human rights. It does, however, pay more attention to a “human rights-based approach” that puts the people at the centre of development so that they can be directly involved in designing and monitoring policies that affect their lives. This approach directly links to the role of participation in accountability as a process, as will be discussed in the following paragraphs.

A human rights-based approach (HRBA) is used to analyse the improvement of people’s living conditions, focussing on their needs, problems, and potential.¹⁷ It shifts the approach of the development initiative from a charity or needs approach to a rights-based approach, emphasising the realisation of the rights and empowerment of people, so that they will play important roles in the development and will not only become objects of the development. The HRBA is based on the principles of participation, empowerment, non-discrimination and equality, and legality.¹⁸ In the human rights concept, everyone is entitled to inalienable rights; therefore, the right holders have a relation with the duty-bearers, i.e. states in this case, who are responsible for respecting, protecting and fulfilling the right holders’ entitlements.¹⁹

The core objective of the HRBA is to invert the power relationships between policy makers, service providers, and the poor,²⁰ who are often excluded from the advantages of the developments. The HRBA aims to empower people in terms of knowing and claiming their rights and to increase the ability and accountability of the responsible individuals and institutions (duty bearers) for respecting, protecting, and fulfilling rights.²¹ The HRBA concerns the participation of society, which is affected by the newly adopted policy. Empowering people means providing chances for people to participate in influencing the government’s decisions which affect human rights. This approach perceives that the citizens serve as the principal actors of the development. Thus, people are the subject of the development, not the object.²²

The states, as the duty bearers of human rights, are accountable for their actions in fulfilling their obligations under the human rights regime, to the citizens as the rights-holders. Some use the terms “citizens with rights” rather than “beneficiaries with needs” or “consumers

¹⁷ J. K. Boesen & T. Martin, ‘Applying a Rights-Based Approach: An Inspirational Guide for Civil Society’ (*The Danish Institute for Human Rights, 2007*) 10 < www.crin.org/en/docs/dihr_rba.pdf > accessed 30 October 2015.

¹⁸ Rory Hearbe and Padraic Kenna, ‘Using the Human Rights Based Approach to Tackle Housing Deprivation in an Irish Urban Housing Estate’ (2014) 6 *Journal of Human Rights Practice* 1; see also Scottish Human Rights, ‘Human Rights Based Approach: An Introduction’ (*Scottish Human Rights Commission*) <<http://www.scottishhumanrights.com/careaboutrights/whatisahumanrightsbasedapproach>> accessed 30 October 2015.

¹⁹ Boesen & Martin (n 17) 11.

²⁰ John M. Ackerman, ‘Human Rights and Social Accountability, Social Development Papers: Participation and Civic Engagement’ Paper No. 86/2005, World Bank, New York, 3.

²¹ *ibid.* This objectives can also be found in statement made by several UN Bodies in 2003, called ‘The Human Rights-Based Approach to Development Cooperation – Towards a Common Understanding among the United Nations Agencies.’ This document is known as Stamford Agreement, UNDG Website <https://undg.org/wp-content/uploads/2016/09/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 27 May 2019.

²² Ackerman (n 20) 8.

with choices”, as they are the subject of development.²³ The HRBA can be employed to increase the ability of responsible parties in recognising and knowing how to respect human rights, fulfilling rights, and to ensure that they can be held accountable. Accountability can be pursued through various available mechanisms at the local, national and international level. Utilising the HRBA can be highly advantageous especially in ensuring that the principles and standards of human rights are incorporated into the policy making process and in the daily management of public institutions.²⁴

Although HRBA has been used in advancing economic, social and cultural rights, this study opts for a broader approach than HRBA, namely ‘accountability as a process’ borrowed from Potts’ definition (See Chapter 9). This approach combines accountability mechanisms with other elements such as participation, monitoring, remedy and redress and enforcement measures. This approach seems to have similar elements as the HRBA, particularly the element of participation and accountability. While the main focus of HRBA is on the empowerment of the people to know their rights and how to advocate them, the ‘accountability as a process’ approach goes beyond the participation aspect and addresses directly the duty bearers. Under this approach, the duty bearers have to update their policies continuously based on the monitoring results. This may not be always possible under the HRBA. Thus, accountability as a process addresses two sides of the same medal: both of the people and the government. In addition, the term accountability in human rights, including in HRBA often merely refers to responsibility for wrongdoing. This falls under the meaning of accountability as a mechanism which renders the authorities accountable,²⁵ and only involves retrospective measures.²⁶

Accountability in this study becomes a broader concept which consists of elements that are dependent on one another and that work continuously to improve the exercise of human rights. This process involves not only the retrospective element, but also both a preventive and a prospective element.²⁷ On one hand, the retrospective process emphasises remedies if the duty-bearers fail to fulfil their human rights obligations. The preventive element involves in the averting non-thoughtful policies by involving the public through a more participatory approach to minimise future mistakes or wrongdoing. Whereas, on the other hand, the prospective process stresses the potential possibilities to improve performance, by evaluating which ones work and those that need to be revised.²⁸ Such a continuous process will advance the fulfilment of human rights by mainstreaming people’s participation in all elements of accountability processes.²⁹

²³ Andrea Cornwall, ‘Beneficiary, Consumer, Citizen: Perspectives on Participation for Poverty Reduction’ (2000) 2 Sida Studies; Andrea Cornwall, ‘Locating Citizen Participation’ (2002) 33 IDS Bulletin 49.

²⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions on Human Rights Based Approach to Development Cooperation* (United Nations 2006) 15 <<https://www.ohchr.org/Documents/Publications/FAQen.pdf>> accessed 5 February 2019.

²⁵ This reference is also supported by findings in the research conducted by Yi Zhang, *Advancing the Right to Health Care in China – Towards Accountability* (Intersentia 2018).

²⁶ Hellen Potts, ‘Accountability and the Right to Highest Attainable Standard of Health’ in Paul Hunt and Tony Gray, *Maternal Morality, Human Rights and Accountability* (Routledge 2013)122-123; Hellen Potts, ‘Accountability and The Right to the Highest Attainable Standard of Health’ (Human Rights Centre, University of Essex 2008) 13 <<http://repository.essex.ac.uk/9717/1/accountability-right-highest-attainable-standard-health.pdf>> accessed 3 February 2019.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

This section has shown that there is a relation between accountability as a process and human rights, in which accountability serves as the central pillar in the implementation of human rights. The next section will explore accountability in the context of the right to adequate housing at both an international and national level.

10.3 ANALYTICAL FRAMEWORK OF ACCOUNTABILITY AS A PROCESS FOR HUMAN RIGHTS

Based on the elements of accountability as a process discussed in Chapter 9, this section elaborates upon these elements, with respect to the specific right to adequate housing. The section divides the roles of duty-bearers and rights-holders in the process. Furthermore, it elaborates upon the mapping of the components of accountability as a process that can be found at the international and national level.

Any discussion on human rights issues always involves two parties: duty-bearers and rights-holders. The states and their agents represent the duty-bearers, and rights-holders are the people being served. In the concept of accountability as a process, states and its agents become both a subject and an object. As a subject, the government is defined as the actor that adopts legislation and policies related to human rights. The adoption of housing legislation is one of the measures which should be taken when fulfilling human rights obligations, including the obligation of the right to adequate housing. Being a subject, the government should provide a forum for the people to actively participate prior to the adoption of a policy. The state's human rights obligations also include the establishment of accountability mechanisms that are effective and accessible to everyone.

As an object, the state is monitored and scrutinised by the rights-holders or other monitoring institutions, such as NGOs (local and international) and national human rights institutions. If the state fails to perform their human rights obligations, it will face the forum in which it will be questioned and its performance will be judged, which might result in sanctions being imposed.

On the other hand, the rights-holders are in the position of a subject. In the process, rights-holders are expected to participate actively in all processes. The active role ranges from participating in the decision making to monitoring and bringing the accountable actors (states) to account for a failure of performance or a human rights violation.

The monitoring aspects can be divided into two types: internal monitoring and external monitoring. Internal monitoring often exists in government institutions based on the principle-agent theory, as was discussed in Chapter 9. The external type can exist both at the national level, such as an ombudsman or NGOs, and at the international level, such as international NGOs or the UN agencies. In all of these monitoring types, participation of the rights-holders is crucial. Sometimes, the monitoring function may lead to holding the state to account before the accountability forums.

The forums can be both national forums and international forums. Similar to monitoring elements, domestic accountability forums consist of internal and external mechanisms. The internal mechanism is the continuation of the internal monitoring process. The mechanism is known as administrative accountability and is conducted based on the principal-agent

relationship in a government institution. The external mechanisms include judicial institutions, such as domestic courts, national human rights institutions or other commissions established by the state to carry out monitoring and accountability functions. At the end of the process, should any failure of human rights performances and/or violations be found, the forums will deliver a judgment or other form of assessment, including remedies and redress that should be provided to the right-holders. The state in this regard has to obey the forums' judgments and follow the recommendation concluded by the forum.

All steps and aspects of accountability previously discussed are summarised and presented in the figure below:

Figure 10.1 Analytical framework of accountability as a process for human rights

Figure description:

- based on obligations
- - - - -→ based on rights

10.4 THE EXISTENCE OF ACCOUNTABILITY AS A PROCESS FOR THE REALISATION OF THE RIGHT TO ADEQUATE HOUSING

To comprehend the elements of accountability as a process, an investigation concerning the issue of housing was conducted. The inquiry aimed to map the existence of the elements, as well as what kind of aspects can be offered by each component to encourage the realisation of the right to adequate housing. To achieve this mapping, an exploration of the literature on housing rights as well as UN documents, such as international treaties, was performed.

In addition, for the national level, the exploration was limited only to Indonesia. A review of Indonesian literature and legislation was conducted by using legal instruments and the secondary materials related to housing issues that were employed in Chapter 2 and Chapters 4 to Chapter 8. Some findings might also be applicable to other countries, though certainly may vary as the way in which elements of accountability are exercised heavily depends on the legal and political conditions in a state.

The findings are summarised in Table 10.1 below. The table categorises the findings based on Potts' work: participation, monitoring, accountability mechanisms, and remedy and redress. The present author, however, has added a further category: enforcement measures, which are considered to be vital in securing the implementation of a remedy or redress ordered by an accountability mechanism for the state's failure to fulfil its human rights obligations.

Table 10.1 Elements of accountability as a process related to the right to adequate housing

Level	Accountability Elements				
	Participation	Monitoring	Accountability mechanisms	Remedy and Redress	Enforce-ment measures
International	1. States' participation in concluding and ratifying treaties 2. NGO participation in negotiation	1. State Report procedure under the ICESCR 2. Universal Periodic Review 3. UN special rapporteur on the Right to Adequate Housing 4. NGOs International and local	Only available for states that have ratified Optional Protocol to the ICESCR: 1. Individual complaints 2. Inter-state complaints 3. To a certain extent, the states' reports and the UPR can also be categorised as accountability mechanism, (quasi-judicial)	1. Compensate by offering a public housing in the absence of accommodation 2. Compensate financial harm 3. Reimbursement of procedural costs communication 4. Guarantee of non-repetition	N/A

National (national and local govern- ment)	1. Public hearing 2. Consultation 3. Socialisati- on	1. Internal: principals/ Inspectorate General 2. National Human Rights Institution; Ombudsman 3. External: NGOs 4. Media (could also play role, however, this monitoring will not be discussed in detail.	1. Quasi- Judicial: National Human Rights Institution, Ombudsman 2. Judicial: constitutional court, general courts 3. Non-judicial: political, administrative and social accountability	1. Financial compensation 2. Rehabilitation 3. Annulment of measures or legislation (as a result of judicial review)	Public Prosecu- tor/ Executi- on of court ruling
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The following section (Section 10.5) will illustrate each element at the international level. The Indonesian situation will be analysed in further detail in Chapter 11.

10.5 ACCOUNTABILITY AS A PROCESS AT THE INTERNATIONAL LEVEL

10.5.1 Participation

Participation in international decision making is possible through engagement in the negotiation of a treaty's adoption. Treaties that are negotiated within an international organisation often involve international organisations whose work corresponds to the treaty in question.

The participants involved in the negotiation process are mostly states, intergovernmental organisations and international non-governmental organisations (NGOs).³⁰ The possible stages in which international civil societies are able to participate in a treaty negotiation are the pre-diplomatic conference and the diplomatic conference stages,³¹ such as observers at meetings of states parties.³² The participation of NGOs can also be in the form of a consultative status that enables the UN bodies to arrange a consultation and to cooperate with international NGOs.³³ Although participation in adopting international legislation (treaties) exists, participation is mostly limited to international NGOs recognised by the UN.³⁴ The role of such participation

³⁰ Alan Boyle and Kasey McCall-Smith, 'Transparency in International Law-making' in Andrea Bianchi and Anna Peters (eds), *Transparency in International Law* (CUP 2013) 422.

³¹ L. Doswald-Beck, 'Participation of Non-Governmental Entities in Treaty-Making: the Case of Conventional Weapons' in Vera Gowlland-Debbas (eds), *Multilateral Treaty-Making* (Nijhoff Law Specials, Springer 2000).

³² See Boyle and McCall-Smith (n 30) 426.

³³ *ibid.*

³⁴ To be able to participate in the negotiation (regardless the status of the participation) an NGO should fulfil certain requirements such as its mandates, that should conform to the UN Charter, adopt a transparent decision-

has ensured that voices from the grassroots level are heard in the highest level of hearings at the UN and has assisted the promotion of the treaties from the ground to up across the globe.

Civil societies can participate at national level by providing considerations on the positive impacts, not only at ratification, but also when negotiating the impacts of an international treaty for the country in question. In this process, states will express the intention to negotiate or ratify a treaty and may consult stakeholders at the national level where civil societies may become involved at this stage.

In conclusion, the element of participation in a more representative way is available at the international level. Although this participation is not direct, like that at the national level, this type of participation can boost accountability as a process at the international level, particularly to advance the realisation of human rights, including the right to adequate housing.

10.5.2 Monitoring

At the international level, mostly at the UN level, several international procedures are available to monitor the implementation of states' human rights obligations related to the right to adequate housing. The procedures are as follows:

10.5.2.1 The state reporting procedure under the ICECSR

The body responsible for monitoring the states' implementation of the ESC rights obligations is the Committee of Economic Social and Cultural Rights (CESCR). The Covenant lays out the state report procedure for these purposes. States have to report their progress in implementing their international obligations as enshrined in article 16(a) of the ICESCR. This procedure is obligatory for all of the parties to the Covenant.

Although this procedure is called "state reporting," third parties other than the state in question can also submit a report concerning the implementation of human rights on the ground. Other parties that might be involved are national human rights institutions, both national and international NGOs, and civil society. These submissions are considered as "shadow reports" that serve as additional information on the state's practices on human rights and becomes part of monitoring process, as required by international treaties. After the submission, the Committee will consider the report and if necessary, it can request an explanation or justification of specific human rights issues to the state in question. In this process, both written and oral forms are involved. The oral procedure means that the Committee will have direct communication with the state's representatives. To a certain extent, the state report may also fall under the category of accountability mechanisms, due to the nature of the chance given to member states to answer the examination of their report by the Committee. However, the oral procedure mostly takes the form of a friendly dialogue, whereby states have the chance to explain the progressive measures that were adopted and justify any retrogressive measures that were carried out, such as limitations on a specific human right, discrimination and other negative measures that infringed upon or violated people's rights.

making, possess a constitution that democratically adopted, and several other requirements. See for details in Boyle and McCall-Smith (n 30) 425.

Furthermore, the Committee will provide recommendations and suggestions³⁵ to the state in question, which are the so-called “Concluding Observations.” The recommendations given to the states aims to improve their human rights legal framework which will also influence the human rights policies in a particular country. Concluding observations are not legally binding.³⁶ Therefore, it depends on the willingness of states to follow the suggestions. The recommendation will also not address specific breaches of human rights that might exist in a particular state but are instead mostly general recommendations that concern the states’ implementation of their human rights obligations.

Therefore, concluding observations do not contain a comprehensive legal analysis and do not possess the effect of jurisprudence.³⁷ Still, this procedure certainly boosts the accountability, both at the international and national level.³⁸ Allowing other institutions such as national human rights institutions and NGOs, to submit shadow reports encourages the participation of societies at the national level to monitor the implementation of human rights. The participation from the third parties strengthens accountability, related to human rights as a continuous process, particularly in regard to the elements of participation and monitoring. Moreover, the publicly open nature of the recommendations and suggestions can also be used by the civil societies to urge their government to pay more attention to the recommendations, in order to fulfil human rights by adopting better laws and policies.

10.5.2.2 *The Universal Periodical Review (UPR)*

The UPR mechanism was introduced following the establishment of the HRC in 2006 replacing the Commission on Human Rights. The UPR procedure is laid down in the Annex of HRC Resolution 5/1 on the Institution Building of the United Nations Human Rights Council.³⁹ The idea of the UPR is that every member state of the UN can participate in the review, either as a reviewee or as an observer, regardless of their ratification of the international human rights treaties.⁴⁰

This mechanism allows a review of a state once every four years; for this purpose, a state has to submit a national report containing all essential information on their domestic implementation of human rights. Aside from the national report, a second report is compiled by the Office of the High Commissioner for Human Rights, comprising of all information available at the UN which is based on the work of the relevant bodies and procedures in the field of human rights concerning the reviewee state. Moreover, another report is also prepared by the stakeholders, particularly relevant NGOs and national human rights institutions. There will be

³⁵ CESCR, ‘Rules of Procedure’ (1 September 1993) UN. Doc. E/C.12/1990/4/Rev.1.

³⁶ Michael O’Flaherty, ‘The Concluding Observations of United Nations Human Rights Treaties Bodies’ (2006) 6 Human Rights Law Review 27 36.

³⁷ International Law Association, Committee on International Human Rights Law and Practice, ‘Final Report on the Impact of the United Nations Treaties Bodies’ in International Law Association, *Report of the Seventy-first Conference* (16-21 August 2004) 621, para 16.

³⁸ Arne Vandenbogaerde, ‘Contours and Viability of a Multi-Duty-Bearer Accountability Framework in the Field of Economic, Social and Cultural Rights’ (DPhil Thesis, University of Antwerp 2015) 65.

³⁹ UNHRC Res 5/1, Institution-building of the United Nations Human Rights Council (18 June 2007).

⁴⁰ Christian Tomuschat, ‘Universal Periodic Review: a New System of International Law with Specific Ground Rules?’ in Fastenrath and Geiger *et al* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 611.

a working group composed of HRC members that will conduct the review whereby the interactive process will occur involving the state under review, the observer states, and the HRC. Following the communication or dialogue, the reviewing states will draw up a list of recommendations whereby the state under review can accept or reject them.

Similar to the State Reporting procedure, the nature of this procedure will not constitute as binding decisions on the implementation of human rights. Nevertheless, it also promotes accountability in the sense that being reviewed by their peers will result in pressure on a state if it does not comply with their human rights obligations, thus affecting their performance in realising human rights for all inhabitants.

10.5.2.3 The UN Special Rapporteur on the Right to Adequate Housing

The UN Special Rapporteur is a part of the so-called “specific procedures” established by the UN Commission on Human Rights or, after 2006, by the HRC to address specific issues occurring in any country. It was established in 2009 with the mandates to mainly monitor, examine and publicly report the human rights conditions in a specific country.⁴¹ The Special Rapporteur has a mandate to visit countries will publish their reports and will conduct direct communications with the governments and relevant stakeholders related to the right to housing. Annually, the Special Rapporteur reports to the UN General Assembly and the HRC.

The public reports can facilitate a states’ accountability in terms of the right to adequate housing. Particularly when a country’s missions are conducted, there will be a chance to effectively communicate with the government to understand how the right to housing is implemented, what the obstacles are and what measures can be taken. This direct communication will strengthen the accountability of states in terms of implementing their international obligations. As a part of the monitoring function, NGOs will also play role in overseeing the government in executing all measures adopted in order to respect, protect, and fulfil the right to adequate housing.

10.5.3 Accountability mechanisms

Bringing the violators of housing rights before an international mechanism is indeed not a new issue at all. Following the Vienna Declaration and Programme of Action stating that “all human rights are universal, indivisible and interdependent and interrelated,”⁴² the acceptance of the justiciability of economic, social and cultural rights has been growing ever since. Several regional courts, such as the European Court of Human Rights and the Inter-American Court of

⁴¹ The complete mandates of the special rapporteur of the right to adequate housing are: (1) Promote the full realisation of adequate housing as a component of the right to an adequate standard of living; (2) Identify best practices as well as challenges and obstacles to the full realisation of the right to adequate housing, and identify protection gaps in this regard; (3) Give particular emphasis to practical solutions with regard to the implementation of the rights relevant to the mandate; (4) Apply a gender perspective, including through the identification of gender-specific vulnerabilities in relation to the right to adequate housing and land; (5) Facilitate the provision of technical assistance. See Commission on Human Rights, Res 2000/9 (17 April 2000) para 7d.

⁴² Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.

Human Rights, as well as national courts, for example in India and South Africa, have adjudicated on ESC rights.⁴³

As a new development in international human rights law, and to provide a binding accountability mechanism, the Optional Protocol to the ICESCR (Optional Protocol/OP) was adopted in 2008.⁴⁴ The OP provides an opportunity for individuals to submit complaints before the CESCR regarding the human rights violations committed by the member states. This confirms that states have recognised the justiciability of ESC rights. However, the mechanisms enshrined in this OP are only applicable for states that have ratified it and, so far, only 24 states have become a party to the OP.⁴⁵

The accountability mechanisms provided in the Optional Protocol are described in the following sub-sections.

10.5.3.1 Individual complaints

The individual complaint procedure differs from the state reporting procedure. The individual complaints result in formal decisions from the Committee that require immediate actions to be taken by the states. The views adopted by the Committee bring responsibility for the state in question to implement the recommendations therein.

However, this procedure is optional in nature, as it requires the willingness of states to accept the Committee's competence in dealing with the individual complaints.⁴⁶ The OP also requires the individual to have employed all legal mechanisms available in the country prior to the international claim being put forward before the Committee (the exhaustion of local remedies principle).

In relation to the right to housing, the Committee has adopted its views in two cases. These two cases are: *Mrs. I.D.G v Spain (I.D.G Case)*, and *Mohamed Ben Djazia v Spain (Ben Djazia case)*. The I.D.G case concerned the lack of judicial protection for an individual facing mortgage foreclosure proceedings.⁴⁷ The second case was that of *Mohamed Ben Djazia and Naouel Bellili v Spain (Ben Djazia et al)* who claimed that Spain had violated the claimants' right to adequate housing due to no alternative accommodation being provided for them, following their eviction from a private rental accommodation.⁴⁸ In both cases the Committee found that Spain had violated the right to adequate housing. The facts occurred in the two cases are provided in the text boxes below.

⁴³ See the discussion on the development of justiciability of economic, social and cultural rights in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008).

⁴⁴ UNGA, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (10 December 2008) UN Doc. A/RES/63/117 (Optional Protocol).

⁴⁵ OHCHR, 'Status of Ratification: Interactive Dashboard' (OHCHR) <<http://indicators.ohchr.org/>> accessed 26 February 2019.

⁴⁶ Robert McCorquodale, 'The Individual and the International Legal System,' in Malcolm D. Evans (ed), *International Law* (OUP 2006) 317.

⁴⁷ CESCR, *I.D.G v Spain*, Communication No. 2/2014 (13 October 2015) UN Doc E/C12/55/D/2/2014 (IDG case).

⁴⁸ CESCR, *Mohammed Ben Djazia and Naouel Bellili v Spain*, Communication 005/2015 (20 June 2017) UN Doc E/C.12/61/D/5/2015 (Ben Djazia case).

Text box 10.1 I.D.G v Spain

Mrs I.D.G claimed that she was inadequately informed about the court's order of authorising the foreclosure of her apartment.⁴⁹ Despite the fact that the apartment was her primary residence, she did not notice the decision and became aware of the process after the Court had summoned the auction of her apartment. After she had missed several mortgage payments, the bank engaged mortgage enforcement proceedings under Spanish law and recalled the full amount of money lent to Mrs. I.D.G.

In June 2012, the Madrid Court delivered its decision in favour of the bank and ordered the payment request from the debtor (Mrs. I.D.G). The order did not reach her on time, although her apartment was primary residence. Following a "no objection" from the debtor, in October 2012, the Court decided to enforce the decision by posting the auction to the public and continued the proceedings by convening the auction against the property in February 2013.

Only in April 2013 did Mrs. I.D.G find a letter in her mailbox informing her that she needed to collect the notice from the Court. She immediately filed an appeal and requested the Court to annul the auction procedure since insufficient notification was provided; however, the court dismissed the claim. In May 2013, Mrs I.G.D then filed a complaint before the Spanish Constitutional Court relating to the fact that the Court dismissal had violated her right to a fair trial and access to an effective remedy guaranteed under the Spanish Constitution. The Court, however, dismissed her complaints.

This case was exceptional in terms of its time frame in which the suspected violations occurred. The Optional Protocol requires that in order to bring forward an individual complaint, the facts that are the subjects of the communication, should have occurred after the adoption of the OP, otherwise the communication will be inadmissible.⁵⁰ However, the Committee stated that the I.D.G case is admissible and adopted its views on Mrs I.D.G's facts that occurred before the adoption of the OP.⁵¹ The Committee argued that the facts that were experienced by Mrs I.D.G still continued following the adoption of the OP, therefore, the case can be declared admissible.⁵²

In its examination, the Committee noticed several measures by the state party to inform Mrs I.D.G, nevertheless it emphasised the fact that the state party did not resort to all available means to serve a notice to the affected person. Due to the fact that the property is the only home of the debtor, the state should have employed other reasonable measures for the notification, such as posting a note through the debtor's letterbox or leaving the notice with the caretaker or the nearest neighbour. The Committee concluded that such an insufficient notice could have prevented the debtors from seeking protection and to defend their rights through the available mechanisms, as well as preventing her from enjoying her home. Therefore, the state breached the right to adequate housing enshrined in the convention.⁵³

⁴⁹ IDG Case (n 47)

⁵⁰ Optional Protocol (n 44) art 3 (2) b.

⁵¹ Juan Carlos Benito Sanchez, 'The UN Committee on Economic, Social and Cultural Rights' Decision in I.D.G. v Spain: the Right to Housing and Mortgage Foreclosures' (2016) 3 *European Journal of Human Rights* 320.

⁵² IDG Case (n 47) para 9.7.

⁵³ *ibid* paras 12.4 and 13.1.

Text box 10.2 *Mohamed Ben Djazia and Naouel Bellili v Spain Case*

Mohamed Ben Djazia and his wife (Ms. Bellili) had been living together in a rented room in an apartment since 2009.⁵⁴ They continued to live there following the birth of their two children. Ben Djazia paid the monthly rent in a timely manner despite his low income. Between 1999 and 2011, around 13 times, Ben Djazia applied for public housing to the Madrid Housing Institute, yet none of them proved successful. Since 2012, particularly after June, Ben Djazia could not pay the lessor due to his financial situation. Thus, the rental agreement could not be extended after 31st August 2012. Ben Djazia refused to move because he had not found alternative accommodation following his efforts to search for accommodation from several charity organisations.

The lessor brought the civil proceeding before the Madrid Court of First Instance No. 37 and requested the Court to order the eviction since the contractual agreement had ended and the tenant was not willing to move. On 30 May 2013, the Court delivered its judgment in favour of the lessor and stated that the tenancy agreement had ended. The court ordered a forced eviction notice on 9th July 2013. In addition, the Court also considered Ben Djazia's financial situation and instructed the Department of Social Affairs of the Community of Madrid and the Government Agency for Family and Social Services of Madrid City Council to adopt the measures within their competence to protect Ben Djazia against situations of distress and exclusion and the agencies should inform the Court, within 20 days, following the specific measures which were to be taken.

Ben Djazia requested a one-month delay of the repossession, which the Court agreed to, following his new application for social housing to the Madrid Housing Institute. Following the delay, the Court ordered to remove Ben Djazia and his family by September 2013. Ben Djazia had also requested the Court to annul the eviction as it would have violated his right to housing, particularly that the eviction would deprive his two minors of their rights.

All of his efforts to avoid eviction and find new accommodation were unsuccessful. Following the eviction, the family were taken into a State emergency shelter for 10 days, then lived in their car for 4 days, before being accommodated by an acquaintance for several weeks. Apart from emergency accommodation, no support was given to the family by the State.

The *Ben Djazia* case provides a compelling foundation for the protection of the right to housing. The case underscores that the right to security of tenure and the right to be protected against eviction should also be given to those living in private (rental) accommodation.⁵⁵ The Committee found that the state did not employ its maximal available resources to protect individuals from homelessness. It noted around 800 requests for public housing in Madrid; however, only 260 units become available within the space of a year.⁵⁶ In addition, the Committee notes that around 3000 houses have been sold to a private company in order to balance the deficiency in the State's budget.⁵⁷ For those reasons, the Committee declared that Spain had violated the right to housing and considered that the state had taken a retrogressive measures by reducing the stock of public housing in the middle of a severe economic crisis.⁵⁸

The result of the individual complaint procedure under the OP is called "views and recommendations" of the Committee that the state party shall take due consideration of. The

⁵⁴ Ben Djazia case (n 48) paras 2.1-2.20

⁵⁵ *ibid* (n 48) para 13.

⁵⁶ *ibid* para 17.4.

⁵⁷ *ibid* para 17.5.

⁵⁸ *ibid* para 17.6.

choice of words of the Committee imply that the individual complaint is not a strong procedure. States' compliance with the Committee's recommendations, emanating from the individual complaint procedure is still unknown and, therefore, further research needs to be conducted as to whether the individual complaints procedure can be considered to be a prominent procedure in enforcing the states' international obligation with regard to economic, social and cultural rights.

10.5.3.2 Inter-state complaint procedure

This procedure is the oldest procedure brought before the international bodies by states to hold another state accountable in the case of incompliance with its international obligations relating to the relevant conventions. The most reputable body to hear such complaints is the International Court of Justice (ICJ); however, the procedures before the ICJ usually concern the rights of states rather than the rights of individuals⁵⁹

The OP enables a procedure for its parties to lodge complaints against another state that is thought to not be fulfilling their obligations under the ICESCR (article 10). However, the inter-state procedure in the human rights field is rarely employed. The cause of this fact is that the human rights instruments, including the OP, require that states involved in the complaints, both as claimants and defenders, have to recognise the competence of the Committee to hear the complaints,⁶⁰ yet many states have not recognised such competences. Consequently, inter-state complaints before the Committee may not yet be effective in holding other states accountable for any omission or commission, particularly in the field of the right to housing and in terms of other economic, social and cultural rights.

10.5.3.3 Special inquiry

This procedure allows the Committee to initiate an inquiry when it "receives reliable information" indicating grave or systematic violations by a state party of any of the economic, social and cultural rights set forth in the ICESCR.⁶¹ For the Committee to be able to follow this procedure, member states have to make an express declaration accepting the procedure.⁶² The wording of "receives reliable information" suggests that the Committee can receive the reliable information from third parties. These parties may include other states, UN bodies, inter-governmental bodies, international NGOs as well as national NGOs.

Similar to the inter-state complaint procedure, the special inquiry has yet to be used under this OP. However, it may become an avenue, in the future, as a mechanism to adjudicate the right to adequate housing, primarily when the domestic mechanisms have been exhausted and no justice has been achieved.

⁵⁹ Bruno Simma, 'Human Rights before the International Court of Justice: Community Interest Coming to Life?' in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 587.

⁶⁰ Optional Protocol (n 44), art 10 (1).

⁶¹ Optional Protocol (n 44) arts 11 and 12.

⁶² *ibid* art 11.

10.5.4 Remedy, redress and enforcement measures

As discussed in the previous sub-section, the OP to the ICESCR is a newly adopted instrument that can be employed by an individual for the violation of ESC rights at the international level. The instrument also offers remedy and redress if the Committee declares any human rights violation to have occurred.⁶³ The observations and analysis in this sub-section were made on the basis of the two cases relating to the right to housing that are currently available under the OP procedure. In the future, the Committee's approach to provide remedy and redress relating to the violations of the right to adequate housing may, perhaps, change or depend on the nature of cases brought before it.

The Committee, for example, in the *I.D.G* case recommended the state party to provide an effective remedy for Mrs. I.D.G by: (1) ensuring that the foreclosure of the property does not proceed unless the state party provides judicial protection, as enshrined in General Comments 4 and 7; (2) reimbursing the costs spent for the communication.⁶⁴ The Committee also recommended that the state should guarantee non-repetition and prevent similar violations from occurring.⁶⁵ In the *Ben Djazia* case, the Committee adopted a slightly different remedy and redress for the affected persons. It recommended the view that the state party had to provide to Ben Djazia and his family 1) public housing; 2) financial compensation for both the violations suffered and; (3) the legal costs reasonably incurred in the processing of the communication. Furthermore, the Committee requested the guarantee of non-repetition and the prevention of similar violations from occurring in the future. At this moment, it is not clear whether Spain has complied with the CECSCR recommendations in the two cases above. However, in 2017 several Spanish NGOs have formed "ESCR Ruling Monitoring Group" which serves as a platform to monitor Spain's compliance with the ruling of the CECSCR.⁶⁶ In 2018, this platform announced that Spain's response to the ruling of the on the case of *Ben Djazia* was insufficient and inadequate.⁶⁷

Based on the two cases relating to the violation of the right to housing, the Committee adopted a variety of remedies and redress, which involve: 1) postponing the order of the domestic court; 2) providing public housing; 3) financial compensation; 4) reimbursement of the legal costs; and 5) a guarantee of non-repetition. Nevertheless, the Committee tends to avoid providing the recommendation in a detailed manner. Due to the quasi-judicial nature of the procedure, the Committee only set out "views" that are characterised as "self-restraints" in which the Committee only recommend states to adopt remedies, though it left some leeway for the states concerned to offer a solution for the individual or parties involved in the

⁶³ Christian Courtis, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A New Instrument to Address Human Rights Violations' (2012) 4 Global Policy 484.

⁶⁴ See IDG case (n 47) para 16.

⁶⁵ *ibid* para 17.

⁶⁶ _____ 'Promoting the right to adequate housing in Spain through UN mechanisms' (ESCR.net website) 9 October 2018 <<https://www.escr-net.org/news/2018/promoting-right-adequate-housing-spain-through-un-mechanisms>> accessed 27 May 2019.

⁶⁷ Press Release: Civil society organisations regret Spain's response to UN ruling and recommendations for failing to provide adequate alternative housing to a family (Housing Rights Watch Website) 7 February 2018 <https://www.feantsa.org/download/press-release-monitoring-group-cescr_final8752163148268550128.pdf> accessed 27 May 2019.

communications.⁶⁸ Such unclear views will put the claimant in a difficult position, in which the complainants should face the state, to negotiate the compensation, or it may result in a case whereby the state will decide how much compensation will be offered for the harm done to the individuals.

This fact has rendered the nature of remedies provided by the Committee weak,⁶⁹ particularly in terms of enforcing the views of the Committee which are non-binding. Nevertheless, it serves as an important leap for the justiciability of ESC rights at the international level. It is worth noting that in order to follow up on its recommendations, the committee requires the state party to report on the recommended measures within the six months following the views.⁷⁰ Although the effectiveness of such progress reports still needs to be investigated, the declaration of human rights violations and the imposed remedies will further provide a prominent basis for the justiciability of the ESC rights and can establish jurisprudence for such violations.

10.6 PRELIMINARY REFLECTIONS

Chapter 10 provided an analytical framework of accountability as a process, both at an international and national level. The framework is considered to be a useful tool which can be used to analyse accountability as a process in the Indonesian context.

Based on the discussion in the preceding paragraphs, we can conclude that international human rights law provides mechanisms for the accountability of states in implementing their international obligations. All mechanisms do not have a legally binding nature and are dependent on acceptance by states. Nevertheless, the recommendations adopted by the Committee for every mechanism have been vital in enabling states to comply with the obligations enshrined in the ICESCR, due to the publicly open nature of the recommendations and the state reports. Moreover, the role of civil society is appreciated in all mechanisms, particularly in providing the shadow reports to complement the state report. Such involvement will strengthen community participation, which will also encourage the accountability of states before the international bodies. Thus, the international accountability mechanisms of the right to housing can serve as supplementary mechanisms to the mechanisms available at the domestic level.

The level of accountability as a process that can be employed at an international level is relatively weak. Although monitoring procedures, to a certain extent, have successfully assisted states in being more accountable in the sense of compliance with their international obligations, the mechanisms and enforcement measures are the weakest element for accountability at an international level.

Considering the fact that accountability as a process, including its aspects at the international level, is a complementary process to the domestic process, the latter becomes central in implementing human rights. A crucial element of accountability discussed above that can be used to supervise Indonesia's compliance with its international human rights obligation

⁶⁸ See Courtis (n 63).

⁶⁹ *ibid.*

⁷⁰ See IDG case (n 47) para 18 and Ben Djazia case (n 48) para 22.

is the monitoring procedure. With this procedure, the CESCR can monitor as well as request the government to explain the progressive or any retrogressive measures that are found in both the state report and shadow reports. In addition, the visit of the UN special rapporteur on the right to adequate housing also provides a supervisory mechanism for the national compliance.

As for the accountability mechanism, all of the three mechanisms are not applicable to Indonesia. Until the present day, Indonesia has not ratified the Optional Protocol to the ICESCR; therefore, it has not declared its acceptance of the competence of CESCR to adopt views with regard to human rights violations on economic, social and cultural rights. As such, Indonesia needs to establish strong accountability at the domestic level to advance the realisation of the right to adequate housing since the implementation of human rights in Indonesia is largely dependent on accountability at the national level. Thus, it is crucial to conduct a thorough examination on accountability as a process in a decentralised Indonesia.

CHAPTER 11

ACCOUNTABILITY AS A PROCESS FOR THE REALISATION OF THE RIGHT TO HOUSING IN INDONESIA¹

11.1 INTRODUCTION

This chapter evaluates accountability as a continuous process, and the extent to which such a process could improve the realisation of the right to housing in Indonesia. Under the Indonesian system, recognition of accountability under good governance principles started after the collapse of President Suharto's regime, in 1999. Accountability is recognised under Law No. 28/1999, which deals with corruption, and a nepotism-free government.² As a principle, accountability sits alongside six other values: legal certainty, public order state administration, public interest, transparency, proportionality, and professionalism. Together, these principles define the ethos of governmental institutions in providing reasonable public services.³ Accountability serves as a principle which determines that all the activities and outcomes of state administration should be made accountable to the people as the highest sovereignty of a state.

Indonesian scholars, such as Miriam Budiardjo, perceive accountability as a form of mandated party responsibility towards parties which give a mandate.⁴ Further, Budiardjo mentions that accountability creates a supervisory function via the distribution of powers throughout numerous governmental institutions. Such distribution aims to reduce the accumulation of power, and to create a system of checks and balances. According to Budiardjo, governmental institutions involved in the accountability process primarily function as either accountable actors, or as forums which hold actors accountable. These institutions include the executive (the President and the Cabinet), the judicative (the Supreme Court and its judicial system), and the legislative (the People's Consultative Assembly and the House Representative), as well as and the press and media. The latter hold a significant position in checks and balances system, and they therefore become the fourth pillar of the governance system.⁵

¹ A section of this chapter (11.4) on accountability mechanisms was published in (2018) 2 Journal of Southeast Asian Human Rights (JSEHR) 389, under the title of: Unsafe River Bank Houses? A Context of Human Rights Issues on Freedom from Poverty, Development Programmes, and Accountability Mechanisms in Indonesia, open access at <<https://jurnal.unej.ac.id/index.php/JSEHR/issue/view/661>>. However, this chapter elaborates further to include the judicial review mechanism, and highlights several cases which have been brought before the judiciary. The published article merely focused on the possibility of accountability mechanisms that people can employ, if an infringement or violation of human rights occurs.

² Law No. 28/1999 on Clean Governance that Free from Corruption, Collusions, and Nepotism (*Undang-Undang No 28/1999 tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme*) SG 75/1999.

³ *ibid* art 3.

⁴ Miriam Budiardjo, *Menggapai kedaulatan Untuk Rakyat* (Mizan, 1998) at 107- 120; see also Dra. Loina Lalolo Krina P., 'Indikator & Alat Ukur Prinsip Akuntabilitas, Transparansi & Partisipasi' (*Bakti Digital Library*) <<https://baktilibrary.omeka.net/items/show/83>> accessed 13 February 2019.

⁵ Budiardjo, *ibid*.

With regard to a state's obligations on the right to housing, as discussed in Chapter 2, states are obliged to establish accountability that enables the advancement of human rights realisation. Further, the UN Special Rapporteur on the Right to Adequate Housing also emphasises the need for accountability in the field of housing, at both national and local levels of government.⁶

As elaborated in Chapter 9, in this book accountability is defined not only as a mechanism, but also as a continuous process that includes elements such as public participation, monitoring or supervision, accountability mechanisms, and the availability of redress and remedies. In light of this, by identifying all accountability elements as a process available in Indonesia, Chapter 11 first examines whether or not Indonesia has fulfilled its obligations in establishing an effective accountability process, regarding the right to adequate housing.

Second, this chapter offers an additional element of accountability; namely, enforcement measures. This is due to the difficulties experienced by the Indonesian government in enforcing judicial decisions related to housing cases. Enforcement mechanisms to execute the result of an accountability mechanism have not yet been explored in the academic discussion on accountability, particularly in Indonesia. In general, the literature on accountability predominantly focuses on the mechanisms available in a country, rather than on how to enforce a result or decision stemming from an accountability mechanism.

Third, in order to analyse the accountability process work, this chapter will base its analysis on several cases relating to the violation of human rights that have been brought before the Indonesian courts. Most of these cases are eviction-based, due to the urban development process occurring in the cities in which this research was conducted. There are also some cases which were not examined by judicial courts, but instead through other mechanisms, such as quasi-judicial or internal mechanisms. However, cases brought before the non-judicial bodies will not be discussed in detail, due to the confidential nature of such cases. By exploring court cases, this chapter will evidence that accountability works better as a continuous circle, with each of the elements dependent on one another; in other words, the elements should not stand alone.

Chapter 11 combines the doctrinal and case study methods. The case study method will mostly be employed in the section that discusses judicial accountability. The cases used in this section were brought before judicial institutions, and it is worth noting that these do not represent all cases related to housing in Indonesia, rather, they provide insight into the way Indonesia's judicial bodies deal with infringements of the right to housing. The data in this section was gathered both from the website of the Indonesian Supreme Court and from lawyers working on the cases.

To achieve its aims, this chapter is based on the framework of accountability as a process, which was developed in Chapter 10. It first identifies the actors who can be held accountable if a violation or infringement of human rights, with regard to housing, occurs (Section 11.2). The identification process will use the framework established in Chapter 2. Section 11.3 examines public participation in decision-making regarding housing, as the first element of accountability in the entire process. Section 11.3 discusses the monitoring and

⁶ United Nations General Assembly, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Leilani Farha' (22 December 2014) UN Doc A/HRC/28/62, paras 40-56.

supervisory element to the implementation of the right to housing in Indonesia. Section 11.4 extensively discusses the accountability mechanisms that are available under the Indonesian legal system, and how the mechanisms are employed by claimants. Subsequently, Section 11.5 examines the remedies to redress human rights infringements, which have become a part of accountability. Lastly, Section 11.6 investigates the enforcement mechanism that enables realisation of the accountability decisions, and provides a preliminary conclusion on this matter.

11.2 WHO SHOULD BE ACCOUNTABLE?

Under international law and the human rights regime, the main actor held responsible for a breach of legal obligation is the state. According to Article 4 of the Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA), the conduct of any state organ (be it central or territorial) shall be considered an act of that state under international law.⁷ Furthermore, the ARSIWA indicates that any person or entity which holds such status, in accordance with the internal law of the state, can be categorised as an organ of state.⁸ As the state is responsible for any breaches of international legal obligations, it should be held accountable under the available accountability mechanism. The authorities (including all governmental institutions and agencies) are organs of state, and are therefore duty bearers for human rights, obliged to respect, protect and fulfil people's human rights (as rights holders). In federal states, duty bearers include both the federal government and its states. In a unitary state, such as Indonesia, the responsible parties are central government and local governments (including all the state agents). Therefore, under international law Indonesia can be held responsible for breaches of its international legal obligations committed by its organs (both national and local), including its obligations for the right to housing. Having indicated the party to be held accountable under international law, the paragraphs below will investigate the responsible party in the field of housing, under Indonesian law.

In the preamble (*Pertimbangan*) of the Indonesian Housing and Settlement Areas Law No. 1/2011, the basic needs of everyone to live in physical and spiritual prosperity, to have a home, and to enjoy a good and healthy environment are recognised.⁹ Further, the law acknowledges the role of the state in arranging affairs related to housing and settlements that would enable people to live in affordable homes.¹⁰ The distribution of mandates between national and local government, based on the Law on Local Government and the Law on Housing and Settlement Areas (as discussed in Chapter 4), showed that the government is the most responsible party in providing housing for all individuals living in its territory.

As discussed in Chapter 4, the central government has delegated part of housing affairs to local governments, particularly when it comes to enabling adequate housing for low-income

⁷ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) II (Part two) Yearbook of the International Law Commission. Text reproduced as it appears in the annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. (ARSIWA)

⁸ Article 4 (2) ARSIWA.

⁹ Law No. 1/2011 on Housing and Settlement Areas (*Undang-Undang No. 1/2011 tentang Perumahan dan Kawasan Permukiman*) SG 7/2011, Preamble para a.

¹⁰ *ibid* para b.

groups. Although the national government is the decision-maker for national housing policy, local governments should implement and adopt local legislations which comply with the national housing policies.

In addition to local governments, governmental institutions related to housing services are also involved in providing housing in Indonesia, such as the Ministry of Public Works and Public Houses, the Ministry of Social Affairs, and the National Land Agency (*BPN*). However, the latter agency has no direct mandates to provide housing. As discussed in Chapter 6, the BPN has mandates to register land as individual, community or state land. This registration system enables local governments to plan the location of settlements, which is crucial in providing housing.

Concerning the accountability issue, neither the law on Housing and Settlements nor the Law on Tower Blocks, which both serve as special laws, explicitly mention that officials of the government involved in housing policy are accountable for their policies, or their acts. These two laws only stipulate punishment - in the form of either imprisonment or a fine - if individuals or legal entities fail to perform in accordance with the law. There is no article stating that claimants can hold officials accountable if their policies are against the purpose of the law. The national law might not be clear on who should be responsible, but this is not relevant under the law of international legal responsibility.¹¹ Given that housing officials are civil servants, they are state organs acting in an official capacity and, as such, Indonesia is legally responsible for their conduct. This also applies to public legal entities acting on behalf of the state.

A slight complication may arise with respect to Indonesia's legal responsibility for the conduct of private actors in the housing sector. The Indonesian housing legislation does not stipulate or differentiate between public and private legal entities.

To a certain extent, under international law, the conduct of private actors might also become the legal responsibility of Indonesia. This may be the case if private actors are empowered by the state to exercise elements of governmental authority, and to act in that capacity under their particular mandates.¹² Indonesia may also be held legally responsible, if the conduct of private actors in the housing sector is under "the instructions of, or under the direction or control of the state".¹³ This usually requires showing that they were acting under effective control of the government, which is often very difficult to establish.¹⁴ The acts of *Perum Perumnas*, the state-owned housing company mandated to provide low-cost housing, can most likely be attributed to Indonesia under article 5 ARSIWA. This is due to the fact that there is legislation containing the mandate of the company¹⁵, which empowers it to carry out its housing tasks and which can arguably be categorised as exercising an element of governmental authority, based on the Indonesian Constitution and the Housing and Settlement Areas Law

¹¹ ARSIWA (n 7), p 39 para 7.

¹² ARSIWA (n 7) art 5.

¹³ *ibid* art 8. See for example how International Court of Justice define effective control in International Court of Justice, *Nicaragua v the United States of America* (judgement) 27 June 1986 (Nicaragua case), paras 105-115; ICJ, *Bosnia and Herzegovina v Serbia and Montenegro* (judgement) 26 February 2007 (*Bosnia and Herzegovina v Serbia and Montenegro*) paras 396-412.

¹⁴ See *Nicaragua*, and *Bosnia and Herzegovina v Serbia and Montenegro* case, *ibid*.

¹⁵ See Government Regulation No. 83/2015 on the Establishment of the State-owned Housing Enterprise (*Peraturan Pemerintah Republik Indonesia No 83/2015 tentang Perusahaan Umum (Perum) Pembangunan Perumahan Nasional*) SG No 256/2015, arts 3-5.

stipulating that Indonesia is responsible for providing housing, particularly for low-income groups.

In addition, even if the conduct of private actors in the housing sector cannot be attributed to Indonesia, the latter still can bear responsibility for their actions, if Indonesia does not act with due diligence or does not abide by its positive obligation to protect.¹⁶ Although human rights experts are debating private responsibility on human rights issues,¹⁷ in practice private actors' activities intersect with, and often infringe, human rights. As discussed in Chapter 4, banks and developers are the private actors most often involved in cycles of housing fulfilment. Private developers' roles relate to housing policies, particularly housing for the poor, since they often agree to build low-cost housing after receiving subsidies and other assistance from the government. As for banks, they distribute mortgages with down payment facilities to low-income households. Arguably, Indonesia can be held legally responsible at an international level if these entities do not act within established human rights norms, and if Indonesia fails to act with due diligence, by not protecting its inhabitants against private actors through (for example) either regulation or by providing adequate monitoring of actors' activities. However, this chapter will mainly focus on the governments (both national and local) and their agencies, such as the Ministries' officials at national and local levels, as the main accountable parties.

The main motive behind applying accountability as a process is to advance human rights fulfilment, particularly the right to housing. In order to achieve this aim, the government should ensure that all the accountability elements suggested in Chapter 9 are implemented. Each of these elements will be examined in the following sections.

11.3 PUBLIC PARTICIPATION

Public participation in the decision-making process is central to ensuring that developments meet the needs and expectations of the people. Participation can be seen as both an objective and a means of development.¹⁸ Based on the United Nations Declaration on the Right to Development, a process can be categorised as participatory if it fulfils certain requirements, which include "active, free and meaningful public participation."¹⁹ Although the Declaration itself is a soft law instrument with no legally binding power, it becomes a relevant instrument in defining the substance and consequences of the right to development.²⁰

¹⁶ See for example Inter-American Court of Human Rights, *Velasques Rodriguez v Honduras* (judgement) 29 July 1988, paras 172-177.

¹⁷ For examples of efforts to hold private actors directly responsible for human rights violations, see Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies', 2018 (5) European Journal of Comparative Law and Governance 5 (2018) 5, pp 16-25; see also A.G. Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011).

¹⁸ Pierre Fallavier, *Participation as an End versus a Means: Understanding a Recurring Dilemma in Urban Upgrading* (VDM Verlag 2009).

¹⁹ United Nations General Assembly (UNGA), 'Declaration on the Right to Development' (4 December 1986) UN Doc A/RES/41/128 Art 2 (3).

²⁰ Karin Arts and Atabongawung Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (2016) 63 Netherlands International Law Review 221.

Public participation goes beyond merely participating in an election.²¹ Thus, decisions made by representatives of the people cannot be regarded as public participation. From a human rights perspective, participation relates to active citizenship that engages people in decision-making processes, allowing people to give their input to the planning and delivery of public services, and involving them in communities.²² Such an approach targets the improvement of objectives and outcomes of development.²³ The involvement of a community should not only occur in consultation or technical meetings for a project, it should also empower people, particularly the most marginalised, by (for example) educating them to increase their soft skills in public speaking, and by involving them in the decision-making, monitoring and evaluation of a decision.²⁴

Although the Indonesian Constitution guarantees that every citizen has the right to participate in decision-making processes,²⁵ basing development on a top-down approach is widespread practice. This “needs-based approach” has its limits, and is characterised by its short-term nature.²⁶ The government planning development based on needs will provide a top-down policy, without knowing and realising individuals’ needs; thus, the participation of the community is crucial. It should be acknowledged that Indonesia’s legal and administrative framework is broadly supportive of citizen engagement in service delivery, as enshrined in the *Permenpan* 13/2009 for Improvement of Quality in Service Delivery with Civic Participation, although it is not consistently implemented.

The Government of Indonesia has already involved communities in development planning, particularly with the emergence of the good governance principle. Participation has started in the smallest division of local government, known as the “village” (*Desa*, or *Kecamatan*). This programme is called *MUSRENBANGDES*, *Musyawarah Rencana Pembangunan Desa* (or, the Village Development Planning Consultation). Participation takes the form of a meeting that is attended by all representatives of society, so that they can deliver their problems and requests for the next five years of development in the “*Desa*”.²⁷ A similar programme also exists at the national level, entitled *Musyawarah Rencana Pembangunan Nasional* (or, the National Development Planning Consultation).²⁸ The consultation is

²¹ United Nations Economic and Social Council, Commission on Human Rights (CHR), Question on the Realization on the Right to Development: Global Consultation on the Right to development as a Human Right (26 September 1990) UN Doc E/CN.4/1990/9/Rev.1 para 114.

²² Tessa Brannan, Peter John and Gerry Stoker, ‘Active Citizenship and Effective Public Services and Programmes: How Can We Know What Really Works?’ (2006) 43 *Urban Studies* 993; See also ‘What does the principle of participation mean for programming?’ <<https://hrbportal.org/faq/what-does-the-principle-of-participation-mean-for-programming>> accessed 29 November 2018.

²³ Brannan et al (n 22).

²⁴ Donna Hardina, ‘Strategies for Citizen Participation and Empowerment in Non-Profit, Community-Based Organizations’ (2006) 37 *Community Development* 4; see also ‘What does the principle of participation mean for programming?’ (n 22).

²⁵ Sekretariat General of the Constitutional Court of Republic of Indonesia, *The 1945 Constitution of the Republic of Indonesia* (Mahkamah Konstitusi 2003) art 28D (3). The authorised translation to English of the Constitution can be found in the website of the government of Indonesia <<http://peraturan.go.id/inc/view/11e58ce2b70ac2c094ce313132313436.html>> accessed 10 March 2019.

²⁶ KOMNAS HAM, *Pembangunan Berbasis Hak Asasi Manusia: Sebuah Panduan* (Jakarta 2013)15-17.

²⁷ See Law No. 6/2014 on Villages (*Undang-Undang No. 6/2014 tentang Desa*) SG 7/2014, art 80; see also Government Regulation No 43/2014 on the Rules Implementing Law No 6/2014 (*Peraturan Pemerintah Nomor 43 Tahun 2014 tentang Peraturan Pelaksanaan Undang-Undang No. 6/2014*) SG 123/2014, art 116 paras 1 &2.

²⁸ Law No. 25/2004 on National Development Planning Systems (*Undang-Undang No. 25/2004 tentang Sistem Perencanaan Pembangunan Nasional*) SG 104/2004; The Ministry of Planning and the Ministry of Home Affairs

conducted at each level of government, starting at the lowest level - that is, villages, districts, municipalities, provinces, up to national level. The lower level consultation functions as input for development planning at the higher level of government.²⁹

Participation related to housing is also stipulated in the housing laws. The Law on Housing and Settlement No. 1/2011 and the Law on Tower Blocks No. 20/2011 set forth that the role of the community becomes an integral part of organising and implementing housing and settlement areas in Indonesia.³⁰ The law does not mention further details about how the community can participate in the field of housing and settlement. In fact, it merely refers to a community role in planning,³¹ community empowerment to prevent the spread of slums,³² settlement upgrading,³³ decisions on resettlement location,³⁴ and self-help in maintaining neighbourhood quality.³⁵

In addition to the several articles that allude to community participation, Law No. 1/2011 proposes a more thorough role for the community, by establishing a forum on the development of housing and settlement areas (*forum pengembangan perumahan dan kawasan permukiman*), in which people can participate in the adoption of housing-related policies.³⁶ The forum will function to³⁷: (1) accommodate and distribute people's aspirations; (2) discuss and formulate ideas to develop the organisation of housing and settlement; (3) improve the supervision role of the community; (4) provide housing related input to governments; and, (5) conduct arbitration and mediation roles in the field of housing and settlement. This 'future' forum will consist of government institutions, developer associations, professionals' associations, housing and settlement experts, and non-governmental organisations or customer organisation representatives working on housing and settlement.³⁸ Considering its composition, the forum will probably not be able to accommodate people's needs and aspirations fully. Most of the forum members work for the government or for private party concerns, while society is represented only by NGOs or customer associations. It is likely that people's participation will not be in the form of direct participation; instead, it will be via a representative system, as has also been employed in other fields.³⁹ Nevertheless, this forum has not yet been established; therefore, people's participation will continue to follow the older regulation and *MUSRENBANG* for the foreseeable future.

issued Joint Circular No. 0259/M.PPN/1/2005.050/166/SJ on Technical Guidelines on the Organisation of Development Planning Community Consultative Meetings (*Surat Edaran Bersama Menteri Negara dan Perencanaan Pembangunan Nasional/Kepala Bappenas dan Menteri Dalam Negeri*).

²⁹ *ibid*.

³⁰ Law No.1/2011 on Housing and Settlement Areas, art 1 (1 & 6); Law No. 20/2011 on Tower Blocks, Consideration para C, art 1(2) and Explanatory Note para I.

³¹ Law No. 1/2011, *ibid* art 7 (2); Law No. 20/2011, *ibid* art 7(2).

³² Law No. 1/2011 (n 30) art 95 (2).

³³ *ibid* art 100 (4).

³⁴ *ibid* art 102 (2).

³⁵ *ibid* art 103; Law No. 20/2011 (n 30) art 82 m.

³⁶ *ibid* arts 131-133.

³⁷ *ibid* art 132 (1).

³⁸ *ibid* art 132(1).

³⁹ For example, in politics, where people elect representatives to take political decisions on their behalf. Also in the *Musrenbangdes*, as previously discussed, which the participants who are considered as representatives of the community are chosen by the government.

Equally, the Law on Tower Blocks orders the establishment of a forum on tower block development (*forum pengembangan rumah susun*)⁴⁰, and it has a similar function to the forum mandated by the housing and settlement law, although its focus differs. The latter focuses on general housing policies, while the first focuses more on the development and maintenance of tower blocks. Furthermore, this forum can be established by the community itself, and it should operate in accordance with applicable laws and regulations.

However, in the area of housing the participation of wider society, especially people from low-income groups, has always been very insignificant and ineffective.⁴¹ The involvement of these groups is indeed crucial, since the main purpose of the development of low-cost housing is to facilitate these groups in accessing affordable housing, although the participation from other privileged groups is also essential in adopting a comprehensive housing policy.

Such a statement is also supported by the fact that there is a lack of people participation in eviction and resettlement in Jakarta, as discussed in Chapter 8, particularly when deciding on the form of compensation due, and in decisions of resettlement and relocation. Such non-involvement was also experienced by people living on the Jagir and Wonokromo riverbanks in Surabaya, who had no choice about their resettlement, other than moving to rented public housing.⁴² This is certainly a matter of negligence by the government, as it is clear from the provisions enshrined in the Housing Law of 2011 that the decision-making process for these two elements should involve the affected communities.

On the other hand, interviews held with housing officials in all four cities revealed that the respective governments have involved community in housing policies. This involvement includes decisions on resettlement and compensation, as well as developing public space on the riverbanks.⁴³ This could lead to a discrepancy in the meaning of participation and who ought to be involved.

As discussed above, community participation in Indonesia tends to use a representative approach. Paradoxically, the famous *MUSRENBANG* does not directly involve individuals, at its lowest level. Normally, representatives of the community comprise the head of the neighbourhood and maybe several other of its members. The latter are usually well-educated people within the community. Only rarely do representatives come from marginalised groups. The representative members have the task of gathering views from individuals and representing the community at bigger meetings with local government. However, it sometimes happens that representatives either have their own agenda or do not comprehend the societal problems they are describing.⁴⁴ For example, during the development of a park on the Gajahwong and Winongo rivers in Yogyakarta, the people involved in the decision-making process were not the people living on the riverbank, who were directly affected by the programme⁴⁵, and this

⁴⁰ *ibid* art 96 (3-5).

⁴¹ Keputusan Menteri Perumahan Dan Prasarana Wilayah Selaku Ketua Badan Kebijakan Dan Pengendalian Pembangunan Perumahan dan Perumahan Nasional (BKP4N) Nomor: 217/KPTS/M/2002 Tentang Kebijakan dan Strategi Nasional Perumahan dan Perumahan (KSNPP).

⁴² Interview with Gatot Subroto, Surabaya Riverbanks Community (*Paguyuban Warga Strenkali Surabaya*) on 4 October 2016.

⁴³ The interview with housing officials in the four cities held respectively in 2016 and 2017. See Chapter 1 which related to interviews method.

⁴⁴ Interview with Yuli Kusworo from an NGO called ARKOM (Community Architects) Institute Yogyakarta held in Yogyakarta on 28 March 2018.

⁴⁵ *ibid*.

eventually led to an impractical programme and waste of resources.⁴⁶ The community did not have a sense of belonging to the programme, since they were not involved. While maintenance from the government for the park was poor, the community did not take care of it either. The park became dark, an inconvenience, and it was used for prostitution; hence, it became an unsafe and unsuitable place for children to play.⁴⁷

This problem can occur in the representative participatory approach; therefore, involving people who are in actual fact affected by a governmental programme is the best way to maximise their role in development. This was demonstrated in practice in Surakarta, where people living on the Bengawan Solo and Kali Pepe riverbanks were resettled successfully, as these programmes directly involved the people affected.⁴⁸ For the first relocation (the Bengawan Solo River resettlement), the Surakarta government gave the community the chance to look for land where they could be relocated together in one place, as a community, the community then bought the land they had selected with money provided by the government.⁴⁹ For the second relocation (the Kali Pepe River resettlement), the government provided in-situ resettlement by building *rumah deret* (terraced houses) with two storeys. The ground floors were directed towards economic activity (such as small shops), whereas the first floors were intended for domestic use.⁵⁰ This method enabled the community to continue its previous activities while maintaining its community bond. The two resettlement options were successful due to countless discussions with all the stakeholders, but mainly due to discussions with the existing community.

Participation as an element of accountability has also been recognised in the two laws on housing in Indonesia. However, until now the housing policy has remained centralised, meaning that local governments follow the policy of the national authority only. To some extent, local governments can adopt their own policy to suit conditions in the region. However, such policy is expected to be in line with nationally adopted policy. In addition, there is still a huge lack of participation by local people in the decision-making process for housing affairs. In particular, if a policy relates to resettlement and riverbank clearance, often no other choice is offered to a community than to accept the accommodation provided by its local government. Within this societal discrepancy, NGOs can be of assistance by adjudicating, and by educating people in becoming more active in the decision-making process for resettlement and the improvement of living conditions in their neighbourhood.

As involving citizens in the designing of policies is crucial, and the national government has provided guidelines for involving the community, local governments should also provide channels for communities to become involved in the decision-making, planning, implementation and evaluation of policies related to public services, including those related to housing.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ Interview with an official of the community empowerment agency (*Badan Pemberdayaan Masyarakat-BAPERMAS*) of Surakarta on 11 October 2016 and the former head of sub-district Setabelan, Surakarta on 20 October 2016

⁴⁹ *ibid.*

⁵⁰ Interview with the housing officials of the Surakarta Office of Public Works, 12 October 2016.

11.4 MONITORING AND SUPERVISORY PROCESSES

Monitoring in an organisation is vital, as it serves to ensure that all the policy decisions, particularly those related to public services, are properly implemented, based on the mandate, aims, and targets that have been set in advance by the organisation.

Monitoring of governmental institutions' work in Indonesia is governed by Law No. 25/2009 on Public Services, and there are two different types of monitoring: internal and external.⁵¹ Internal monitoring is carried out at every level of government⁵², and supervision can be conducted directly by supervisors or functional supervisors. When officials carry out their duties, a reporting system ensures that they are accountable to their principals for their conduct. The functional supervisors are known as 'inspectorate generals' and are appointed by each department at provincial level. The inspectorate generals conduct routine monitoring.

The interviews revealed that the local government agency for housing affairs has employed internal monitoring mechanisms at the ministerial level. If there are indications of infringements or misconduct, principals can call and report directly to their inferior, via a reporting system. At the national level, some misconduct cases have been reported and brought before domestic courts, resulting in dismissals as well as fines. Disciplinary action has also been taken by the inspectorate general, in particular by demoting officials who commit misconduct. However, the details of these cases cannot be revealed, as the interviewee objected to such disclosure. Nevertheless, the cases show that internal monitoring is indeed operational, despite some hesitance due to the need to protect the institution's name, which might hinder its efficacy.

In contrast to internal monitoring, external monitoring should be carried out by the public, the Ombudsman and the House of Representatives, at both national and local levels (provincial and municipal).⁵³ Monitoring carried out by society is also a part of the participation process in which individuals or groups (as rights holders) can evaluate/critique the governments' programmes and provide input on the various levels of government in Indonesia. This type of monitoring can be carried out either by civil society or by non-governmental organisations (NGOs) working on housing and settlement issues.

Most governmental institutions provide an internal complaints mechanism as a method of communication between people (either individuals or civil organisations) and governmental agencies. This programme becomes an integral part of how society monitors public services provided by governments. Such monitoring employs several channels, such as email, short messaging service (SMS), websites, and complaint boxes. The most common methods of monitoring are websites and SMS.

NGOs working on city planning and housing, and associations of people living on riverbanks are also involved in the monitoring process. They provide input for, and critiques of, governmental policies. They are also involved in educating people, particularly poor communities, to become more proactive in monitoring programmes and policies that relate specifically to their own lives.

⁵¹ Law No. 25/2009 on Public Services (*Undang-Undang No. 25/2009 tentang Pelayanan Publik*) SG 112/2009 art 35.

⁵² *ibid* art 35 (1).

⁵³ *ibid* art 35 (2).

Although supervision procedures are available within Indonesia's housing policies, based on the literature and housing legislation review, as well as interviews with housing officials and NGOs, there still are some discrepancies between the idea as enshrined in the regulations and its implementation in practice. The discrepancies include, for example, the effect of local regulations that indirectly discriminate against people with no residential card, as discussed in Chapter 7. With regard to the laws, the housing officials being interviewed for the purposes of the present study seem reluctant to propose an amendment to the legislation in the near future. When asked a follow-up question related to the specific preference for registered residents to access public housing, the officials mentioned that they were still facing difficulties in providing housing for their own inhabitants. Therefore, giving access to housing for migrants would put more pressure on local expenditure.⁵⁴ In addition, there is also a fear that, once a local government provides easier access to housing for migrants, more migrants will move to, and live in, that government's municipality.⁵⁵ If this is the case, or if the officials are not aware that limiting access to housing to only specific groups using the local regulations would be categorised as discriminatory practice, then the national government should play its role as duty bearer in monitoring the practices of local governments.

Another problem is that many tenants lease their units to other people, in order to obtain additional income.⁵⁶ This practice is prohibited by all local regulations on the management of public housing, and when caught tenants can be given a prison sentence.⁵⁷ However, the fact is that such practices do occur. These obstacles require continuous monitoring, both by the governments and by individuals, in order to ensure that public housing can be delivered to the right people.

The following section will present accountability mechanisms that are available under the Indonesian legal system. Accountability mechanisms refer to forums that can be employed to hold the government and its officials accountable for their possible wrongdoing.

11.5 ACCOUNTABILITY MECHANISMS

This section deals with the accountability mechanisms within the Indonesian legal system. Accountability can be pursued through various available mechanisms, from local through national to international processes.⁵⁸ However, international mechanisms are not applicable in Indonesia, particularly in terms of the violation of economic, social and cultural rights, since

⁵⁴ Interview with the officials of the Public Works and Housing Agency of Surakarta, 12 October 2016

⁵⁵ *ibid.*

⁵⁶ 'Penyelewengan Di Rumah Susun: Akal akan /"mengangsir"/Jatah Subsidi di Rusun Marunda' Detik.com, 11 September 2013 <<https://news.detik.com/berita/2355922/akal-akalan-mengangsir-jatah-subsidi-di-rusun-marunda>> accessed 8 December 2018; see also Bima Setiyadi "Rusunawa yang Dikontrakan akan Dialihkan ke Penyewa" Sindonews.com, 22 May 2014 <<https://metro.sindonews.com/read/865976/31/rusunawa-yang-dikontrakan-akan-dialihkan-ke-penyewa-1400684571>> accessed 8 December 2018; interview with an official of the Housing and Land Agency of Surabaya city, 5 October 2016.

⁵⁷ See for example Jakarta: Governor Regulation No. 111/2014 on the Occupancy Mechanism for Rented Modest Multi-Storey Housing (*Peraturan Gubernur DKI Jakarta No. 111/2014 tentang Mekanisme Penghunian Rumah Susun Sederhana Sewa*) arts 17 & 19.

⁵⁸ The international process can be employed by citizens only if states have agreed on and ratified the international mechanism provided by certain international instruments. In the case of the International Covenant on Economic, Social and Cultural Rights, states have to ratify the Second Optional Protocol on Individual Complaints concluded on 10 December 2008, under Resolution A/RES/63/117.

Indonesia has not ratified the Optional Protocol to the International Covenants on Economic, Social and Cultural Rights (ICESCR). For this reason, the accountability mechanisms that will be discussed further are the national mechanisms. There are various types of national level accountability mechanisms available in Indonesia: judicial, quasi-judicial, administrative, political, and social.⁵⁹ The last two types of mechanism will not be discussed in this book, as they have already been extensively researched, for example in studies conducted by the World Bank⁶⁰ and RTI International (New York),⁶¹ which observed that the mechanisms are available in the Indonesian legal system, and that they can be employed to hold any level of government accountable.

Three types of accountability mechanisms that are relevant in Indonesia will be explored: judicial accountability, quasi-judicial accountability, and administrative accountability. Judicial accountability mechanisms are divided into two procedures that take place in domestic courts, including civil procedures in general courts and administrative procedures in administrative courts. Judicial reviews can be executed in three different ways, via the Constitutional Court or the Supreme Court, or through the process of executive review. The quasi-judicial mechanisms involve the Indonesian Commission on Human Rights (KOMNAS HAM) and the Ombudsman of the Republic of Indonesia (ORI). Lastly, internal administrative accountability, which refers to accountability within the institutions related to housing affairs, will also be examined.

11.5.1 Judicial accountability mechanisms

This section explores the possibility of advancing the realisation of the right to housing through the judicial accountability mechanisms available within the Indonesian legal system. Such judicial mechanisms can be pursued via the domestic courts. Under the current Indonesian legal system, no court has a mandate to adjudicate the unconstitutionality of governments' actions, let alone any actions which violate human rights to housing.⁶² However, the general court and the administrative court can each hear civil complaints regarding governments' wrongdoings, and may provide compensation and remedy, where necessary. This includes civil complaints that may be related to issues regarding the right to housing. The legal basis for such complaints can be found in the civil code and in "housing-related" legislation.

This section on judicial accountability mechanisms categorises the mechanisms into two types: (1) complaint mechanisms that can be pursued before several types of domestic courts; and, (2) judicial review of legislation. The complaint mechanism before the courts is a mechanism where individuals or groups can present complaints against other individuals, groups or governmental agencies, when their actions or decisions cause harm and loss, including possible human rights infringements. The claimants usually ask the courts for redress

⁵⁹ Helen Potts, 'Accountability and the Right to the Highest Attainable Standard of Health' in Paul Hunt and Tony Gray (eds), *Maternal Mortality, Human Rights and Accountability* (Routledge 2013) 125.

⁶⁰ See for example in Sebastian Eckardt, 'Political Accountability, Fiscal Conditions and Local Government Performance-Cross-Sectional Evidence from Indonesia' (2008) 28 *Public Administration and Development* 1.

⁶¹ See for example in Anna Wetterberg, Jana C. Hertz, & Derick W. Brinkerhoff, 'Social Accountability in Frontline Service Delivery: Citizen Empowerment and State Response in Four Indonesian Districts' in the International Development Group Working Paper Series (New York: the RTI International, 2015).

⁶² Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) 104.

and/or compensation. Claims are usually in the form of ordinary private claims under the Civil Code, class actions, and legal standing. The other type of judicial accountability mechanism is that of judicial review, in which complaints against legislation that has affected or harmed people's human rights or interests can be pursued before the Constitutional Court or the Supreme Court.

Before discussing the availability of judicial mechanisms, it is vital to understand Indonesian judicial power. The judiciary in Indonesia consists of two courts: the Supreme Court (*Mahkamah Agung*) and the Constitutional Court (*Mahkamah Konstitusi*). The latter is relatively recent and was established in 2003, following the amendment of the Indonesian Constitution in 2002. The Constitutional Court has four mandates: 1) reviewing statutory laws against the Constitution; 2) determining disputes between the authorities of state institutions, whose powers are determined by the Constitution; 3) confirming the dissolution of a political party; and, 4) settling disputes regarding the results of general elections.⁶³ In addition, the Constitutional Court has the authority to issue a decision regarding an opinion given by the People Representative's Assembly (Dewan Perwakilan Rakyat-DPR), concerning any alleged violations of the Constitution by the President and/or Vice-President.⁶⁴ The rulings of the Constitutional Court are final and binding.⁶⁵

Under the Supreme Court, four further types of court exist, each with different jurisdictions.⁶⁶ These courts are the general courts (*pengadilan negeri*), religious courts (*pengadilan agama*), administrative courts (*pengadilan tata usaha negara*), and military courts (*pengadilan militer*). These courts serve as the courts of first instance. Moreover, the courts have two levels of appeal. The first level of appeal is before a high court (*banding*) and the second level of appeal is before the Supreme Court (*kasasi*). Under the general courts, special courts have also been established in particular cities,⁶⁷ such as commercial courts, human rights courts, children's courts, taxation courts, anti-corruption courts, and industrial relations courts. All of these special courts have been established by various forms of legislation and are housed within the general courts at district level. The establishment of these courts aims to provide expertise and experience in helping district judges with specific fields.⁶⁸ For this reason, it is likely that ad-hoc judges, who have expertise in specific fields, will be hired.⁶⁹ For the purpose of discussing judicial accountability mechanisms in this section, it is not necessary to discuss the role of every individual court mentioned above. This section will instead examine the courts that have mandates related to the nature of the cases that are brought before each court. The relevant courts in this case are the general courts, the administrative courts, the Supreme Court, and the Constitutional Court.

⁶³ The 1945 Constitution (n 25) art 24 C (1).

⁶⁴ *ibid* art 24 C (2).

⁶⁵ *ibid* art 24 C (1).

⁶⁶ Law No. 14/1985 as amended by Law No. 5/2004 and Law No. 3/2009 on the Supreme Court (*Undang-Undang No 14/1985 sebagaimana telah diubah dengan Undang-Undang No. 5/2004 dan No. 3/2009 tentang Mahkamah Agung*) SG 73/1985, SG 9/2004, and SG 3/2009.

⁶⁷ Law No. 2/1986 on General Courts as amended by Law No. 8/2004 and Law No. 49/2009 (*Undang-Undang No 2/1986 tentang Peradilan Umum sebagaimana telah diamandemen dengan Undang-Undang No 8/2004 dan No 49/2009*) SG No 20/1986, SG 34/2004, and SG 159/2009.

⁶⁸ *ibid*, art 8 (2).

⁶⁹ *ibid*.

The position of the Indonesian domestic courts discussed above is illustrated in Figure 11.1, below.

Figure 11.1 The judicial structure in Indonesia

11.5.1.1 Complaint mechanisms before domestic courts

A human rights court does exist within the Indonesian domestic legal structure. However, this court has a limited mandate to hear cases of a gross violation of human rights, including genocide and crimes against humanity.⁷⁰ Thus, if an allegation of human rights infringement does not fit either of the two crimes, it cannot be heard before the human rights court - unless it is proven with sufficient evidence, supported by an investigation by the national human rights institution (KOMNAS HAM), and followed up by the state prosecutor.⁷¹ This excludes the investigation of allegations regarding the violation of economic, social and cultural rights that do not fulfil the requirements.

However, the general courts and administrative courts may receive complaints with regard to infringements and human rights violations related to housing rights (amongst others). This section aims to investigate and analyse these courts' practices when dealing with infringements of the right to housing. To achieve this aim, several cases on eviction and development programmes that affected the right to housing will be discussed. However, the cases are limited to those which were brought before the relevant courts between 2014 and 2017, and are further limited to the courts that are based in the four cities being researched here. Interestingly, not all cities face civil complaints on the right to housing (e.g. Surakarta), although it is difficult to establish reasons why this is the case. The cases discussed here were

⁷⁰ Law No. 26/2000 on the Human Rights Court (*Undang-Undang No 26/2000 tentang Pengadilan Hak Asasi Manusia*) SG 208/2000, arts 4-9.

⁷¹ *ibid* arts 18-21.

gathered from the Supreme Court's website, NGOs, lawyers (Yayasan Ciliwung Merdeka), the Yogyakarta Legal Aid Institute, and the Jakarta Legal Aid Institute. All court judgements ruled after 2009 are supposed to be made publicly available on the Supreme Court's website; however, this is not always the case. Several judgements (mainly from the first instance courts) of the cases discussed in this section were not retrievable via the website. Therefore, this examination is based on the available judgements.

11.5.1.1.1. General courts — Civil proceedings

Judicial mechanisms can be filed through the general court. The general courts exist at three levels, i.e. the courts of first instance—district state courts (*Pengadilan Negeri*), the appeal courts (*Pengadilan Tinggi*), and the Court of Cassation—Supreme Court (*Mahkamah Agung*). The courts of first instance are available in every district/municipality, in all Indonesian territories.⁷² The Court of Cassation is part of the Supreme Court which is located in the capital city, Jakarta, and the appeal courts are available at the provincial level.

People can employ civil proceedings to make claims via the procedure that is available to them in the general court of their municipality. They may claim against the government, private parties, or individuals.⁷³ However, employing such a mechanism generally consumes a significant amount of time, money, and energy, without knowing what the result will be. Due to the rampant corruption and collusion within the court system, a large number of people do not trust this institution to settle their conflicts, because the courts still cannot provide an effective forum for impartially resolving cases.⁷⁴ However, such a mechanism is, to a certain extent, still the only mechanism that either provides legal enforcement and remedies, or compensates the winning parties. Several cases related to housing rights have been heard before the general and administrative courts in Surabaya and Jakarta. These cases suggest that society still believes and hopes that the courts can work in their interests and provide them with justice.

Cases brought before the general courts relate mostly to the government-based civil liability. Civil liability in Indonesia is stipulated under the Indonesian Civil Code (*Burgerlijk Wetboek van Indonesie – Kitab Undang-Undang Hukum Perdata*).⁷⁵ The provisions that form the legal basis for civil liability or torts are articles 1365, 1366 and 1367. These three articles state that:⁷⁶

⁷² See Law No. 48/2009 on Judicial Power (*Undang-Undang No. 48/2009 tentang Kekuasaan Kehakiman*) SG No 157/2008.

⁷³ Herzien Inlandsch Reglement-HIR (*Reglemen Indonesia yang diperbaharui*), Staatsblad No. 44/1941, art 118. The article does not explicitly mention which parties can bring a complaint. It only refers to the claimants or their representatives. Moreover, it does not further justify whether a claimant can be an individual or a state institution. However, there are also specific laws on, for example, consumer protection, child protection, etc., which regulate who can bring a complaint before the civil court. In the general courts', the three parties mentioned above are the most common complainants.

⁷⁴ Lindsey and Butt (n 62) 83, 281-303.

⁷⁵ Indonesian civil code is a product of the Dutch colonialist era, which began in 1847, but it is still the primary resource for civil proceedings in Indonesia.

⁷⁶ Until now, there has been no official translation of the Indonesian Civil Code into Indonesian or English. The official language of the regulation is Dutch. The Indonesian translation that is most widely used by judges and academics is by C.S.T. Kansil, Subekti and Tjitrosudibio. The English translation used in this section is based on the online version of the Indonesian Civil Code, Refworld, <<https://www.refworld.org/pdfid/3ffbd0804.pdf>> and

“1365 A party who causes loss to another person by means of an unlawful act must, because of his or her fault in causing the loss, compensate for that loss.

1366, Every person is responsible, not only for loss caused by their acts, but also for loss caused by negligence or lack of care.

1367 (1), A person shall be responsible for the damage which he has caused by his own act, as well as for that which was caused by the acts of the individuals for whom he is responsible, or caused by matters which are under his supervision...”

The first two provisions (1365 and 1366) become the central legal basis for civil wrongdoings that cause loss, either by omission or through negligence.⁷⁷ The articles dominate most civil proceedings and cause a high workload in the general courts, because they have been widely employed for unlawful acts causing loss which stemmed from nuisance, defamation, and land disputes.⁷⁸ Moreover, Article 1365 has also been used to claim compensation resulting from criminal acts.⁷⁹

Although the Civil Code does not provide a definition of “unlawful acts”, the usage of such “flexibility” can be traced back to jurisprudence and doctrines.⁸⁰ The Government Institute of National Legal Development (*Badan Pembangunan Hukum Nasional*) summarised the widespread practice of judges, regarding cases of unlawful acts. The summary indicates that an unlawful act is comprised of:⁸¹ 1) breach/es of the applicable law, or infringement of another person’s rights; 2) violation/s of the legal obligations of the perpetrator; 3) inappropriateness of acts/behaviour, according to community standards; and 4) conflicts with the requirement for a social mix, with respect to people and property.

Similar to the aforementioned reasons, these articles have also been employed by individuals or organisations to claim that governments have conducted unlawful acts and have thus harmed people’s human rights and caused loss. Although the 1365 provision does not mention that governments or officers can be held accountable, the courts’ practices show otherwise. The term “a party” can be broadly interpreted as either individuals or organisations (private or public), therefore governmental acts fall under this article. The 1367 provisions also stipulate that an official should be held responsible for any harm caused by his/her subordinates.

This usage of the Civil Code’s provisions against governments (both national and local) can be traced back to cases that were put before the general courts. Claims relating to the right to housing can be submitted not only in the form of individual or group claims, but also in the form of class actions (or a citizen lawsuit). A class action claim is a lawsuit filed by a group of people with the same interests (cases based on similar facts, or with a similar legal basis); the group can be represented by one or more of its members, who do not need to be authorised by power of attorney to speak on behalf of the group.⁸²

Trilingual Indonesian Civil Code, KPC Melati, <<http://kpcmelati.or.id/wp-content/uploads/2017/03/Indonesian-Civil-Code.pdf>>, accessed 9 December 2018.

⁷⁷ The civil wrongdoings under these two articles are equivalent to torts under the common law system.

⁷⁸ Rosa Agustina, *Perbuatan Melawan Hukum* (Universitas Indonesia 2003); Lindsey and Butt 2018 (n 62) 307-321.

⁷⁹ Lindsey and Butt 2018, *ibid*.

⁸⁰ *ibid* 309.

⁸¹ Badan Pembinaan Hukum Nasional, “Naskah Akademis Peraturan Perundang-undangan tentang Perbuatan Melawan Hukum” (Kementerian Hukum dan Hak Asasi Manusia, 1993) 17. Also cited in Lindsey and Butt 2018 (n 62) 310.

⁸² The Supreme Court Regulation No. 1 of 2002 on Class Action Procedures

Cases that involve such provisions for unlawful governmental actions that have harmed people's human rights include those involving evictions, the development of new airports or dams, and other projects.⁸³ Some eviction cases have also involved state-owned enterprises.⁸⁴

Three of the five cases mentioned in the previous paragraph will be explored, to provide examples on how civil claims relating to the right to housing were brought before the general court. All these cases are related to forced evictions conducted by government actors and state enterprises: the *Petamburan* case,⁸⁵ the *Masenah/Bukit Duri* case,⁸⁶ and the *Abdullah/Dewi Nasiroh* case.⁸⁷ These cases were chosen because they offer some insights into the legal reasoning (or lack thereof) provided by judges, with regard to the right to housing. In addition, two of these cases will be discussed in sub-section 11.7, because they highlight issues related to compensation and enforcement measures which are as yet unresolved. The facts of the cases are described in the text boxes below.

Text box 11.1 The Petamburan case⁸⁸

Mar'ali Mardjuki and Mazri Rizal are the representatives of 473 individuals who claimed as a community affected by the construction of multi-storey housing in Petamburan, Central Jakarta. They brought the claim in March 2003, because their land and houses, in the neighbourhood area of around 1.8 ha, had been expropriated for the construction. The governments offered to give compensation upon agreement, plus housing units (depending on the land owned by individuals). The government planned to build the multi-storey housing in one year, from September 1997-September 1998.

In the end, compensation was granted without any discussion with the affected community, who claimed they were forced to accept the amount granted and leave their homes. The multi-storey housing construction was not ready until 2002. Therefore, the evicted community could not live in their new accommodation until that time, and meanwhile they spent their compensation money on renting other houses. The claimants based their claim on Article 1365 of the Civil Code, and on several other articles relating to agreement legality (arts 1313, 1320, 1347 and 1348), and requested compensation of 4.7 billion IDR for punitive damage and 14 billion IDR for immaterial damage. On 10....

⁸³ For example, *Mar'ali Mardjuki and Masri Rizal et al. v Governor of DKI Jakarta, Mayor of Central Jakarta and Head of Housing Agency of DKI Jakarta*, judgements, No. 107/Pdt.G/2003/PN. JKT (Central Jakarta District Court, 10 December 2003) jo No. 377/PDT/2004/PT DKI JKT (Jakarta High Court, 23 December 2004) jo No. 2409K/Pdt/2005 (the Supreme Court, 26 June 2006) jo No. 700 PK/PDT/2014 (the Supreme Court, 19 May 2015) (*Petamburan Case*). This case was finally binding in the last and final level of the judicial mechanism, *i.e.* *Peninjauan Kembali*. This mechanism can be invoked if new evidence is found following a legally binding court decision.

See also *Masenah et.al v Kementerian Pekerjaan Umum dan Perumahan Rakyat Cq. Direktorat Jenderal Sumber Daya Air Cq. Kepala Balai Besar Wilayah Sungai Ciliwung Cisadane (BWSCC); Gubernur DKI Jakarta* (Jakarta High Court, 21 October 2017, judgement) 192/PDT/G/2018/PT. DKI jo. 262/Pdt.G/Class Action/2016/PN.Jkt.Pst 25 October 2017 (*Masenah –Bukit Duri I Case*). The decision of the first instance court is not available on the Supreme Court website.

⁸⁴ See for example *Abdullah/Dewi Nasiroh et al v PT. KAI DAOP VIII Surabaya and PT Pelabuhan Indonesia (PELNI)*, (*Surabaya District Court*, 15 Juni 2015, judgement) 901 / Pdt.G / 2014 / PN. Sby; *Kadarwati al Ibu Baginda v PT KAI DAOP VIII dan PT PELNI Indonesia* (*Surabaya District Court*, 10 Juni 2015, judgement) 902/Pdt.G/2014/PN.SBY; *Wakijo v PT. Angkasa Pura I and Badan Pertanahan Nasional* (*Wates District Court*, 8 September 2016, judgement) 68/Pdt.G/2016/PN. Wates jo 3286K/Pdt/2016 (*The Supreme Court*, 19 December 2016, judgement); see also *Johanes Hutasoit et al v President Republik Indonesia, Kementerian BUMN, Kementerian Perhubungan dan PT KAI* (*Central Jakarta District Court*, 9 December 2014, judgement) 355/PDT.G/2014/PN.JKT.PST.

⁸⁵ See *Petamburan Case* (n 83).

⁸⁶ See *Masenah/Bukit Duri I* (n 83).

⁸⁷ See *Abdullah/Nasiroh* (n 84).

⁸⁸ See *Petamburan Case* (n 83) 2-7.

On 10 December 2003, the Court of first instance delivered judgement in favour of the claimants, stating that the government acted against the law; it ordered the government to pay compensation for punitive damage, and to provide the affected community with the housing units as promised. The government appealed, both to the High Court and to the Supreme Court. However, the appeals were rejected on 23 December 2004 and 26 June 2006, respectively. The government made its last appeal (*Peninjauan Kembali*) before the Supreme Court and, again, was rejected on 19 May 2015.

Text box 11.2 The Masenah/Bukit Duri I case⁸⁹

On 10 May 2016, Masenah, D Mulyadi (RIP) and Sandyawan Sumardi, who acted as representatives for 89 other individuals, brought a class action suit against the Governor of DKI Jakarta. The individuals were forcibly evicted from their homes, due to construction along sections of the Ciliwung River in the Bukit Duri area (neighbourhood nos. 10, 11, and 12). The claimants stated that the governments (including the governor, the head of the housing agency, the department of spatial planning, etc.) violated their human rights. The alleged human rights violations included the rights to housing, work, education, and a social and cultural environment as guaranteed under the Constitution, Indonesian Human Rights Law, Law No. 11/2005 on the ratification of the ICESCR and the CESCR General Comment 4 on the Right to Adequate Housing. The forced eviction caused the individuals to suffer from damages for several reasons.

The representatives claimed that the legal basis of the construction, Governor Regulation No. 163/2012 as amended by Governor Decree No. 2181/2014, expired on 5 October 2015. However, the governments were continuing the plan by conducting several activities (from October–December 2015), such as socialisation of the programme, and relocating the affected community before January 2016. The government issued eviction notices (*Surat Peringatan* I and II) on 18 and 28 December 2015, respectively. The second notice only gave the communities 3 x 24 hours to demolish their houses. On 4 January 2016, a demolition order was issued (SP III). If the houses were not demolished within 24 hours, demolition would be carried out by the governments. The affected communities resisted the eviction when the governments' teams forcibly demolished houses on 14 January 2016.

In addition, the representatives claimed that the procedure of land expropriation was against Law No 2/2012, due to no consultation having taken place with the affected communities, prior to the project. The residents also claimed that the governments did not consult with them regarding the construction. Moreover, the claimants based their suit on Article 1365 of the Civil Code on illegal acts. They claimed punitive damages of 1.07 trillion IDR and immaterial damages of 104 billion IDR.

Note: Some of the claimants in this suit brought an administrative claim before the administrative court of Jakarta for the eviction notice they received after 30 August 2016. The details of the relevant case is discussed in the sub-section on the complaint mechanism before the administrative court.

⁸⁹ See Masenah/Bukit Duri I Case (n 83) 19-71.

Text box 11.3 The Abdullah/Dewi Nasiroh case⁹⁰

Abdullah/Dewi Nasiroh, together with 20 other individuals, filed a suit against two state enterprises - the national railway company (PT. KAI DAOP VIII) and the Indonesia Port Corporations (PT PELNI III) - on 6 November 2014. The claimants had been living in their houses on Jakarta Barat Street and Jakarta Timur Street, in Surabaya, since the 1970s. At first, they lived there as squatters. The railway company then claimed the land, without any proof of tenure. The claimants paid a significantly high monthly rent to the railway company, while the tax for Land and Building remained in their names.

In 2013 the two companies established logistical cooperation, because the port company needed trains to carry goods, as a part of a national programme. For this purpose, the railway company compensated the claimants 250,000 IDR/m², for their houses. The claimants refused, since the amount was too little compared to the real price at that time (5 million IDR/m²). The offer was made on 14 May 2013. The following day, officials of the company, together with a few members of the armed forces, intimidated the claimants and offered a final offer of 80 million IDR, per house - if they refused, there would be no compensation at all.

In July 2013, the companies started to forcibly demolish houses, which caused fear to the inhabitants. The Human Rights Commission got involved and officially requested that the railway company explain the basis of its compensation amount which, according to the Commission, was part of an unfair, inhuman and non-transparent decision. In a letter, the Commission also gave a calculation of the expected compensation amount based on the market price, which was significantly higher than the railway company's offer. In total, the amount that should be given to the complainants was stated as 12.6 billion IDR. However, no agreement was made.

On 10 December 2013, the companies circulated an eviction order. Moreover, on 17 December, around 1500 members of the police and armed forces, as well as security forces for the companies, gathered to evict the resisting inhabitants. The police used water cannons and tear gas against 200 inhabitants, the owners of 38 houses. As the power was imbalanced, the inhabitants gave up, and the forces demolished their houses. The forced demolition ruined their properties and cost them additional damages of 5 billion IDR. In addition, they claimed for immaterial damages of 1 billion IDR.

It is worth noting that, although many cases deal with issues related to the right to housing, including forced evictions conducted by the state (as in the *Petamburan case*) and by state enterprises (as in the *Abdullah/Dewi Nasiroh case*), the general courts rarely make a direct reference to domestic human rights law, or its international equivalent. In most cases, judges considered the legality of evictions conducted by governments or by the state-owned enterprises by examining elements of unlawful action under Article 1365 of the Civil Code, rather than by examining legality from the perspective of human rights norms.⁹¹ This lack of reference to human rights norms could be caused either by the judges' limitation to considering only norms raised by the plaintiffs, or by the fact that the judges cannot exceed their competence and consider other legal viewpoints.⁹² This is exemplified in the case of *Abdullah /Dewi Nasiroh*, and in the *Petamburan case*, in which the claims were based merely on the (civil) unlawful acts of the government.⁹³ Although judges have the obligation to discover, follow and understand

⁹⁰ Abdullah/Dewi Nasiroh (n 83) 4-10.

⁹¹ *ibid*; see also *Petamburan case* (n 83) 25-27.

⁹² HIR (n 73), art 178 (3); see also *Rechtreglement voor de Buitengewesten-RBG (Reglemen Indonesia yang diperharui untuk Luar Jawa dan Madura)* Staatsblad No 227/1927, art 189 (3).

⁹³ Abdullah/Dewi Nasiroh case (n 83) 12 and *Petamburan Case* (n 83) on the decision of petition for reconsideration (*permohonan kembali/PK*) pp 23-24.

the justice norms/values that exist within a community,⁹⁴ it seems that the judges for these eviction cases still follow the old-fashioned principle of considering only the norms mentioned in the claim, as the legal basis of the case (i.e. the principle that judges should remain passive).⁹⁵ Thus, the judges should have considered applying human rights norms, even though such norms were not brought directly by the claimants.

In the *Petamburan* case, the court was of the opinion that the delay in the construction of public housing was an unlawful act, under Article 1365 of the Civil Code. In deciding this, the judges did not refer to human rights provisions in their considerations. The court did, however, consider the failed promises of the government to build the new housing complex within one year to be an act of omission, which can be categorised as an unlawful act by the government. This decision appeared to be inspired by an Indonesian scholar, Yahya Harahap, who was cited in the judgement.⁹⁶ This act of omission proved to be an infringement of the rights of the affected community to receive and enjoy adequate and environmentally healthy houses.⁹⁷ The claimants did not complain about the eviction itself; thus, the judges did not consider it. On the other hand, the judges did conclude that the first compensation for the eviction was fair, as it was originally accepted by the claimants, in spite of the fact that they claimed not to have been involved in the decision. In this regard, the court was of the opinion that the claimants could not prove that the compensation offered was discriminatory.

The decision suggests that the court did not go further, to examine the deteriorating living conditions for the affected community within the last five years, following the eviction. Even though the court is not obliged to do this,⁹⁸ if the living conditions had been considered, this might have provided a stronger argument for unlawful acts in the form of broken promises, which caused further infringements of several human rights guaranteed in the Constitution, particularly the right to housing and the right to property. In this regard, in the opinion of the present author, the court could actually have granted the claim for immaterial damage requested by the claimants for human rights infringements. The issue of living conditions was raised by the claimants, but the court did not provide proper legal reasoning on that issue.

Again, in this regard the court should have been more creative in exploring and applying so-called “justice values”⁹⁹ found within the community; it should not have relied solely on the claims brought before it. The finding of social justice value is crucial in solving cases brought before the judges, especially when either the laws relevant to the cases or the bases of the claims

⁹⁴ Law No. 48/2009 on Judicial Power (*Undang-Undang No. 48/2009 tentang Kekuasaan Kehakiman*), SG 157/2009, art 5. Based on this article, in performing their tasks Indonesian judges are obliged to explore, discover, and apply legal values and the principle of justice that develops within communities. Indonesian society consists of many different communities, all of which have traditions and customs developed over hundreds of years. The communities have also developed customary laws, which become the living law for the community. This living law is mostly unwritten, but the community abides by it. Therefore, when resolving legal cases judges are encouraged to understand the legal culture and values that are relevant to the given community. See detail with regard to the living law in Franz von Benda-Beckman & Keebet von Benda-Beckman, ‘The Social Life of Living Law in Indonesia’ Kelsen in Marc Hertogh (eds), *Living Law: Reconsidering Eugen Ehrlich* (Hart Publishing 2009) 178-197.

⁹⁵ The passive nature of judges in considering only the legal basis for claims is applicable in civil cases. This principle can be found in the HIR. See (n 73) and (n 92).

⁹⁶ *Petamburan* case (n 83) 26.

⁹⁷ *ibid* 25.

⁹⁸ HIR (n 73), and see (n 95).

⁹⁹ See note 94.

are unclear¹⁰⁰. However, this conflicts with the civil procedure legislation, which does not allow Indonesian courts to judge claims that are not raised by claimants (the principle of passivity).¹⁰¹ Nevertheless, in the *Petamburan* case, the deteriorating living conditions, which could possibly lead to human rights infringements, were caused directly by an unlawful act of the government. Therefore, in the present author's opinion, the judges should have reasonably made the connection between the construction delay and its adverse impact on the claimants' living conditions. One of the negative impacts experienced by the claimants was that they could not afford to live in an adequate house, because they spent all their compensation money on extending their rental agreement.¹⁰² The drastic change from home owners to tenants made the claimant's lives even more difficult than before. Some of the community members also experienced depression and missed out on job opportunities.¹⁰³ Therefore, if the judges had linked the claimants' living conditions and their the negative impacts to the human rights of the claimants, such reasoning would still fall under the scope of the case and would not violate the judges' limitation principle under the civil cases procedure.

In the *Abdullah/Dewi Nasiroh* case, the court completely rejected the claims of "reverse forced evictions and request punitive damages"¹⁰⁴, by relying mostly on the arguments brought by the defendants that the claimants were illegal settlers and therefore had no right to stay or receive compensation from the defendants.¹⁰⁵ Moreover, the court was of the opinion that the settlers had an obligation to give back the plots of land, if the defendants were in need of them.¹⁰⁶ The money offered by the state-owned company was considered as aid to move, based on humanitarian grounds (*tali asih*), and was not considered as compensation based on the law. Consequently, this type of aid could not become the object of a legal claim before the court.¹⁰⁷ The court ruled in favour of the defendants in their counter claims, and decided that the claimants were the ones who had committed an unlawful act by living on someone else's property without authorisation from the owner.¹⁰⁸

This was an unfortunate case for the claimants. The facts show that forced evictions did happen, and forced evictions that are contrary to international human rights law are prohibited. In the case of evictions, the human rights of the affected community should be taken into

¹⁰⁰ Andi Sofyan, 'Rechtsvinding by Judges in Judicial Process' (2017) 7 International Journal of Scientific and Research Publications 270-273.

¹⁰¹ There is legislative conflict between the formal hearing on civil cases procedure under the HIR, which requires judges to be more passive, and the Law on Judicial Power, which requires judges to be more active in exploring legal reasoning for cases, based on the justice values within society. A dissertation written by Sunarto mentioned that, although further research is still needed on judges' practices, and how to create harmony between the two forms of legislation, there is still a possibility for judges to be more active and creative in hearing civil cases, although several limitations still apply, such as judges remaining impartial and not changing the subject of a claim. Judges can still require and ask both claimants and defendants to provide evidence and witnesses, based on their claims. See detail in Sunarto, 'Prinsip Hakim Aktif dalam Perkara Perdata' (DPhil thesis, Airlangga University 2012). An article version of this dissertation has been published in Sunarto, 'Prinsip Hakim Aktif dalam Perkara Perdata' 5 (2) 2016 *Jurnal Hukum dan Peradilan* 249.

¹⁰² *Petamburan* case (n 83) 6

¹⁰³ *ibid.*

¹⁰⁴ *Abdullah/Dewi Nasiroh* case (n 83) 52.

¹⁰⁵ *ibid* 43-49.

¹⁰⁶ *ibid* 45.

¹⁰⁷ *ibid* 46-47.

¹⁰⁸ *ibid* 50, 52.

account, regardless their occupancy status.¹⁰⁹ The court, however, did not consider the facts that one of the defendants (the railway company) knew that the occupants had built houses on the land, and had even received a monthly rental payment for use of the land. The claimants stated that they started building houses in the 1970s, and the company had owned the land since 1928. Moreover, some of the company's staff lived next to the plot. Therefore, the company should have known that people were living on the plot of land, and if the company was not planning to let them stay there, it should have warned the occupants a long time ago, and not simply let them stay then evict them later with no compensation. Moreover, witnesses stated that the occupants had paid building, water and electricity taxes.¹¹⁰ All this evidence was completely ignored by the court.

In general, the judgement lacks legal reasoning. For example, the court could have further analysed the unlawful acts of the state enterprise as an agent of the state. Thus, there are two lacunae in the legal reasoning: in the discussion of the procedure for eviction, as well as in the legal basis for people staying on that specific land. In this regard, the judges did not consider whether the evictions conducted by the state-owned company comply with international human rights law. As suggested by General Comment No. 7 and the Basic Principles of Forced Evictions Based on Development Projects, excessive force during evictions is not necessary. This is something that the judges neglected to discuss, even though the company used excessive force to evict people. Furthermore, as a part of the immediate obligation on the right to housing under article 11 of the ICESCR, the judges should have explored whether alternative accommodation for everyone (including those who disputed the eviction) should have been provided, as well as compensation. Furthermore, if evictions cannot be avoided, the company should follow international norms to protect the human rights of the affected community. As a state agent, or in any case as an entity under effective control of the state, the company is also bound to the international obligation to refrain from any forced evictions, and the government of Indonesia should ensure that the company also respects the community's housing-related rights. Unfortunately, the judges did not consider the fact that the company is a state agent; therefore, the judgements seems to miss out an important point of the case.

The second lacuna is the lack of consideration of the reason why people might stay on the particular plot of land for a long period, without any "notice". In some circumstances, people are actually allowed to stay on state-owned company assets via tenancy agreements and the payment of a rental fee (see the discussion on land tenure in Chapter 6), or with no payment at all - depending on their arrangement with the owner of the land. In a case where there is an agreement between the company and the community, the court should not simply have stated that the community was comprised of illegal settlers. However, no evidence to support such agreements was presented by the claimants, or by the company. In the present author's opinion, the court could have explored more by testing the claim that the people involved had already been living there for decades. In its counter claim, the company only requested rental fees after 2009, in spite of the fact that people were living on the plots far earlier than that. This should have moved the judges to explore the facts on legality and the actual period during which people had been living on that plot.

¹⁰⁹ See the discussion on Chapter 2 on forced evictions.

¹¹⁰ See the discussion on Chapter 6.

It is also worth noting that the claims were not sufficiently convincing, unfortunately, particularly with respect to their legal basis. The claims did not rely on human rights norms for their legal basis, although evictions do in fact have human rights impacts. The claimants should have pointed out that the situation was partially the result of the company's omission to act earlier on. The company, as a state enterprise, can be considered as a state agency that can be held responsible for providing alternative accommodation for those who reversed the evictions. Therefore, it might be better for this type of case if human rights issues under human rights law (both national and international) are brought to bear, rather than relying solely on provisions in the Civil Code, which is too general in nature. In any event, in spite of any arguments that were not brought by the claimants, the claims were not backed up by sufficient evidence. For example, the claimants should have provided records of their settlement of the land before 2009.

Another forced eviction case that revolved around human rights violations stemming from the governments' unlawful acts is that of *Masenah-Bukit Duri I*. In addition to the legal standing of the unlawful acts, the Masenah/Bukit Duri I claim was based on several human rights instruments, such as the Constitution, the Human Rights Law, and the national ratification law to the ICESCR, as well as General Comment No. 4 on the Right to Housing.¹¹¹ This case containing human rights claims succeeded in making the governments accountable for the unlawful acts at the courts of first instance and appeal, on 25 October 2017 and 28 May 2018, respectively. Unfortunately, the present author cannot assess the legal reasoning of the first level judgement, as the decision is not available on the Supreme Court's website.¹¹² The appeals judgement decision is available, but it unfortunately does not contain a summary of the legal reasoning of the first level court. This case is not yet final, and at the time of writing the second appeal before the Supreme Court is currently under consideration.¹¹³

In the future, further research on eviction cases claiming the human rights norms may need to be conducted, in order to perceive judges' understanding of the meaning of the right to housing. As for the compensation requested in the claims against the unlawful acts conducted by other parties (including the government), it is up to the complainants to request an amount, and such a plea must be supported by strong evidence. However, the amount decided by the courts often depends on the judges' considerations.¹¹⁴ For example, in the *Petamburan* case the complainants requested 18 billion IDR, yet the court only approved 4.7 billion IDR, in addition to ruling that housing units should be given to the applicants due to the evident unlawful act of

¹¹¹ See for example Masenah-Bukit Duri I case, on the appeal decision (n 83) 20-22.

¹¹² As stated in the methodological section in Chapter 1 of this book, not all court decisions are available on the Supreme Court website. The Supreme Court only started to digitalise court decisions in 2007, and it still cannot cover all the courts across Indonesia. Often, the more recent district court judgements (for example, in 2016) are not available. Previous works by Lindsey and Butt, as well as by Adriaan Bedner, have affirmed this situation. Lindsey and Butt further mentioned that the decisions appearing on the website comprise only a small fraction of the real cases decided in the Indonesian courts. Other issues which remain a challenge are that many of the decisions are not published immediately, and only selected decisions become publicly available. "Controversial" cases and decisions are either far less available, or they become available many months after the delivery date. See details in Lindsey and Butt (n 62) 75-76. See also Adriaan Bedner, 'Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions' (2013) 5 Hague Journal on the Rule of Law 253.

¹¹³ The second appeal was brought by one of the respondents in the case, *Kepala Balai Besar Wilayah Sungai Ciliwung Cisadane* (BWSCC). This information was gathered from a conversation with the claimants' lawyers on 17 March 2019.

¹¹⁴ Agustina (n 78).

the government in evicting the inhabitants.¹¹⁵ Moreover, the judge's consideration of the decided amount of compensation was in line with the request of the claimants. The court was of the opinion that the request to substitute the amount of money used for rental accommodation was appropriate, according to the price of private accommodation at the time.¹¹⁶

In addition to the *Petamburan* case, the judges in the *Masenah-Bukit Duri I* case ordered the government to pay compensation. The court of first instance and the Jakarta High Court ruled that the government should pay 18.4 billion IDR to the 92 claimants of the case;¹¹⁷ however, the latter case is ongoing and there is still a possibility that either the amount will change or the Supreme Court will rule differently on the matter. As for implementation of the compensation as one of the redress procedures provided by Indonesian law, this will be discussed in Section 11.5.

11.5.1.1.2 Administrative court - Administrative proceedings

Another type of court that can be utilised to challenge government policies is the administrative court, which is located in every municipality. However, not all cases can be heard before this court. The administrative court has a mandate to settle state administrative disputes, between individuals or private parties and state institutions, or within governmental institutions themselves, as a result of the adoption of the state's administrative decision (*Beschikking*).¹¹⁸ Administrative complaints should be filed within 90 days of the date upon which a decision is implemented.¹¹⁹ The primary reason for administrative complaints is when an administrative decision is perceived to be against the applicable legislation and contrary to the principles of good governance.¹²⁰ As such, most of the complaints brought before the administrative court cite the human rights norms in the Constitution, as well as other laws.

One example of this type of procedure, which was used in relation to eviction, is the *Galuh Radiah et al. v Gubernur Provinsi Daerah Khusus Ibu Kota Jakarta (Bidara Cina Case)*.¹²¹ See text box 11.4.

¹¹⁵ *Petamburan Case* (n 83).

¹¹⁶ *ibid* 26.

¹¹⁷ See *Masenah-Bukit Duri I case*, on the appeal decision (n 54) 111-113.

¹¹⁸ Law No 5/1986 as amended by Law No 9/2004 and Law No 51/2009 on Administrative Court (*Undang-Undang No. 5/1986 tentang Pengadilan Tata Usaha Negara sebagaimana telah diubah dengan Undang-Undang No. 9/2004 tentang Peradilan Tata Usaha Negara*) SG 77/1986, SG 35/2004, SG 160/2009, art 1 para. 10.

¹¹⁹ *ibid* art 55.

¹²⁰ *ibid* art 53 ayat (2).

¹²¹ *Galuh Radiah et al v Gubernur Provinsi Daerah Khusus Ibu Kota Jakarta* (Jakarta Administrative Court, 25 April 2016, judgement) No 59/G/2016/PTUN-JKT (Bidara Cina Case).

Text box 11.4 The Bidara Cina case¹²²

On 15 March 2016, Galuh Radiah and four of her neighbours filed a complaint before the Jakarta Administrative Court against the Governor of Jakarta. The subject of the complaint was the Decision of the Governor of DKI Jakarta No. 2779/2015 adopted in 15 December 2015, concerning the government's plan to construct an inlet from the Ciliwung River to the Banjir Timur Canal, in the neighbourhood of Bidara Cina, Jakarta, Galuh and her neighbours had been living for 50 years. They claimed that the object of the suit was never consulted or discussed with the claimants, particularly regarding the part of the neighbourhood and width of the area most likely to be affected by the construction. Furthermore, the claimants stated that, in fact, the development would adversely affect their lives.

The claimants were of the opinion that the Decision was against several higher laws, including the Constitution, human rights law, and land expropriation law, as well as the principle of good governance. Based on these laws, the claimants argued that the government had violated their human rights, particularly their right to housing, and they requested that the court annul the Decision.

The Jakarta Administrative Court delivered its judgement on the disputes between the DKI Jakarta province and the people living in Bidara Cina on 25 April 2015. The court stated in the merits of the decision that the government had erroneously adopted this decision. The court primarily assessed the legality of the Decision, based on Law No 2/2012 on Land Acquisition for Development in the Public Interest, in particular the procedural aspect of land procurement for the project itself.¹²³ This is vital, as this law serves as a *lex specialis* in assessing the legality of a decision relating to development projects in the public interest. Unfortunately, in most of its decision, the court cited the provisions of the law, rather¹²⁴ than providing actual legal reasoning.¹²⁵ The court was of the opinion that requirements for land procurement are cumulative in nature. The suit claimed that the document concerning the location was not made available, and was therefore not communicated to the claimants. The judges accepted this, and decided that the government had not met all of the requirements of the Land Acquisition Law. Thus, the Decision of the Governor of DKI Jakarta No. 2779/2015 should be annulled.¹²⁶ It should be noted that the defendant did not attend the hearings in spite of the fact that the court had subpoenaed the Governor.

As a result of this decision, the government had to temporarily postpone the eviction plan. The government submitted an appeal to the Supreme Court on 27 April 2016, to which the Supreme Court ruled in opposition to the decision made by the Jakarta Administrative Court. In its judgement, the Supreme Court ruled in favour of the government, noting that the absence of the defendant (the Governor of Jakarta) meant that the governor could not refute the legality of the object of the case (the Governor Decision No. 2779/2015).¹²⁷ Moreover, the Court argued that the claimant exceeded the time period in which the complaint should have been lodged: therefore, the claim could not be granted.¹²⁸ As a result, the government was legally allowed to continue with the project.

¹²² *ibid* 3-29.

¹²³ *ibid* 122

¹²⁴ *ibid* 122-144. 22 pages were devoted for only citing the provisions.

¹²⁵ *ibid* 144-145.

¹²⁶ *ibid*, paras 144-145, 153. There was a dissenting opinion from one of the judges, who argued that the claimants did not fulfil the timing requirement in filing a complaint within 30 days of notice being given of a new law or decision being adopted. This judge argued that the complaints should have been rejected.

¹²⁷ *Gubernur Provinsi Daerah Khusus Ibu Kota Jakarta v Galuh Radiah et al (MARI, 23 August 2016, judgement) 267 K/TUN/2016, pp 34-36.*

¹²⁸ *ibid*.

Some observations can be made about this case. For example, the administrative court at the first level did not even consider the human rights issue raised by the claimants. The primary focus of the administrative court is to assess whether a government's administrative decision complies with all the applicable law, arguably including human rights law.¹²⁹ The author argues that the court should have addressed the human rights-based argument of the claimants in more depth. This is due to the fact that human rights (*kesamaan hak* - equal rights) form part of the principles of good governance that underlie public administration.¹³⁰ In addition, the principles of good governance include public participation in decision-making processes. This means that the court should have addressed the lack of consultation of the community affected as being incompatible with the procedural requirements.¹³¹ Moreover, since the Decision had human rights implications, as argued by the claimants, the court should have addressed the element of participation. This is due to the fact that the Decision aimed to benefit the community's development, and that a human rights-based approach towards development requires community involvement. Thus, the government should have involved the community in the decision making.

By considering this participatory approach that is also recognised as one of the good governance principles in Indonesia,¹³² the judges could have provided a better legal argument which linked administrative law with human rights. In this regard, the judges would have not exceeded their competence under administrative law, but could still have considered the legal basis brought by the claimants in deciding the case.

The Supreme Court judgement will not be analysed thoroughly, since it did not bring up any human rights issues. However, certain observations can be made. The fact that the Court only provided a brief legal reasoning with respect to the absence of the defendant is somewhat strange. As observed above, the administrative court subpoenaed the government multiple times, but the latter did not respond; in fact, the government only responded after it had lost the case. The Supreme Court's decision emphasised that the absence of the defendant could not be used to assess the legality of the Decision without further motivation, which lacks legal reasoning. Furthermore, the Supreme Court also addressed the timing requirement of the complaint in a very scant manner, not taking into account how the administrative court dealt with this matter.

The Supreme Court should have considered that the administrative court had followed the procedure, and that the government did not respect the subpoenas. This decision brings an interesting issue to light, with regard to accountability. Indonesian legislation does not oblige the government to attend hearings. Therefore, the government is not answerable for its acts and seems only to respond when a court's decision is not to its liking. This is a considerable gap with respect to accountability, which should be addressed by the legislature in the near future if the Indonesian government wishes to take accountability as process seriously. For example,

¹²⁹ Law No 5/1980 as amended by Law No 9/2004 and Law No 51/2009 on Administrative Court (n 118) arts 1 (4), 47, 53 (2), 107, and 107A

¹³⁰ Law No. 25/2009 (n 229) art 4c.

¹³¹ Law No 2/2012 on Land Acquisition for Development in the Public Interest (*Undang-Undang No 2/2012 tentang Pengadaan Tanah Bagi Pembangunan Demi Kepentingan Umum*) SG 22/2012 (Land Acquisition Law) arts 16, 17, and 19.

¹³² Law No. 25/2009 (n 229) art 4f, also Law No 2/2012 *ibid*.

the legislature could adopt legislation that could force the government to respect the due process of a court hearing.

Another government decision that was adopted with regard to the Ciliwung River revitalisation project, and related to the right to housing, is that of *Masenah et al v Head of the Civil Service Police of South Jakarta* (hereinafter referred to as the *Bukit Duri II* case).¹³³

Text box 11.5 The Masenah II /Bukit Duri II case¹³⁴

Masenah, and 11 other residents of Bukit Duri, claimed before the Jakarta Administrative Court in September 2016. The subject of this claim was Eviction Notices I-III (*Surat Perintah Penggusuran-SP I –III*), adopted by the Public Orders Enforcement-Municipal Police (Satuan Polisi Pamong Praja) of the South Jakarta Municipality. This case is related to the other case discussed earlier (see Masenah/Bukit Duri Case I, in text box 11.2). In the earlier case, the Community was against the eviction, as it had no legal basis, and it requested fair compensation for its property which had been damaged and lost during the eviction.

The Bukit Duri communities pursued both civil (as discussed 11.5.1.1.1) and administrative proceedings. While the General Court was still examining the civil case, which initiated on 1 May 2016, and the government (in this case represented by the Civil Service Police) issued eviction notices (SP) on 30th August 2016 (SP I), 7 September 2016 (SP II) and 20 September 2016 (SP III), respectively, which then became the subject of the administrative court proceedings.

The communities claimed that, in this case the adoption of the eviction notices was against the law, as the community was still fighting against the first eviction and the case remained under the consideration of the general court. The government (in this context, the municipal police) adopted the notices and carried out evictions for the second phase of the river revitalisation project.

As the government did not respect the general court's procedure, the claimants brought the complaint to the South Jakarta Administrative Court, asserting that the eviction notices were against the applicable law, including human rights norms and the principles of good governance. The administrative court of the first instance found that the notices had caused damage to the claimants, in terms of being evicted from their homes or places of residence.¹³⁵ By relying on several laws and international documents, including the statutory law on the ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR), General Comments of the Committee on Economic, Social and Cultural Rights (CESCR), and the Law on Land Acquisition, the court found that the third notice did not comply with two important requirements, which are the need to involve the affected community in deciding the relocation, and the provision of alternative accommodation and compensation for such projects.¹³⁶ Therefore, the court ruled in favour of the claimants and decided that the third eviction notice (SP III) was against the applicable law and should thus be revoked.¹³⁷

However, the two appeal courts, i.e. the DKI Jakarta Administrative Court and the Supreme Court, annulled this first level decision and ruled that the eviction notice was in

¹³³ Administrative Court of South Jakarta, *Masenah et al v Head of the Civil Service Police of South Jakarta*, Case No. 205/G/2016/PTUN.JKT SLTN, judgement 5 January 2017, 123.

¹³⁴ *ibid* 1-21.

¹³⁵ *ibid* 103-126.

¹³⁶ *ibid* 123-124.

¹³⁷ *ibid* 127.

compliance with the law, as the government had based its decision on the relevant legislation.¹³⁸ The two rulings had very scant legal reasoning and did not address the issue of the effect of the eviction notices had on the community from the perspective of human rights, even though the human rights-related norms were raised by the claimants. In contrast to the civil proceeding, the administrative judges are not supposed to be passive, meaning that the judges should actively engage in judicial truth finding. They are allowed to make an *ultra petitem* decision, and consider other legal bases that are not included in the claims.¹³⁹ Therefore, judges should consider all the relevant provisions and issues raised by the claimants, as well as other relevant provisions that might be related but are not brought forward in the claims. The two courts mentioned above did not act in this manner. Moreover, the appeal courts seemed to restrict themselves with regard to positive and normative standards. For example, the court mentioned that the claimants did not have proof of ownership (*sertifikat hak milik*) of their land, and thus they were not entitled to keep the land. However, the courts should have noticed that such proof was recognised only after 1960, following the adoption of the Basic Agrarian Law (BAL). The fact that there is still a dualist approach in the land registration system, as discussed in Chapter 6, allows several types of ownership proofs outside the BAL to be recognised. Although the BAL aims for the unification of land registration, land registration in Indonesia has not been finished until now.¹⁴⁰ Therefore, the court should have been aware of these conditions and should not only have relied on formal proof of ownership. The other evidence presented to the court, such as receipts from previous landowners or customary proof of ownership (letter C) from the sub-district authority, should have been sufficient to prove ownership of the plots of land.¹⁴¹

Another eviction case that was brought before the court relates to forced eviction in Yogyakarta, which was triggered due to the development of a new airport, namely New Yogyakarta International Airport (NYIA).¹⁴² See text box 11.6.

Text box 11.6 The NYIA case¹⁴³

Sumadi and 42 other individuals living in village of Glagah-Temon, Kulon Progo, brought a complaint against the Governor of Yogyakarta, regarding the Governor's Decision to determine the location of the New Yogyakarta International Airport (NYIA), which would be located in their village.

The claimants based their complaints on various national legislation, such as human rights law and the ratification instruments of the ICESCR, as well as General Comment No. 7 on Forced Eviction. They claimed that the decision for the location of the airport had not been discussed with the affected communities by using a more participatory approach. They claimed that not all of the members of the affected community were involved in the consultation, and even that some of them were not allowed to enter the consultation venue. Therefore, the Decision did not meet the requirements under the Law on Land Acquisition for Development in the Public Interest. Thus, the claimants asked the Yogyakarta Administrative Court to annul the Decision.

¹³⁸ The High Administrative Court of Jakarta, *Masenah et al v Head of the Civil Service Police of South Jakarta* Case No 95/B/2017/PT.TUN.JKT, judgement 19 July 2017; see also the Indonesian Supreme Court, *Masenah et al v Head of the Civil Service Police of South Jakarta*, case No 560 K/TUN/2017, 5 December 2017.

¹³⁹ Law No 5/1980 as amended by Law No 9/2004 and Law No 51/2009 on Administrative Court (n 118), art 107.

¹⁴⁰ See Chapter 6.

¹⁴¹ *ibid*.

¹⁴² *Sumadi et al v Governor of Daerah Istimewa Yogyakarta* (Yogyakarta Administrative Court, 23 June 2015, judgement) 07/G/2015/PTUN Yogyakarta (NYIA case).

¹⁴³ *ibid* 9-12; 25-31.

Furthermore, similar to the eviction case in Jakarta, the administrative court of the first instance found that the Decision of the Governor of Daerah Istimewa Yogyakarta (DIY) No. 68/KEP/2015, on the plan for location of the NYIA, was void and must be annulled.¹⁴⁴ Although the government had fulfilled the formal procedure required by the law on Land Acquisition for Development in the Public Interest at every stage, to a certain degree the government violated the regional and national Spatial Planning Law which does not include a plan to construct a new airport.¹⁴⁵

Moreover, in its consideration the court examined whether or not the Decision was against human rights, such as the right to life, work, housing and property, enshrined in the Constitution and in Human Rights Law.¹⁴⁶ The court cited the definition of human rights violation stipulated in the human rights law, which according to the court contains three elements: 1) acts resulting from either omission or commission, that are against laws; 2) such acts cause human rights infringements or limitations guaranteed under laws; and, 3) such acts are not/may not be processed before applicable legal mechanisms.¹⁴⁷ However, the judges seem to have misinterpreted the definition of human rights violation under the Law No. 39/1999 on Human Rights. The paragraph of the specific provision does not in fact mention “against the applicable law”, but it does state “against the human rights law”.¹⁴⁸ This means that the scope of the violation of human rights is narrower than the general unlawful acts that the court seems to suggest, as the violation of human rights can only occur if the act is contrary to the applicable human rights law. Therefore, according to this article, not all unlawful acts against other applicable laws can be categorised as human rights violations.

Even taking into consideration the fact that the judges’ interpretation of the first element of a human rights violation may be incorrect, the court’s discussion of the first element, as to whether the decision was an unlawful act and thus against human rights, was inconsistent. This is due to the fact that the judges briefly mentioned that as long as the procedure to acquire the land was followed properly by the government, the act was considered to be lawful.¹⁴⁹ However, due to the fact that not all members of the community were involved in the consultation process, as required by law,¹⁵⁰ it is possible to infer that such a lack of consultation

¹⁴⁴ *ibid* 210.

¹⁴⁵ NYIA case (n 142) 205-208.

¹⁴⁶ *ibid* 186, 196.

¹⁴⁷ *ibid* 195.

¹⁴⁸ Law No 39/1999 on Human Rights (*Undang-Undang No. 39/1999 tentang Hak Asasi Manusia*) SG No. 165/1999, art 1 (6). This provision in original language states “*Pelanggaran hak asasi manusia adalah setiap perbuatan seseorang atau kelompok orang termasuk aparat negara baik disengaja maupun tidak disengaja atau kelalaian yang secara melawan hukum mengurangi, menghalangi, membatasi, dan atau mencabut hak asasi manusia seseorang atau kelompok orang yang dijamin oleh Undang undang ini, dan tidak mendapatkan, atau dikhawatirkan tidak memperoleh penyelesaian hukum yang adil dan benar, berdasarkan mekanisme hukum yang berlaku.*”

The ILO unofficial translation on this provision: “Human rights violations mean all actions by individuals or groups of individuals, including the state apparatus, both intentional and unintentional, that unlawfully diminish, oppress, limit and/or revoke the human rights of an individual or group of individuals guaranteed by the provisions set forth in this Act, and who do not or may not obtain fair and total legal restitution under the prevailing legal mechanism.”

¹⁴⁹ NYIA case (n 142)196.

¹⁵⁰ *ibid* 189-194.

is contrary to the Land Acquisition Law, and thus an unlawful act which violated human rights. Even if the judges had applied the actual text of the provision on the definition of a human rights violation (as observed in the previous paragraph), the Court should have still concluded that there was a potential violation of human rights, due to the lack of consultation with all members of the affected community, which is not only contrary to the Land Acquisition Law but also to Articles 40, 1 (6), and 7 (2) of the human rights law. This is because, under the latter article, the ICESCR is applicable in Indonesia and, according to the CESCR (in General Comments No. 4 and No. 7), consultation by the development project affecting the right to housing with all members of the affected community is obligatory, as found Article 11 of the ICESCR.¹⁵¹

Furthermore, the court stated that the aim of the Decision was triggered by the need to build a new airport, which is considered to be in the public interest, and it was mandated by legislation; therefore, the land procurement was not against human rights.¹⁵² However, it was not clear from the decision whether the court referred to the land procurement law or to other legislation. Although it did mention that the community occupying the land should obey the land procurement law.¹⁵³ The court was of the opinion that, since the adoption of the location of a new airport was not against human rights, it was also not automatically against the statutory law on ratification of the ICESCR.

The court seemed to suggest that, if the government needed land for development and it was in the public interest to do so, the government was justified in taking land away from people. Unfortunately, the judgement did not provide further arguments for the approach that should be taken by governments in such cases – those in which the claimants state that the government did not meet the procedural element of consultation. Furthermore, the judgement did not contain categories of public interest under the land acquisition law. The court also seemed to fail to take into account the effects of the decision on people's lives. Given the fact that the location of the settlement is on very fertile land, most of the occupants are farmers. A witness stated that there is an option to construct the airport on the less fertile land, so that the government would not lose farming land. When the new airport is built, the community living in its vicinity will have no fields in which to plant crops. They may have to switch to other occupations, for which they have neither the skills nor the education. Although the decision was not against human rights law, the court found that it was against the spatial planning legislation (both national and provincial), which did not require moving the airport or building a new one, since the legislation only mentioned enhancement of the old airport.¹⁵⁴ In addition, the Court was of the opinion that the location, as stated in the local spatial regulation, was mapped as a disaster prone area, and stated that the usage of such land should be in line with the evacuation plan.¹⁵⁵

¹⁵¹ See discussion in Chapter 3.

¹⁵² *ibid*

¹⁵³ *ibid*.

¹⁵⁴ *ibid* 203-204.

¹⁵⁵ *ibid* 204-208.

This case went to appeal, and the Supreme Court¹⁵⁶ annulled the ruling of the Yogyakarta Administrative Court.¹⁵⁷ The Supreme Court ruled that the first instance court had a restrictive opinion, regarding its analysis of the legal basis of the administrative decision in question without analysing other factors, such as events or facts prior to adoption of the decision. The Supreme Court held that the Annex of the local regulation explicitly mentioned the necessity of constructing of a new airport in the province.¹⁵⁸ The Court also decided that the plan could have changed depending on the circumstances, particularly the need to improve the existing Yogyakarta airport. The judgement did not seem to address whether there was an indication of procedural misconduct in adopting the decision, or any human rights infringements resulting from the decision. The consideration of merit is quite short (just one page), compared to the bulk of the judgement which comprises 76 pages containing mostly the summary of the claim, the counter claim, and the reasons for appeal. This case shows that, even when claimants bring human rights as a legal basis for their complaints, the administrative courts, up to the Supreme Court, rarely address human rights law in their legal reasoning.

In summary, the Indonesian administrative courts can be an alternative forum for holding the government accountable, in particular when it comes to annulling an administrative decision that is against the applicable legislation, including human rights law. However, in practice, the reliance on human rights norms by these courts seems to be non-existent. Moreover, the administrative courts can also potentially provide redress and compensation for loss or damages experienced by individuals or communities targeted by a government's decisions. Nevertheless, the illustrative cases mentioned above did not involve any compensation, remedy or redress.

11.5.1.1.3 Summary of the complaints mechanisms before domestic courts

In conclusion, both civil and administrative proceedings are available, and can be used to hold the state accountable for its actions or policies that infringe human rights. However, the legal basis for claims is not mainly human rights violation, *per se*. In civil proceedings, claims often use tort law in relation to the human rights law and other legislation that is connected to harm and loss caused by unlawful acts. In administrative proceedings, people can base a claim about the legality of an administrative decision on the applicable legislation, including that concerning human rights.

Moreover, it is worth noting that the judgements arising from the two procedures only serve to bind the parties to the complaints. People who do not participate in the proceedings cannot demand that the court provides the same treatment for them as is received by the plaintiffs. This means that judicial accountability alone will not repair a systemic problem. Although judicial accountability is vital, it cannot advance the realisation of human rights in a meaningful manner on its own, in particular with regard to the right to housing in Indonesia.

¹⁵⁶ This case was based primarily on the Law on Land Acquisition for Development in the Public Interest, which stipulates that complaints relating to a decision regarding a project's siting can be brought before the General Court and the Supreme Court. The latter serves as a final court of appeal. See Law No 2/2012 (n 131) art 23.

¹⁵⁷ *Sumadi et al v Governor of Daerah Istimewa Yogyakarta* (the Indonesian Supreme Court, 23 September 2015, judgement) 456K/TUN/2015, 74.

¹⁵⁸ *ibid*.

This is mainly because cases related to evictions were not approached from a human rights perspective, and were not based on human rights norms enshrined in both international and national instruments and documents. Moreover, the rulings of the first instance courts related to evictions are often annulled by higher courts, without much in-depth reasoning or justification by the higher judges of their grounds for deciding differently.¹⁵⁹

There is a possibility that the judges' hesitance to consider human rights norms is caused by their lack of human rights knowledge and perspectives. Although this preliminary claim still needs to be investigated in future research, the lack of a human rights perspective may not be the primary culprit. The Indonesian legal system, in general, does not enable complaints that are based merely on pure human rights norms, particularly in the fields of economic, social and cultural rights; for example, by employing the Indonesian Constitution or Indonesian human rights law, or even international instruments that have been ratified by the government. Although Indonesia established its Human Rights Court in 2000, the court has a specific mandate only to hear cases of gross violations of human rights, i.e. cases involving genocide or crimes against humanity.¹⁶⁰ Therefore, if a violation of the right to adequate housing (or any other ESC rights) does not contain the elements of a gross violation, such as being "systemic" and "widespread", in order to fulfil the requirement for crimes against humanity,¹⁶¹ the allegation will not be heard before the Indonesian human rights court.

In order to file a complaint relating to the right to housing, complainants often base their claims either solely on the "unlawful acts" provision under the Civil Code, or on a combination of the unlawful acts and human rights norms. This can be seen in the case of *Masenah/Bukit Duri I and II*, as well as in the *NYIA* case. In some of the cases discussed above, human rights law is rarely discussed, as the court primarily addresses the requirements for "unlawful acts."

Moreover, the practice suggests that the manner in which the courts deal with the claims will mostly depend on the legal basis raised by the claimants. For example, if claimants do not use human rights law as the legal basis of their claims, judges will rarely come to the conclusion that human rights were infringed, even though this is obviously the case. This may be for two reasons. First, the judges follow the strict rule of only considering the legal basis presented in the claims and do not explore the concurrent legal basis. Second, judges may lack a human rights perspective, due to a lack of education in this field. With the swift development in international human rights law, judges' knowledge of this field should be improved and updated, to familiarise them with the development of case law at an international level and in other countries.

It may prove useful if lawyers, paralegals and others presenting these cases provide a clear and direct link between the complaints and human rights norms that may be applicable,

¹⁵⁹ The lack of legal reasoning in the higher courts (particularly, the Supreme Court) has received widespread criticism from legal scholars. Based on his research on the Court's rulings on judicial reviews, Simon Butt revealed that the Court's reasoning is too simplistic and superficial, and it is also lacking in academic literature reviews which support the rulings. Discussions of the legal interpretation process are rarely disclosed. See Simon Butt and Nicholas Parsons, 'Judicial Review and the Supreme Court in Indonesia: A New Space for Law?' [2014] *Indonesia* 55; see also Lindsey and Butt 2018 (n 62) 76; Simon Butt, 'Judicial Reasoning and Review in the Indonesian Supreme Court' (2018) 00 *Asian Journal of Law and Society* 1 <https://www.cambridge.org/core/product/identifier/S2052901518000268/type/journal_article> accessed 10 March 2019.

¹⁶⁰ Law No. 26/2000 (n 70).

¹⁶¹ *ibid*, art 9.

and which are enshrined in both national and international legal instruments. This will require that claims are carefully drafted and that claimants possess adequate human rights knowledge, and these are aspects which the cases discussed above suggest is still lacking. Such deficiency is sometimes caused by the lack of a proper legal representative, as seen in several cases discussed in the previous sections, in which the claimants presented the case themselves, without any legal representation. In any case, human rights education - for members of society and for lawyers, paralegals and NGOs - may benefit everyone.

The next sub-section will provide an analysis of accountability mechanisms in the form of judicial review before the Constitutional Court and the Supreme Court.

11.5.1.2 Judicial review

Judicial review is defined in this book as a mechanism for reviewing a piece of legislation as to whether it contradicts the Constitution or other higher statutory laws, which may include human rights law.¹⁶² The power of judicial review in Indonesia is in the hands of two national courts: the Constitutional Court and the Supreme Court.¹⁶³ The main difference between these courts' mandates regarding judicial review lies in the level of legislation that may be reviewed. While the Constitutional Court examines the inconsistency of an act with the highest law, namely the Indonesian Constitution of 1945, the Supreme Court reviews the consistency of lower level legislation in relation to higher-level legislation (laws). Executive or bureaucratic reviews of local regulations can also be carried out. Each of the procedures, and how they are used to review national legislation, will be discussed in the following sub-sections.

11.4.1.2.1 The Constitutional Court

According to Law No. 8/2011 on the Amendment of Law No. 24/2003 on the Constitutional Court, the Indonesian legal system provides an avenue for challenging laws (*undang-undang*), especially if they contradict the Indonesian Constitution, or if the constitutional rights of applicants are violated as a result of a new law.¹⁶⁴ This procedure is called 'constitutional review'. In some cases, the Court extends its power to review government regulation in lieu of the law (*peraturan pemerintah pengganti undang-undang*). However the Court does not have a mandate to review the constitutionality of the government's actions.¹⁶⁵

The Court has considerable leeway (or latitude) for allowing parties to lodge a constitutional review. Individuals, groups with shared interests, indigenous communities, and

¹⁶² Hamid Chalid, 'Dualism of Judicial Review in Indonesia: Problems and Solutions' 2017 (3) Indonesia Law Review 367; see also Mark Tushnet, 'Establishing Effective Constitutional Review' in Miodrag A. Jovanovic (ed), *Constitutional Review and Democracy* (Eleven International Publishing 2015) 7.

¹⁶³ Article 24A para (1) and Art. 24C paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia

¹⁶⁴ The other powers that the Constitutional Court has are: delivering judgement on authority disputes between state institutions, the dissolution of political parties, and disputes around election results. It also has the authority to make a decision on the opinion of the House of People's Representatives around alleged violations of laws committed by the President and/or the Chief President (Article 10 of Law No. 24/2003).

¹⁶⁵ Lindsey and Butt (n 62) 105.

public and private institutions can all file a request for review before the Court.¹⁶⁶ Despite accepting requests for constitutional reviews from a variety of groups, the Court has (up to now) seemed hesitant to accept applications from foreign citizens.¹⁶⁷

Once the Court declares a law or provision to be unconstitutional, the law or the provision in question theoretically becomes inapplicable.¹⁶⁸ The Court will then inform parliament, local parliaments, the president, and the Supreme Court of its decision.¹⁶⁹ If there is further need to amend the legislation that has been decided by the Court, the parliament or government should follow up the judgements.¹⁷⁰ There is no further definition of the criteria for the “need” as stated in the provision. The text of the article seems to suggest that the need is at the discretion of either the parliament or the president. Ideally, if a law or a provision in a law is declared null and void because it conflicts with the Constitution, the government needs to take action to amend or withdraw such a law. In cases where the entire law is unconstitutional, the government needs to adopt a new law. Both aforementioned choices, either to amend or to adopt a new law, have a consequence that needs to be considered: the lengthy procedure of law-making. This means that, following a decision, the government needs to modify the specific law in question. The processes of amending and adopting a new law needs to follow the procedure of law making, which often takes a significant period of time since it involves the parliament. Moreover, this procedure frequently requires a large budget. These barriers often cause a ‘no action’ condition that creates a legal vacuum in the specific field that is being regulated by the law in question.¹⁷¹ In this regard, the Court does not have the power to force the government to change the specific law that has been reviewed.

As the Court does not have any enforcement power, it cannot prevent the government from ignoring the Court’s ruling. The consequence is that, if the government adopts an action based on the unconstitutional law, the action will have no legal basis. If the government does not take any action and simply ignores the decision, there will be no legal consequences, as the legislation is silent in relation to this issue.¹⁷² Unless the government is of the opinion that a law is pivotal with regard to public interest (such as laws related to national security or state territory), it is likely to amend or adopt a new law instead. However, if the government ignores a ruling, the Court may use the media to ‘shame’ the government for not considering the ruling.¹⁷³

The decision of the Court is applicable only after it delivers its ruling; therefore, any action based on the law, conducted by the government prior to and within the time of the claims brought before the Court, is still valid and legally justified. The nature of the decision may also hinder applicants from receiving redress for the violation of human rights that they have

¹⁶⁶ Law No. 24/2003 as amended by Law No. 8/2011 on the Constitutional Court (*Undang-Undang No 24/2003 sebagaimana telah diubah dengan Undang-Undang No. 8/2011 tentang Mahkamah Konstitusi*) SG 98/2003/SG 70/2011, art 51 (1).

¹⁶⁷ Lindsey and Butt (n 62) 104.

¹⁶⁸ Law No. 24/2003 as amended by Law No.8/2011 (n 166) art 57 (1), see also *ibid* 106.

¹⁶⁹ *Ibid* art 59 (1).

¹⁷⁰ *ibid* art 59 (2).

¹⁷¹ Lindsey and Butt 2018 (n 62) 106.

¹⁷² Law No. 24/2003 as amended by Law No.8/2011 (n 166) art 59, see also Lindsey and Butt, *ibid*.

¹⁷³ Lindsey and Butt 2018 *ibid*.

experienced.¹⁷⁴ However, if approved, such a claim can be used to prevent the violation of other peoples' human rights in the future.

Based on a previous study by Simon Butt, the Court went further in its decision in some cases, by introducing the "conditional unconstitutionality" approach.¹⁷⁵ This means that the Court essentially states that the provision is unconstitutional unless it is interpreted in a certain manner, which should often follow the Court's interpretation provided in its decision.¹⁷⁶ The interpretation often seems to mirror the 'expected' amendment of the provision.¹⁷⁷ The Court might adopt this method to avoid the legal vacuum of the specific provision. To a certain extent, this approach may raise an issue of interference between legislative and executive power, as the Court is trying to formulate the text of the provision in its decision - a task which generally belongs to the legislative or executive powers. However, the Court does not seem to be aware of this interference. In 2011, the Law on the Constitutional Court 2004 was amended by Law No. 8/2011, which clearly stated in one of its provisions that the decisions of the Court do not contain¹⁷⁸ a formulation of a revoked clause.¹⁷⁹ However, the Court seemed to continue its practice of adopting such an approach in its recent decision in 2018, on the case of parliamentary approval for treaty ratification.¹⁸⁰

The Court has also dealt with complaints related to the human rights provisions in national legislation. The exact number of cases related to the constitutionality of national laws regarding human rights is difficult to assess.¹⁸¹ This difficulty is due to a change in the Constitutional Court's internal policy, which allows claimants not to mention the provision that serves as the legal basis for their claims.¹⁸² Moreover, in its yearly report the Court did not categorise the complaints based on the provisions enshrined in the Constitution. Rather, it applied one general category - namely, the category of judicial review (*pengujian undang-undang*).¹⁸³ Previous research conducted by Widiarto *et al* affirms that the Court has reviewed several national laws related to human rights enshrined in the Constitution, such as the right to not be discriminated against, the right to life, the right to work, the right to a health service, the right to self-development and the right to practise a religion/belief.¹⁸⁴ It is worth noting that the

¹⁷⁴ *ibid* 107.

¹⁷⁵ Lindsey and Butt 2018 *ibid*.

¹⁷⁶ *ibid*, Lindsey and Butt describe this approach by basing the Court's review on article 43 (1) of the Marriage Law. The article states that "a child born out of marriage has a civil legal relationship with its mother and her family". The Court ruled that the article is against the Constitution, unless the article interpreted that "a child ... has a civil legal relationship with its mother and her family, and its father and his family which can be proven by science and technology and/or another form of legally-recognised evidence that the father has a blood relationship with the child," see further detail in the Indonesian Constitutional Court, *Hj. Aisyah Mochtar and Muhammad Iqbal Ramadhan*, Case No 46/PUU-VIII/2010, paras 3.13-3.15.

¹⁷⁷ Lindsey and Butt 2018 (n 62)106.

¹⁷⁸ The phrase "do not contain" that is translated from "...tidak memuat" is a quite ambiguous. The formulation chosen by the legislature most likely can be interpreted as meaning as "may not contain".

¹⁷⁹ Law No. 24/2003 as amended by Law No.8/2011 (n 166) art 57 (2a).

¹⁸⁰ See discussion in Chapter 3.

¹⁸¹ Aan Eko Widiarto, Muchamad Ali Safa'at and Mardian Wibowo, 'Pemaknaan Norma Hak Asasi Manusia Dalam UUD 1945 Berdasarkan Putusan Mahkamah Konstitusi' (2018) 11 *Arena Hukum* 369.

¹⁸² *ibid*.

¹⁸³ See for example Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, Laporan Kinerja Mahkamah Konstitusi 2017 (Mahkamah Konstitusi 2018) 89-93, <[https://mkri.id/public/content/infooumum/laporankinerjamk/pdf/LaporanKinerjaMK_16_Laporan%20Kinerja%20\(LAKIP\)%20Mahkamah%20Konstitusi%20Tahun%202017.pdf](https://mkri.id/public/content/infooumum/laporankinerjamk/pdf/LaporanKinerjaMK_16_Laporan%20Kinerja%20(LAKIP)%20Mahkamah%20Konstitusi%20Tahun%202017.pdf)> accessed 3 March 2019.

¹⁸⁴ Widiarto *et al* (n 181).

above-mentioned research shows that the Court has not dealt with the provision on the right to adequate housing.

Based on research conducted by Widiarto *et al*, the author conducted a simple search by using the key words ‘*hak atas tempat tinggal*’ (the right to housing) and ‘*tempat tinggal*’ (a place to stay) on the Court’s website. The search showed that data on cases related to these keywords was unavailable. However, if the keywords were changed to ‘*perumahan*’ (housing), the results showed that there were two cases heard by the Court with regard to the judicial review of Law No.1/2011 on Housing and Settlement Areas, particularly Article 22 (3) on the minimum size of detached and terrace houses.¹⁸⁵ The two cases were *Adittya Rahman et al* and *DPP APERSI*, and due similarities between the cases, text box 11.7 describes the facts of each.

Text box 11.7 The *Adittya Rahman et al* and *DPP APERSI* cases¹⁸⁶

The applicants in the two cases requested a judicial review of the minimum requirement for housing size, which was set at 36m² under Article 22 (3) of the Law on Housing and Settlement Areas (No.1/2011). They claimed that the provision was against the human rights enshrined in the Constitution, particularly the rights to housing, equal opportunities, and property (Articles 28H (1), (2) and (4), respectively). Similar rights are also stipulated in the Indonesian Human Rights Law. The legal bases of these two cases were almost similar, but the claimant in the DPP APERSI case additionally argued that Article 22 (3) of the Housing Law was against Articles 27 (1) on the right to equality before the law, and 28 D (1) on the right to equal protection and treatment. These two cases were filed before the Constitutional Court within days of each other.

The main argument in the *Adittya Rahman et al* case, which was brought by individuals, relied on the fact that the housing backlog experienced in Indonesia was already high before the minimum size requirement was introduced. Thus, they argued that the housing backlog would become higher following implementation of the provision, thus affecting the right to housing. In addition, the claimants argued that, as workers with a monthly salary below 2 million IDR, they would not be able to afford housing at a size of 36m², which was predicted to cost around 135 million IDR. The provision enshrined in the housing law made it impossible for them (and other people in similar conditions) to have a house. The claimants argued that this provision was against the spirit of both the Constitution and the preamble of the housing law itself, which mentioned that the government will provide for easier access to adequate and affordable homes for lower income groups. Therefore, an article stipulating the minimum size of houses that can be built would violate their rights to housing as guaranteed in the Constitution; thus, the article should be revoked.

The second case was brought by DPP APERSI, an association of housing developers concerned with the development of low-cost housing designed for middle and lower income groups. In this case, the claimants argued that the construction of houses below the specific size mentioned above is still needed, due to the economic conditions of low income groups in Indonesia. The claimants also argued that the increasing housing backlog, together with the unaffordability of minimum size houses, hindered low income groups in owning a house of that size, thus encouraging the expansion of slums. Moreover, the affordability issue is exacerbated by the fact that the mortgage subsidy programme provided by the government did not reach all people from low income groups. Therefore, the claimants argued that this provision was against the Constitution.

The Court ruled in favour of the *DPP APERSI* case and declared Article 22 (3) of Law No 1/2011 to be unconstitutional. Due to the similar nature of the claims between these two constitutional review petitions, the Constitutional Court considered that its legal reasoning for

¹⁸⁵ See the Indonesian Constitutional Court, *Aditya Rahman et al*, Reg No. 12/PUU-X/2012, judgement 3 October 2012 (*Adittya Rahman et al*) and *Dewan Pengurus Pusat Asosiasi Pengembang Perumahan Dan Permukiman Seluruh Indonesia (DPP APERSI)* No. 14/PUU-X/2012, judgement 3 October 2012 (*DPP APERSI*).

¹⁸⁶ *Adittya Rahman et al* (n 185) 5-11; and *DPP APERSI case* (n 185) 2-6, 17-67.

the *DPP APERSI* case was also applicable in the *Aditya Rahman et al* case.¹⁸⁷ The latter case was dismissed with a “*ne bis in idem*” reasoning.¹⁸⁸

In the *DPP APERSI* case, the Court reviewed neither the content of the right to housing as found in the Constitution nor the content of the relevant clauses in the Housing and Settlement Law. Rather, it came up with a broader and more general notion that the government must manage and facilitate housing affairs, particularly housing for the poor.¹⁸⁹ Furthermore, the Court cited the Explanatory Notes (*Penjelasan Umum*) when considering Article 22 (3) of the Housing and Settlement Law, to the effect that the government should take into account numerous criteria, such as health requirements, adequacy, and affordability.¹⁹⁰ The Court was of the opinion that setting a certain size limit for houses would go against the affordability element of housing, and consequently the construction of houses in sizes below the prescribed minimum should be allowed. This means that the poor would find houses of the prescribed size unaffordable. Therefore, a policy limiting the size of houses would prevent low-income groups from having or building houses that are smaller in size than required.¹⁹¹

Considering housing prices and the affordability index across Indonesia, the Court stated that homogenising the size of houses is unacceptable.¹⁹² At the same time, the Court mentioned that the rights to live in adequate housing, in a good, healthy and prosperous environment, and have access health care, as found under Article 28H (1), are determined not only by the size of the houses they live in, but also by other factors, mainly a gift from God in the form of fortune (“...akan tetapi ditentukan pula oleh banyak faktor, terutama factor kesyukuran atas karunia yang diberikan oleh Tuhan Yang Maha Esa”).¹⁹³ Although such a consideration appears to be based on non-legal reasoning and is apparently a religious argument, the Court decided that the reviewed provision is not legally binding in nature, and the majority of judges (eight out of nine) agreed with this.

In this regard, the Court dealt with the review of the right to adequate housing on a limited basis, observing that the government should have realised the right without necessarily limiting the sizes of the houses, as long as houses are affordable, and can be accessed by the lower income groups. Furthermore, although the Court decided to revoke Article 22 (3) of the Law on Housing and Settlement Areas No. 1/2011, due to its incompatibility with the right to housing under the Constitution, no changes have been made to the national law in question. The government, as far as the present author has been able to observe, has not yet amended the provision following the Court’s ruling.

Aside from the fact that the claimant in the *DPP APERSI* case quite possibly did not have the legal standing to file a petition, as its rights, as an organisation, were not directly affected by the article,¹⁹⁴ both this decision and the decision in *Aditya Rahman et al* can be criticised on certain substantive grounds.

¹⁸⁷ *DPP APERSI* case (n 185) 94-95 paras 3.11 and 3.12.

¹⁸⁸ *Aditya Rahman et al* (n 185) 95.

¹⁸⁹ *DPP APERSI* (n 185) 156.

¹⁹⁰ *ibid*; see also the General Elucidation of Law No 1/2011 (n 30) para I.

¹⁹¹ *DPP APERSI* (n 185) 156 -157.

¹⁹² *ibid* 157.

¹⁹³ *ibid*.

¹⁹⁴ The main reason for claims in the *DPP APERSI* case was that the article limiting housing size would violate the right to equality before the law, and the right to housing. However, given the fact that the claimant was an association of housing developers that builds houses for the low-income groups, the legal standing of the

First, the Court's decision to dismiss the *Aditty Rahman et al* case with a *ne bis in idem* is somewhat misguided. The Court did not consider in an in-depth manner, the other legal basis proposed by the claimants in the *Aditya Rahman et al* case, which was the right to affirmative action (Article 28H (2), Constitution). The Court only stated that the right to affirmative action was not relevant to the case, without providing any further reasons for that statement.¹⁹⁵ The fact that there is a slightly different legal basis for each of the two petitions should have directed the Court to also consider other relevant legal bases and only apply *ne bis in idem* to the same legal basis. Ideally, the Court should have merged the cases if it thought that they were too similar.

Second, and somewhat related to the first point, the Court should have addressed the claims brought in the *Aditty Rahman et al* case, in particular with regard to the tripartite typology of human rights obligations within the Indonesian government,¹⁹⁶ namely to respect, protect, and fulfil the right to housing. The fact that the claimants thought the impugned article was contrary to the Constitution and the ICESCR should have pushed the Court to address the tripartite typology of human rights obligations in its legal reasoning. That the Court did not address this is even more perplexing, given the fact that the government was aware of and acknowledged these obligations in its response to these two cases.¹⁹⁷

Thirdly, despite the Court's use of human rights language based on the Law on Housing and Settlement Areas (obliging the state to provide low income groups with affordable housing), the majority of both judgements was dedicated to summarising the claims and government responses, witnesses' testimonies and expert opinions, and to citing the relevant legislation, rather than providing actual legal reasoning.

As discussed above, judicial review before the Constitutional Court can be employed to claim that provisions contained in a law have violated, or are predicted to be in violation of, human rights related to housing provision enshrined in the Constitution. Despite the weaknesses of the constitutional review, such as having no enforcement power, the 'non-retroactive' element of the Court's decision, and (often) the lack of convincing legal reasoning, the mechanism can be effective in showing the government that a particular legislation possibly violates the Constitution. This may induce the government to amend (or possibly withdraw) the legislation, to prevent further violations from occurring.

association and its relation to the violation of rights that could stem from the provision was not so clear. The legislation clearly expresses that, in order to file a constitutional review, petitioners should explain in detail their rights which might be affected by a certain provision (see Article 51 and 51 A Law No 24/2003 as amended by Law No. 8/2011). In addition, based on two of its previous cases ((No. 006/PUU-III/2005 (31 May 2005) and No. 11/PUU-V/2007 (20 September 2007)), the petition under article 51 should include: (1) the existence of a right given by the Constitution to the petitioners; (2) an indication that such a right is predicted to be violated; (3) a description of the constitutional damage that is claimed, which should be actual and specific; (4) the existence of a causal link (*causal verband*) between the constitutional damage and the law; and, (5) an assertion that the same violation will not be repeated or continued if the petition is accepted. In the DPP APERSI case, the association making a petition for a constitutional review did not provide the Court with such details, which means that, in the present author's opinion, the direct effect of the impugned provision on the rights of the claimant was lacking.

¹⁹⁵ *Aditty Rahman et al* (n 185) 9 para 3.12.

¹⁹⁶ *Aditty Rahman et al* (n 185) 8 para 17.

¹⁹⁷ See DPP APERSI case (n 185) 99-100, *Aditty Rahman* (n 185).

11.4.1.2.2. *The Supreme Court*

In addition to the Constitutional Court, the Indonesian Supreme Court has a mandate to review lower level legislation (that which is below a statute/a law)¹⁹⁸ - such as government regulations, presidential regulations, and provincial/municipal local regulations - as to whether they are in conformity with the higher-level law (the material aspect).¹⁹⁹ The Supreme Court may also review the drafting procedures of the lower levels of legislation (the formality aspect).²⁰⁰ If the Supreme Court declares that a lower level regulation is inconsistent with a law, the lower law becomes invalid from the date of the judgement, and it ceases to have any binding legal power.²⁰¹

To implement its mandate of judicial review enshrined in the Law on the Supreme Court,²⁰² the Court adopted an internal regulation, namely The Supreme Court Regulation No. 1/2011 on Material Judicial Review (*Peraturan Mahkamah Agung No. 1/2011 tentang Hak Uji Materiil*). This regulation provides several administrative requirements that should be met by parties when filing their complaints.²⁰³ For example, applications can be lodged directly with the Supreme Court, or via the applicant's local district court. Moreover, the Supreme Court's decision on judicial review cases is final and no appeal is applicable.²⁰⁴ However, the regulation does not contain procedural guidance on how the examination process should be conducted. The regulation amends the time limit requirements in the previous regulation, which was 180 days following the adoption of a legislation. Based on the current regulation, no time limit is applicable; therefore, judicial review can be initiated at any time, as long as the legislation is still valid.

The primary requirement with regard to who can lodge a judicial review before the Supreme Court is that the parties should have been affected by a local regulation (*peraturan daerah*).²⁰⁵ The Supreme Court has received much criticism for its reviewing of local legislation. For example, for providing scant legal reasoning, for making decisions that are inconsistent with past decisions, and for its lack of human resources to adequately handle judicial review cases.²⁰⁶ Moreover, the process of judicial review before this Court does not

¹⁹⁸ The hierarchy of Indonesian law can be found in Law No. 12/2011 on the Formation of Legislation (*Undang-Undang No. 12/2011 tentang Pembentukan Peraturan Perundang-Undangan*) SG 82/2011, art 7 (1). The Constitution is the highest norm, followed by decisions made by the *Majelis Permusyawaratan Rakyat* (MPR – People's Consultative Assembly), laws/government regulations in lieu of law (interim emergency laws), government regulations, presidential regulations, provincial local regulation (*peraturan daerah tingkat provinsi*), and local municipality regulation (*peraturan daerah tingkat kabupaten/kota*).

¹⁹⁹ Law No. 14/1985 as amended with Law No 5/2004 and 3/2009 on the Supreme Court (*Undang-Undang No. 14/1985 sebagaimana telah diamandemen dengan Undang-Undang No. 5/2004 and No. 3/2009 tentang Mahkamah Agung*) art 31 (2); see also The Supreme Court Regulation No. 1/2011 on Material Review (*Peraturan Mahkamah Agung No. 1/2011 tentang Hak Uji Materiil*) adopted on 30 May 2011, art 1(1) (Supreme Court Regulation).

²⁰⁰ *ibid*.

²⁰¹ *ibid* art 31(4).

²⁰² Supreme Court Regulation (n 199).

²⁰³ *ibid* (n 199).

²⁰⁴ *ibid* arts 2 and 9.

²⁰⁵ Butt and Parsons (n 159).

²⁰⁶ Butt 2018 (n 159); see also Maftuh Effendi, *Kewenangan Uji Materiil Peraturan Perundang-Undangan Dibawah Undang-Undang* (Mahkamah Agung 2013).

involve the applicants, neither does it involve witnesses or experts, nor is it open to the public.²⁰⁷ Therefore, the process lacks transparency, as well as accountability.²⁰⁸

Despite criticism of how the Supreme Court has dealt with the judicial review procedure, as discussed in the previous paragraph, the number of petitions brought before the Supreme Court for the judicial review of legislation below statutory laws is increasing. For example, 52 judicial review petitions were filed in 2012,²⁰⁹ 76 in 2013,²¹⁰ and 83 in 2014.²¹¹ These numbers, on judicial review alone, do not seem significant. However, if these numbers are then combined with other types of cases brought before the Supreme Court (civil, criminal and administrative cases), the overall number of cases is not balanced when taking into consideration the number of available judges at the Supreme Court.

In the future, the workload of the Supreme Court in reviewing local legislation below the statutory laws, may continue to increase. This is mainly due to the Constitutional Court's judgement on the annulment of the executive review power that was previously the responsibility of the Ministry of Home Affairs and the Governor; the Constitutional Court gave the mandate for judicial review of local legislation solely to the Supreme Court (see Section 11.4.3, below).

Previous research has shown that hundreds of local regulations violate fundamental rights, in terms of discrimination against women²¹² or religious belief.²¹³ These local regulations are inconsistent with higher laws, such as the Human Rights Law No. 39/1999. However, due to the localised nature of these regulations, they receive less scrutiny from the public and media.²¹⁴ There may be an ample number of local regulations that are both directly and indirectly discriminatory in nature, but which have not yet been identified. For example, the local regulation on accessing public housing, as discussed in Chapter 7 of this book. All these regulations need to be reviewed by the Supreme Court, if a party brings a judicial review petition before the Court. These numbers suggest that there could be a potential influx of cases

²⁰⁷ See Butt and Parsons (n 159).

²⁰⁸ See for example "Diskusi Media "Transparansi Peradilan & Membenahi Persidangan Tertutup di Mahkamah Agung" (PUSKAPSI, UNEJ, 9 April 2018) <<http://puskapsi.fh.unej.ac.id/?p=550>> accessed 5 March 2019; "MA Diminta Transparan Soal Judicial Review" (Hukum Online 9 April 2018) <<https://www.hukumonline.com/berita/baca/lt5acb660217f88/ma-diminta-transparan-soal-judicial-review>> accessed 5 March 2019.

²⁰⁹ Mahkamah Agung Republik Indonesia, *Laporan Tahunan Mahkamah Agung Republik Indonesia Tahun 2012* (MARI 2013) 12 <https://www.mahkamahagung.go.id/files/20160302191408_LTMARI-2012.pdf> accessed 5 March 2019.

²¹⁰ Mahkamah Agung Republik Indonesia, *Laporan Tahunan Mahkamah Agung Republik Indonesia Tahun 2013* (MARI 2014) 15 <https://www.mahkamahagung.go.id/files/20160302191531_LTMARI-2013.pdf> accessed 5 March 2019.

²¹¹ Mahkamah Agung Republik Indonesia, *Laporan Tahunan Mahkamah Agung Republik Indonesia Tahun 2014* (MARI 2015) 24 <https://www.mahkamahagung.go.id/files/20160302192042_LTMARI-2014.pdf> accessed 5 March 2019.

²¹² Indonesian National Women Commission (Komisi Nasional Perempuan), 'Laporan Independen Komisi Nasional Anti Kekerasan terhadap Perempuan (Komnas Perempuan) Kepada Komite CEDAW: Mengenai Pelaksanaan Konvensi Penghapusan Segala Bentuk Diskriminasi terhadap Perempuan di Indonesia, 2007 - 2011' (KOMNAS PEREMPUAN, 10 October 2011) paras 49-50; see also 'Perda-perda yang 'diskriminatif' menurut Komnas Perempuan' (BBC Indonesia, 20 November 2018) <<https://www.bbc.com/indonesia/indonesia-46261681>> accessed 5 March 2019, 'Komnas Perempuan: Ratusan Perda Diskriminatif terhadap Perempuan' (Tempo.com, 20 November 2018) <<https://nasional.tempo.co/read/1147997/komnas-perempuan-ratusan-perda-diskriminatif-terhadap-perempuan/full&view=ok>> accessed 5 March 2019.

²¹³ Melissa Crouch, 'Judicial Review and Religious Ahmadis' (2012) 34 *Sidney Law Review* 545.

²¹⁴ Butt 2018 (n 159).

filed before the Supreme Court. The judicial review procedure is a burden for the Supreme Court, in addition to its tasks to review appeal cases (*Kasasi and Peninjauan Kembali*) from all types of domestic courts. Therefore, the Court needs to push itself to become more effective and transparent in handling judicial review cases in the future, while at the same time ensuring that the process remains transparent and fair.

Similar to the Constitutional Court, the Supreme Court has the power to invalidate lower legislation that violates fundamental human rights or authorises the government to disregard its human rights obligations.²¹⁵ Since judicial review before the Supreme Court is similar to procedures that are brought before the Constitutional Court, this procedure can be employed to claim that a lower regulation is against the human rights enshrined in national statutory law, including those in the field of housing. To the present author's knowledge, no judicial review application relating to the right to housing has been brought before the Supreme Court, even though this mechanism can be used to annul such a discriminatory practice if it exists at the local level.

11.4.1.2.3 Executive (Bureaucratic) review

Until 2017, executive review was the responsibility of national government via the Ministry of Home Affairs and Governors. The legal basis of the review was stipulated in the Law on Local Governments No. 23/2014 (Article 251). This mechanism allowed the ministry to review and invalidate laws passed by provincial governments (provincial local regulations—*peraturan daerah tingkat provinsi*) and through governor regulations (*peraturan gubernur*).²¹⁶ Moreover, the Law on Local Governments mandates governors to review and, if necessary, invalidate the laws passed by municipalities (municipal local regulations (*peraturan daerah tingkat kota/kabupaten*)) and the heads of municipality regulations (*peraturan walikota/bupati*).²¹⁷ All pieces of local legislation could be invalidated if they are in conflict with²¹⁸ national laws, the public interest, or morality.²¹⁹

However, in 2017, the Constitutional Court revoked this power and stated that the authority of the Ministry to review and invalidate laws at the lower level was inconsistent and against the Constitution, primarily in relation to Articles 24 and 124.²²⁰ The Court argued that the Constitution has allocated the power to review lower level legislation to the Supreme Court. In addition, reviewing local pieces of legislation is not an affair for the higher tiers of government, instead it is something that should fall under the general courts' judicial review

²¹⁵ *ibid*.

²¹⁶ Law No. 23/2014 on Local Governments (*Undang-Undang No 23/2014 tentang Pemerintahan Daerah*) SG 244/2014, arts 250 (1) and 251 (1).

²¹⁷ *ibid* arts 250 (1) and 251 (2).

²¹⁸ *ibid* art 251 (1 and 2).

²¹⁹ In the Law on Local Governments, 'public interest' refers to: 1) the disturbance of social cohesion or harmony; 2) the disturbance of access to public services; 3) the disturbance of peace and public order; 4) the disturbance of economic activities which aim to improve social welfare; 5) discrimination based on ethnicity, religion and belief, race, or gender. See *ibid* art 250 (2). This law refers to the word 'morality' as meaning noble manners and good behaviour. See the Explanatory Note for Article 250.

²²⁰ The Indonesian Constitutional Court, Decision No. 56/PUU-XIV/2016 (14th June 2017) para. 3.9.2 in conjunction with Decision No. 137/PUU-XIII/2015 (5 April 2017) para 3.12.4.

competences.²²¹ Following these two decisions, the Ministry of Home Affairs and Governors does not have the executive power to review lower level legislation. Therefore, if any local legislation is inconsistent with the three requirements mentioned above, the annulment claim should be brought before the Supreme Court.

As for the judicial review process, the Supreme Court has been criticised for being non-transparent in its hearing process, as well as in its judicial review decisions.²²² Given the Constitutional Court's decision, the Supreme Court will have an extensive workload with its new tasks and (most probably) an accumulation of 'unfinished' or, to a greater extent, 'untouched' cases will occur. This early observation results from the fact that around 40,000 pieces of legislation are either inconsistent with higher laws, or they conflict with each other.²²³

The law on local government recognises two types of internal monitoring mechanisms for local legislation. First is the *a-posteriori*, or executive review, when the higher levels of government may annul local pieces of legislation that have been implemented. Second is the *a-priori* preview, which enables higher levels of the government to review a draft of local legislation, before its adoption process begins.²²⁴ Following the Constitutional Court's rulings, the *a-posteriori* review for lower legislation is no longer available within the Indonesian legal system. However, the *a-priori* review may still apply. Therefore, the higher levels of government should review whether the legislation drafts have fulfilled the legal requirements enshrined in the Law of Local Government.

This type of review cannot be employed to review local housing legislation that has been adopted, but it can be used for future reference, particularly when evaluating legislation drafts on the part of the governments to ensure that future pieces of legislation do not contain any provisions that might infringe human rights.

11.5.2 Quasi-judicial accountability mechanisms

The second type of accountability mechanisms are quasi-judicial mechanisms. In Indonesia, these mechanisms include two institutions: the Ombudsman Republic of Indonesia (ORI), and the Indonesian National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia-KOMNAS HAM*). The Ombudsman receives complaints regarding dissatisfaction with public services, while KOMNAS HAM accepts and handles complaints about the alleged violation of

²²¹ *ibid.*

²²² Butt and Parsons (n 90) 72-73.

²²³ This fact was brought by the President of Republic of Indonesia in his speech in the grand opening of the "Rembug Nasional 2017" 23 October 2017, see Very, 'Presiden Ungkap 42 Ribu Peraturan Berpotensi Saling Bertentangan' *Indonews.id* (Jakarta, 24 October 2017) <<http://indonews.id/artikel/9837/Presiden-Ungkap-42-Ribu-Peraturan-Berpotensi-Saling-Bertentangan/>> accessed 14 February 2019; see also Tim Lindsey and Simon Butt, 'Unfinished Business: Law Reform, Governance, and the Courts in Post-Suharto Indonesia' in Mirjam Kunkler and Alfred Stephan (eds), *Democracy and Islam in Indonesia* (Columbia University Press 2013).

²²⁴ Ni'matul Huda, *Problematisasi Pembatalan Peraturan Daerah* (FH UII Press, 2010); see also Pan Mohamad Faiz, 'Perubahan Politik Hukum Pengujian Peraturan Daerah Pasca Putusan Mahkamah Konstitusi' in Budy Sugandi and Ali Rif'an (eds), *Pemerintah dan Pemerintahan Daerah: Refleksi pada Era Reformasi* (Insight Indonesia 2018) 90-97; M. Nur Sholikin, 'Penghapusan Kewenangan Pemerintah untuk Membatalkan Perda: Momentum Mengefektifkan Pengawasan Preventif dan Pelaksanaan Hak Uji Materiil MA' (2017) *Jurnal Rechtsvinding Online* <https://rechtsvinding.bphn.go.id/jurnal_online/Putusan%20PUU%20Pembatalan%20Perda.pdf> accessed 14 February 2019.

human rights.²²⁵ This section discusses the role of the two institutions in providing quasi-judicial accountability mechanisms for the right to adequate housing.

11.5.2.1 *The Ombudsman Republic of Indonesia (ORI)*

The ORI has become an alternative mechanism for citizens to present their concerns and further complaints for maladministration in public services. The general public tends to prefer using this procedure, rather than the judicial mechanism, because the latter is often time-consuming and expensive. The ORI was first established by Presidential Decision No. 44/ 2000, and its mandates were then strengthened by Law No. 37/2008 on the Ombudsman of the Republic of Indonesia.²²⁶ The ORI has authority, as an independent monitoring body, for public service delivery²²⁷, as well as an investigation body for complaints about public services or allegations of maladministration.²²⁸ Moreover, Law No. 25/2009 on Public Services affirms the supervisory role of the Ombudsman in affairs regarding public services provided by governments, state's enterprises, regional enterprises, and individuals who are authorised to provide services.²²⁹ The two legislations mandate the Ombudsman to receive complaints from the people (both citizens and non-citizens) for any inconsistencies or breaches in public service delivery.²³⁰

In addition to receiving complaints, the Ombudsman legislation mandates this institution to instigate an investigation at its own discretion, should it suspect an occurrence of maladministration.²³¹ The Ombudsman has several other tasks, such as coordinating with other governmental bodies, establishing and expanding its network, and preventing maladministration from occurring.²³² The Ombudsman law also authorises the institution to provide suggestions to the president, the House of Representatives, the heads of local governments, or other leaders of governmental bodies, on advancing the delivery of public services and on the amendment of certain legislation to prevent maladministration.²³³

If the Ombudsman decides to accept the complaints it will deliver a recommendation, following a series of procedures to check the facts.²³⁴ The officials who are being reported to the Ombudsman under the supervisory function of their principals are obliged to implement the recommendation within 60 days of having received it.²³⁵ Failure to comply with such a recommendation will result in 'shaming' sanctions being taken by the Ombudsman. These sanctions vary from a publication in the media that mentions the name of the official and his

²²⁵ Law No. 39/1999 (n 148) arts 76, 89 paras 3 and 4.

²²⁶ Law No. 37/2008 on the Ombudsman of the Republic of Indonesia (*Undang-Undang No. 37/2008 tentang Ombudsman Republik Indonesia*) SG 139/2008.

²²⁷ *ibid* arts 2 and 6; see also Sirahudin, Didik Sukriono and Winardi, *Hukum Pelayanan Publik: Berbasis Keterbukaan Informasi dan Partisipasi* (Setara Press 2012) 145, 155, 160.

²²⁸ *ibid* art 7.

²²⁹ Law No. 25/2009 on Public Services (*Undang-Undang No. 25/2009 tentang Pelayanan Publik*) SG 112/2009, art 1 (13), 35 (3b); see also Law No. 37/2008 (n 226) art 6.

²³⁰ See Law No 37/2008 (n 226) arts 7, 23 and Law No 25/2009 *ibid*, art 46.

²³¹ *ibid*.

²³² *ibid* art 7.

²³³ *ibid* art 8 (2).

²³⁴ *ibid* arts 36, 37.

²³⁵ *ibid* art 38 (2).

principal, to a report that is sent to the House of People's Representative(s) and the president.²³⁶ Further lack of compliance may result in administrative sanctions being taken against the reported officials and their principals.

In order to reach all the regions in Indonesia, the ORI has established branches in several Indonesian big cities. In two of the Indonesian provinces, namely Daerah Istimewa Yogyakarta and South Sulawesi (Makassar), the governors have established a local ombudsman. The role of the local ombudsman is similar to that of the national Ombudsman, and sometimes the roles even overlap. The Yogyakarta Ombudsman is the local ombudsman who is relevant to this thesis, due to Yogyakarta being one of the selected research locations; together, the local and the national ombudsmen agreed to avoid cases in which their roles would overlap. In any case, these institutions remain different in terms of their establishment and the financial resources available to them; therefore, one is not higher than the other, and they do not serve as appeal ombudsmen.

Based on the yearly report of the ORI, the number of complaints filed against public services tends to increase each year. For example, in 2016 the ORI received 10,476²³⁷ complaints, and in 2017 it received 10,556.²³⁸ An increase can also be seen between 2012 and 2015.²³⁹ In 2017, complaints were mainly related to land, accounting for 13.34 percent of the total number of complaints, while housing issues made up 1.56 percent of the total.²⁴⁰ The public administrators receiving complaints most often are local governments, the police force, ministries, and the National Land Agency (BPN).²⁴¹ The complaints regarding land issues relate to agrarian conflict, compensation for development based on the public interest (such as the Pari island conflict), permits for islands resulting from Jakarta Bay reclamation, and urban spatial arrangement.²⁴²

In an effort to resolve complaints brought before the Ombudsman, the ombudspersons act as mediators to the conflict in question, thereby serving as neutral parties.²⁴³ In addition to mediation, the ombudspersons may also opt for conciliation.²⁴⁴ If the complaints are resolved via the two aforementioned methods, the Ombudsman will adopt a "legally binding recommendation."²⁴⁵ However, not all complaints will result in a recommendation. The complaints often only request that the Ombudsman suggests or provides an opinion on a specific issue.²⁴⁶ The procedure following a complaint is to check and investigate whether the applicants have legal standing, and whether the issues brought fall under the competences of the

²³⁶ *ibid* art 38 (4).

²³⁷ Ombudsman Republik Indonesia, *Laporan Tahunan 2016: Awasi, Tegur, Laporkan* (ORI 2017) 18 <<http://ombudsman.go.id/produk>> accessed 6 March 2019.

²³⁸ Ombudsman Republik Indonesia, *Laporan Tahunan 2017: Awasi, Tegur, Laporkan* (ORI 2018) 14 <<http://ombudsman.go.id/produk>> accessed 6 March 2019.

²³⁹ *ibid*, respectively 2,209; 5,172; 6,678; 6,859 complaints.

²⁴⁰ ORI 2018 (n 238) 17.

²⁴¹ *ibid*.

²⁴² *ibid* 18.

²⁴³ Law No. 25/2009 (n 229) art 46 para 5.

²⁴⁴ *ibid*.

²⁴⁵ The provision in the Ombudsman Law does not directly mention its legally binding nature. However, it does use wording which describes the obligation of plaintiffs and their principals to implement the ORI's recommendations. See Law No. 37/2008 (n 226) art 38 (1).

²⁴⁶ Interview with the staff of the ORI from Assistance Group 4: Economy, 13 September 2016.

Ombudsman. In the latter case, the Ombudsman often refers to other bodies with the relevant competences.

The mediation process is of a closed nature, and the hearing often involves only the parties in conflict. The Ombudsman might conduct an investigation as well; however, this is also not open to public. Moreover, the adopted recommendations are provided for the involved parties only.²⁴⁷ The only medium via which the public can obtain information on investigations or recommendations is the media, as the Ombudsman often provides press releases if it deals with cases that attract the attention of the public. The Ombudsman's website also provides information on recommendations in numerous cases; however, this information is not up-to-date and it therefore does not include any recent recommendations.²⁴⁸

The Ombudsman's main limitation is its inability to compel government officials and departments to respond to its inquiries and recommendations.²⁴⁹ The Ombudsman Law does not give it coercive powers to enforce its recommendation to officials who are ignoring it, or not fully complying with the Ombudsman's requests and findings. For example, between 2016 and 2017 the Ombudsman published eight recommendations, none of which were fully implemented; six out of eight were only half implemented, and two were not implemented at all.²⁵⁰ The Ombudsman sent reports to both the president and the House of Representatives, yet tracing the follow-up procedure to these reports is challenging. Therefore, although the Ombudsman Law states that the recommendation is legally binding in nature, actual practice does not support this provision.

Another drawback of the Ombudsman's procedure is that it only has mandates to deal with complaints related to maladministration. Therefore, if human rights issues are involved, the Ombudsman will only consider the maladministration aspect and not the human rights aspects, even though the human rights aspects are more relevant.²⁵¹ For example, in the case where evictions were carried out by the State-owned Railway Company (PT KAI), in which people lived on PT KAI assets and no agreement was reached between those people and the company, PT KAI was allowed to evict them. However, if it had been proved that the people were living on land next to that belonging to KAI, and as a result the company evicted them, then maladministration would have been evident; the ORI would then have had to adopt a recommendation stating that the eviction was mistargeted and is regarded as a wrongful act in the eyes of public administration. Consequently, the complaints procedure before the ORI can be used to hold public authorities accountable, but the complaints should stay within the field of public administration acts and policies, rather than within the field of human rights issues.

11.5.2.2 The Indonesian National Human Rights Commission (KOMNAS HAM)

KOMNAS HAM was first established in 1993, following Presidential Decision No. 50/1993. The establishment of the early KOMNAS HAM was considered to be political, as the decision

²⁴⁷ *ibid*

²⁴⁸ The latest recommendations available on the website are those from 2014. Based on an interview conducted in 2016, the ORI adopted a few recommendations, but, as of 5 March 2019, none of the 2016 recommendations can be found on the ORI website of the. See <<http://ombudsman.go.id/produk>> accessed 5 March 2019.

²⁴⁹ See for example Butt and Lindsey 2018 (n 62) 26.

²⁵⁰ ORI 2018 (n 238) 34-35.

²⁵¹ Interview with the Ombudsman Republic Indonesia (n 246).

was adopted a week before the UN Human Rights Conference in Vienna. Despite receiving criticism from the public that the new body was weak and was not independent,²⁵² the Commission was keen to provide criticism of the government, and it conducted investigations into cases of security force abuse.²⁵³ In addition, the Commission succeeded in obtaining support from the public.²⁵⁴ In 1999, the position of KOMNAS HAM as the human rights watchdog was strengthened by the adoption of Law No. 39/1999 on Human Rights. The Commission aims primarily to: (1) develop a conducive environment for the implementation of human rights; and, (2) improve the protection and enforcement of human rights for all Indonesians.²⁵⁵ To achieve these aims, KOMNAS HAM has four functions, namely: 1) research and study; 2) human rights dissemination; 3) supervision; and, 4) mediation of human rights disputes.²⁵⁶ Furthermore, the Human Rights Law provides detailed activities that should be carried out by the Commission when performing its functions. For example, under the first function the Commission may examine international human rights and, further, suggest that the government ratifies the instruments and conducts research into a specific field of human rights.²⁵⁷

Under its fourth function, the mediation of human rights disputes, the KOMNAS HAM has the power to act as mediator for parties disputing a human rights issue. The dispute can be processed through consultation, negotiation, mediation, conciliation, and expert evaluation. If mediation is successful and the parties in conflict agree to engage in a written agreement, the dispute is solved. The agreement becomes legally binding and enforceable by a district court, if one of the parties does not implement their own obligation.²⁵⁸ Moreover, the Commission can make recommendations to parties to resolve their disputes in the courts.²⁵⁹ In addition, the Commission may recommend to the government and House of Representatives that the human rights violations be tackled or followed up.²⁶⁰

As a monitoring body on human rights issues, KOMNAS HAM reports on how human rights are implemented, investigates incidents characterised as human rights violations, calls victims and witnesses for statements related to certain incidents, conducts site visits and examines property, and provides input for ongoing cases involving human rights violations.²⁶¹ The Commission reports its work on the status of human rights implementation in the country to the parliament and president, including all the relevant cases that have been heard.²⁶²

As discussed in the previous paragraph, the KOMNAS HAM has a very broad mandate. It functions both as a supervisory body, and as a quasi-judicial body that is mandated to hear complaints. It is worth noting that there is one exception to the cases that can be heard by the

²⁵² Ken Maritje Prahari Setiawan, 'Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia' (Leiden University 2013) <<https://openaccess.leidenuniv.nl/handle/1887/22838>> pp 38-40.

²⁵³ *ibid*, pp 40-45; see also Ken Setiawan, 'From Hope to Disillusion: The Paradox of Komnas Ham, the Indonesian National Human Rights Commission' (2016) 172 *Bijdragen tot de taal-, land- en volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 1.

²⁵⁴ *ibid*.

²⁵⁵ Law No. 39/1999 (n 148) art 75.

²⁵⁶ *ibid* art 76.

²⁵⁷ *ibid* art 89 (1).

²⁵⁸ *ibid* art (96).

²⁵⁹ *ibid* art 89 (4).

²⁶⁰ *ibid* art 89 (4).

²⁶¹ *ibid* art 89 (3).

²⁶² *ibid* art 97.

KOMNAS HAM, namely cases that are categorised as a gross violation of human rights. For such cases, involving serious grievances or gross violations,²⁶³ KOMNAS HAM has an inquiry function; this will not be discussed in this section, because the function can only be invoked if the Commission is of the opinion that a gross violation of human rights was allegedly conducted by the government or its agencies.²⁶⁴ The mediatory function of the Commission in this regard can serve as a type of accountability mechanism, available in Indonesia, which can be used to file complaints for human rights infringements by either state actors or private companies.

The Commission heard 98 cases related to housing between 2011 and 2016.²⁶⁵ Based on its 2017 report, the majority of complaints received by the Commission were linked to welfare rights violations (including eviction).²⁶⁶ The respondents in the cases vary from the government (mostly local governments), through state's enterprises (such as the railway company, PT. KAI), to public universities and private companies.²⁶⁷ The complaints related mostly to eviction from homes (either private or official)²⁶⁸ and places of work. The reasons behind the evictions vary, from the need for development projects to private reasons. These cases were resolved via mediation before the Commission, and the mediation agreements were respected and implemented by the parties.²⁶⁹ KOMNAS HAM can also investigate alleged human rights violations; for example, it investigated the possibility of human rights violation in a mass eviction case in Jakarta. For the eviction related to a development project, the KOMNAS HAM provided a recommendation to the governments for a road development project in Malang, East Java.²⁷⁰

The drawbacks of the mediation process are that the procedures are closed to the public, and the results of the agreements are provided only to the parties involved in each complaint. In this regard the process also lacks transparency, as the public cannot monitor its progress. There may also be concerns that, in a case of mass eviction where not every member of the affected community has filed a complaint, the treatment of people affected by the eviction might differ between those who have filed a complaint and those who have not. As the binding nature of the agreement is only applicable to the parties involved, third parties will not therefore be legally bound to the result of the mediation. This also means that resolving complaints with a human rights dimension before the Commission requires the good faith of the parties involved.

²⁶³ The Indonesian Human Rights Law categorises several types of gross human rights violations, such as genocide and crimes against humanity (see the detailed crimes in arts 7, 8 and 9 of Law No. 26/2000 (n 70). For all these violations, the human rights court is the only court that is competent to hear cases. The KOMNAS HAM may conduct preliminary inquiries to obtain initial evidence. Once it has enough evidence to proceed to further criminal investigations, the evidence must be sent to investigators. See Law No 26/2000 (n 70) art 20.

²⁶⁴ Law No 26/2000 (n 70) art 18.

²⁶⁵ This data gathered from the field research conducted in 2016 in the sub-commission of the KOMNAS HAM.

²⁶⁶ KOMNAS HAM, 'Laporan Tahunan KOMNAS HAM 2017' (KOMNAS HAM 2018) 33

<<https://www.komnasham.go.id/index.php/laporan/2018/09/14/50/laporan-tahunan-komnas-ham-2017.html>> accessed 11 March 2019.

²⁶⁷ Field research at KOMNAS HAM (n 265).

²⁶⁸ 'Official homes' means houses that are provided by a certain institution for their staff. In certain cases, the pensioners of an institution are allowed to stay in their houses. However, this arrangement is not entirely clear in terms of tenure, so it often creates problems for the tenants if the institution decides it wants the houses back.

²⁶⁹ Interview with KOMNAS HAM's Mediation staff, Jakarta 8 September 2016.

²⁷⁰ KOMNAS HAM (n 266) 36.

11.5.3 Internal administrative accountability

Internal accountability as a form of administrative accountability is another vital element with regard to holding officials accountable in the very first instance. The officials are accountable to their principal; if any of their conduct is against the purpose of their work, the principals have the power to deliver judgement and impose administrative sanctions. This mechanism exists in every institution in Indonesia, since it is obligatory. The obligation is stipulated in Law No. 25/2009 on Public Services, and Regulation of *Menteri Pendayagunaan Aparatur Negara-Permenpan* (Ministry of Administration)²⁷¹ 13/2009 on the Improvement of Quality in Service Delivery with Civic Participation. This regulation legally proposes complaint surveys, in order to collect the likes and dislikes of the general public, as well as complaints about public services.

These regulations enable four types of accountability mechanisms to be employed in holding public officials accountable – namely, the Ombudsman, the principals and the House of Representatives (local and national), and the domestic courts if the public officials in question are involved in criminal acts. The accountability procedures before the Ombudsman and the Court have been discussed in previous sections (11.4.2. and 11.4.1.1). This section will thus focus only on the internal administrative procedure for wrongdoers.

The procedure of accountability might vary, as it depends on the internal policy of institutions or companies. Nevertheless, this channel serves a similar notion as an accountability mechanism, whereby the institutions receive a report of any misconduct by its officials, either from internal officials who notice the dereliction, or external sources (societies or individuals). For example, in the Ministry of Public Work and Public Housing, each directorate has a director who deals with the internal supervisory mechanism, including evaluation. Complaints are filed either through the general website or via the Ministry email system. The complainants can also send their inquiry to a platform called '*Layanan Aspirasi dan Pengaduan Online Rakyat (LAPOR)*'. All complaints will be forwarded either to the directorate relevant to the issue, or to the directorate to whom the complaint is addressed. The next procedure - such as an investigation, follow up actions, and clarification, as well as an administrative decision, if necessary - will be delivered by the competent departments. Based on an interview conducted with one of the national housing officials,²⁷² it was revealed that the procedure does work, and the interviewee noticed that several housing officials have been condemned administratively and have received criminal punishment due to their misconduct. However, the data regarding the wrongdoers, sentences and number of the infringements are confidential, as per the interviewee's request.

The confidentiality of the internal procedures may suggest that the institution protects its own credibility. This situation is, of course, contrary to the transparency principle, which requires states to provide access to information. The practice of the internal accountability mechanism in the housing institutions seems to suggest a one-way approach only, indicating

²⁷¹ *Permenpan-Menteri Pendayagunaan Aparatur Negara* (Ministry of Administrative), currently the name of the ministry has been changed into the Ministry of Administrative and Bureaucratic Reform. This ministry is in charge of regulating the public servants at national level; therefore, the ministry is responsible for enacting the guidelines for all state apparatus to provide the best services to the people.

²⁷² Interview with a staff of Secretariat at the Directorate General of Housing Provision, Ministry of Public Works and Public Housing, Jakarta, 15 September 2016.

that the institutions only receive a complaint from an individual through their reporting procedure (this can be emails, hotlines, SMS, or web complaints). However, the institution does not report back to individuals on how the reports were handled and what was the result. As such, the one-way approach may hinder access to information for the people and further impair the accountability process, as individuals do not know whether their complaints are being handled seriously.

It might be challenging for the government if it has to report back to the complainants in addition to its various daily tasks. This, however, might be done over a semester, or on a yearly basis. The institution could publish all the complaints it has received and how they were handled, and put in place the reports online so that people can easily access them. The reports can also be used to improve its service to individuals.

11.6 REMEDIES AND REDRESS

One element that cannot be separated from accountability mechanisms is remedy. In addressing human rights infringements based on a development project, an effective remedy is essential. Remedies for human rights violation may take the form of either one or a combination of the following: restitution, rehabilitation, compensation, satisfaction, and guarantees of non-repetition.

Indonesian law guarantees compensation will be provided for people who are affected by development projects built for the sake of public interests; for example, the government adopted Law No. 2/ 2012 on Land Acquisition for Development in the Public Interest. The categories of ‘public interest’ according to this law are, for example: roads, highways, tunnels, railway tracks, train stations and their facilities, dams, irrigation systems, drinking water facilities, sanitation, sewage systems, ports, airports, bus stations, and hospitals.²⁷³ Article 36 of Law No. 2/2012 stipulates that compensation can be awarded in the form of cash, alternative land, resettlement, shared ownership, or in other forms to be agreed upon by the parties.

Although Indonesia recognises compensation and remedies, several drawbacks persist, such as the problem of discrimination.²⁷⁴ Daniel Fitzpatrick, a socio-legal scholar, discovered discrimination, particularly in the different forms of compensation awarded to owners, land occupiers who have or do not have certificates of title for their land, and groups who were

²⁷³ Law No 2/2012 (n 131) art 10.

²⁷⁴ Daniel Fitzpatrick, “Beyond Dualism: Land Acquisition in Indonesia” in Tim Lindsey (ed) *Indonesia: Law and Society*, 2nd edition, (Sydney: The Federation Press, 2008) 224 at 232-233. See also the report conducted by Human Rights Watch, stating that the compensation available is inadequate for several reasons, such as a lack of consultation, low compensation compared with actual loss, compensation being reduced by officials, etc. See details at Human Rights Watch (HRW), ‘Condemned Communities Forced Evictions’ vol 18 No. 10C (Jakarta: HRW 2006).

vulnerable to state coercion.²⁷⁵ The remedy and compensation scheme is even more complicated in cases of so-called “unlawful occupancy”²⁷⁶ and “illegal settlements.”²⁷⁷

The problems with compensation can be seen in the evictions based on the flood prevention system development project in Jakarta. Many of the evicted people in this case had lived in the informal settlements for years, without any objection from public entities. They also had access to government public services, such as electricity. Moreover, they paid taxes to a certain extent. In particular cases they were allowed to live in the area where they had the tacit agreement with the authorisation of state-owned companies. For example, in the Duri Tambora Jakarta, the community had a deal with the PT KAI, the Indonesian railroad company.²⁷⁸

People living in “illegal settlements” built their houses permanently, and in some cases the owners sold their houses or leased them to immigrants. In this regard, problems may arise such as who will receive remedy or compensation if any violation occurs (such as eviction), or if any disaster occurs. The Government of Jakarta stated that compensation is not available to those who built their houses in the “non-settlement” location. However, the government provided eviction victims with walk-up rental houses. For the inhabitants, the alternative place to stay offered by the government is unfair. As the inhabitants cannot own the accommodation, they only become tenants of the Government of Jakarta. Prior to resettlement, they owned the houses, although not the land. Following the eviction, the government did not provide cash compensation, because the government was of the opinion that the houses were built in prohibited areas.

Based on the law on land procurement, resettlement can be categorised as a form of compensation.²⁷⁹ Therefore, the Government of Jakarta has provided a form of compensation to the inhabitants. However, some deficiencies in the policies for resettlement still exist. These deficiencies include, for example, the discriminatory practices received by the legal residence and migrants, as discussed in Chapter 8. In addition, the decision to resettle inhabitants in rented public housing does not seem to consider the cultural and emotional condition of those inhabitants.

Currently, no legally binding instrument exists to regulate how the government can relocate or resettle people affected by a development project. In 2007, the UN Special Repertoire on the right to housing introduced a set of basic principles and guidelines on development-based evictions and displacement.²⁸⁰ This document emphasises the obligation of states to refrain from forced evictions, and to protect their people if such activities occur.²⁸¹

²⁷⁵ Fitzpatrick (n 274).

²⁷⁶ This term refers to those who occupied land long before the enactment of the Agrarian Law in 1960, as a result of the traditional “adat” means of acquiring land that is rampant in Indonesia. In addition, these occupations also occurred due to massive changes in urban areas and former colonial plantations. Although the agrarian law provides that *adat*’s long-term possession could still be governed as ownership rights, some of occupants had been evicted despite having paid land taxes for a very long time. See in Daniel Fitzpatrick (n 274), 238.

²⁷⁷ Illegal settlements refer to people living in areas that are not designated as housing complexes or settlements, including parks, riverbanks, railway tracks, national forests, etc.

²⁷⁸ United Nations General Assembly (UNGA), Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Raquel Rolnik (26 December 2013) UN Doc. A/HRC/25/54/Add.1, 16.

²⁷⁹ Law No 2/2012 (n 131) art 36.

²⁸⁰ United Nations General Assembly, *The Basic Principles and Guidelines on Development-Based Evictions and Displacement* (5 February 2007) UN Doc A/HRC/4/18.

²⁸¹ *ibid* para 1.

Moreover, in terms of eviction, the document highlights the interdependence of civil rights and the non-interference of home and private life with the right to adequate housing.²⁸² Development-based evictions should be:²⁸³ (1) authorised by law; (2) carried out in accordance with international human rights standards; (3) undertaken solely for the purpose of promoting general welfare; (4) reasonable and proportional; as well as, (5) regulated to ensure full and fair compensation and rehabilitation. ‘General welfare’, according to this document, refers to the urgent need to protect the most vulnerable groups in society.

The guidelines provide measures that should be taken by governments in every phase of an eviction, i.e. prior, during and post-eviction. This article does not discuss the first two phases, but concerns only the post-eviction phase. In this phase, states are obliged to provide fair compensation, and sufficient alternative accommodation or restitution when feasible. The compensation scheme should be carried out in a non-discriminatory manner, and should be immediately conducted following the evictions.²⁸⁴ In several eviction cases, local governments in Indonesia did provide alternative accommodation for registered residents, but compensation was rarely granted, or if compensation was granted the amount was usually less than the market price.

From the perspective of human rights, providing alternative accommodation in rented public housing is not sustainable in the long run. Notably, the difficulties that people face in paying rent, as well as the loss of community bonding, evidence the insufficiency of such a measure.

There is nothing wrong with providing public housing for people affected by development programmes, particularly if the design of public housing aims to tackle the problem of land availability that occurs in many major cities. However, the resettlement plan should be promoted to the affected community, so that it can participate in the decision-making process. Moreover, the change of environment from sociable riverbank settlements to multi-storey housing that is more separate may affect each individual’s social bonds within the neighbourhood. This social interaction is of substantial value to people living in slums. The spirit of togetherness - *gotong royong* - and helping each other that exists in such communities could significantly decrease if people’s shared spaces are split across different floors, or even completely separate if people end up living in different buildings, apart from one another.²⁸⁵ The adversity of this problem can be reduced by designing public housing which reflects the communal life of a society,²⁸⁶ for example by providing more public space within the public housing.

Based on the discussion in the previous paragraphs, the Indonesian government does recognise remedies in the form of compensation for the infringement of the right to housing based on development projects; however, there are still some elements that need to be improved, in order to guarantee the realisation of the human rights.

²⁸² *ibid* para 2.

²⁸³ *ibid* para 21

²⁸⁴ For the detailed obligations of states after eviction see the guidelines, *ibid*, paras 52-58.

²⁸⁵ See Chapter 8 and the discussion in ED Kusumawati, AG Hallo de Wolf and MMTA Brus, ‘Access to Public Housing for Outsiders: A Practice of Indirect Discrimination in Decentralised Indonesia’ (2018) 19 Asia-Pacific Journal on Human Rights and the Law 238.

²⁸⁶ Erna Dyah Kusumawati, ‘Between Public and Communal Interests: a Legality Issue of Forced Evictions Occurring in Jakarta’ (2018) 8 Indonesia Law Review 87.

11.7 ENFORCEMENT (EXECUTION OF COURT DECISIONS) MEASURES

As was previously discussed in relation to judicial accountability mechanisms (see Sections 11.4.1 and 11.5), domestic courts are increasingly playing a significant role as a forum for holding governments accountable, and in strongly advising sub-national governments to provide remedy and redress for violations of the right to housing. Despite the development of a body of jurisprudence to clarify the obligation on the right to housing, domestic courts and winning parties have struggled to execute the rulings; in particular, if the decision involves money as compensation awarded to the parties of the conflict.

One illustrative case is an eviction that occurred in Petamburan, Jakarta in 1997 (see text box 11.1). The Government of Jakarta evicted people due to the development of public housing, which was apparently delayed for five years following the eviction and people were left homeless from then onwards. In 2005, the Indonesian Supreme Court ruled that the Government of Jakarta breached the legal provision by conducting a wrongful act under the provision enshrined in Article 1365 of the Civil Code. Subsequently, the Court ordered the government to pay the sum of 4.7 billion IDR and provide housing units for the evictees, as had been promised.²⁸⁷ However, today, five years after the final court decision (or 22 years after the district court's decision to order compensation for the people), the Government of Jakarta has still not implemented the decision. Given inflation and the present economic situation, the value of the compensation may decrease, meaning that it will not be the same as was awarded by the Court at that time. To date, the affected people are still living in a slum surrounding the apartment block.²⁸⁸ The difficulty in enforcing the Court's decision to compensate stemmed from the development projects, which also occurred in previous cases, such as in the case of Kedung Ombo in 1983.

The procedure of enforcing the Court's decision in Indonesia gained its legal basis under the amended *Herziene Inlandsch Algemeine* (HIR) that was originally applicable in the colonial period. HIR is still applicable to date. Article 196 HIR suggests a certain measure that, if based on a legally binding court decision, one party is requested to pay a certain amount of money or provide another form of compensation. If one of the parties does not voluntarily carry out the ruling within a certain amount of time, the winning party may request an execution of the decision via the general courts.²⁸⁹ The request will then be examined by the court in a closed procedure, without any hearing, except that the court will call the defeated parties to explain why they did not carry out their obligations; then, the court provides a notice stating that the ruling must be executed within a maximum of eight days (*aanmaning*). If the defeated parties are still not willing to carry out the judgement, the court may order a seizure of assets in order to guarantee the right of the winning party.²⁹⁰

²⁸⁷ Petamburan case (n 83).

²⁸⁸ LBH Jakarta, 'Pilu di Balik Rusun Petamburan' (LBH Jakarta, 4 December 2018) <<https://www.bantuanhukum.or.id/web/pilu-di-balik-rusun-petamburan/>> accessed 13 March 2019; see also Rindi Nuris Verarosdela, 'Potret Permukiman Kumuh Warga Petamburan Korban Penggusuran 22 Tahun Lalu' (Kompas.com, 16 January 2019) <<https://megapolitan.kompas.com/read/2019/01/16/18414291/potret-permukiman-kumuh-warga-petamburan-korban-penggusuran-22-tahun-lalu>> accessed 13 March 2019.

²⁸⁹ Herziene Inlandsch Reglement – HIR (n 92) art 196.

²⁹⁰ *ibid* arts 197-200.

However, the practice of an execution phase is not without difficulty. For an individual case, the process is less demanding. However, if the defeated party is a governmental institution, the execution will be more complicated. Since the HIR only governs individual cases, such a regulation does not provide guidance for the execution of civil cases involving compensation that should be paid by a governmental institution. At the same time, for example in Indonesia, the courts cannot order the seizure of the government's assets²⁹¹ as a guarantee that the government will pay the compensation. A specific procedure must be followed for the execution phase, which means it often takes a long time to execute the ruling.

In numerous cases, the court did not mention the time limit within which the defeated party should carry out the ruling. For example, in the Petamburan eviction case, the court only stated that the government had to pay compensation, without stating when it should be executed.²⁹² In this case, it can be understood why the court either seemed reluctant to mention the timeframe or avoided it completely, as it did not want to intervene with the executive powers in planning budget resources for social policy.²⁹³ The affected people tried all the mechanisms available under the Indonesian law, including hearings with local government as well as with the regional parliament in 2015, yet they received only empty promises. The realisation of the court's decision is now in the hands of Jakartan politicians.

This case suggests that the right to housing, including aspects related to eviction, can be adjudicated in Indonesia, but that the execution of a case still depends on the willingness of the executive and legislative powers to budget for the amount of compensation in their expenditure. This procedure will hinder the enjoyment of the right to housing.

The domestic courts, as the final impartial institution of accountability can provide justiciability of the right to housing (and other human rights) by complementing the role of the legislative and executive powers in creating a just society. Hesitance to overpower executive and legislative powers is not pervasive, as the domestic court is constitutionally empowered to review a social policy programme that may involve housing rights (or other economic, social and cultural - ESC rights).²⁹⁴ However, the adjudication power is limited to human rights that are enshrined in the constitution.²⁹⁵ In this case, the right to adequate housing and other ESC rights can be adjudicated before the court, although the main arguments used for such infringements do not cite human rights norms, but instead use tort law to request compensation. The court should be more determined to put a reasonable timeframe in place for the government to award the compensation.²⁹⁶ This approach will advance the guarantee of the realisation of the court's rulings and further protect the right to housing of people affected by a development project.

²⁹¹ Law. No 1/2004 on State Treasury (*Undang No. 1/2004 tentang Perbendaharaan Negara*) SG 5/2004, art 50.

²⁹² See Petamburan case (n 83) 26-27.

²⁹³ Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009).

²⁹⁴ Y. P. Ghai, J. Cottrell, 'The Role of the Courts in the Protection of Economic, Social and Cultural Rights' in Y.P. Ghai, J. Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (Interights 2004).

²⁹⁵ Ludovic Langlois-Therien, 'The Justiciability of Housing Rights: From Argument to Practice' (2012) 4 *Journal of Human Rights Practice* 213.

²⁹⁶ Domestic courts in India and South Africa for example, have been taking a progressive steps to ground the government to realise ESC rights.

Another measure that could be an option is to adopt a mutually friendly agreement between the parties, in which a period is set for realisation of the decision that is facilitated by the court. Such an agreement may include convenient steps that can be followed, in order to prevent further harm while the governments adopt necessary measures for the full execution of the court's ruling. If the government then fails to realise its promises, the court could report the misconduct of the government to its principals (for example, to the Ministry of Home Affairs, and the president), asking for administrative sanctions with regard to providing resources in a timely manner.

A friendly settlement can also come in the form of negotiating compensation. This measure is currently being tried by the lawyers of the *Masenah-Bukit Duri Case I* (text box 11.2). They are approaching the government to request that it builds “*kampung susun*”²⁹⁷ as alternative compensation,²⁹⁸ rather than paying financial compensation as ruled by the courts.²⁹⁹ *Kampung susun* is preferable, because the affected communities can then live communally similar lives to previously, rather than in individual apartments.³⁰⁰

Moreover, the supervisory function of the parliament can also be used to urge the government to execute a decision. For future measures, legislation needs to be adopted which regulates the procedure for the execution of court decisions involving governments. As it is now, court decisions seem to have no teeth in the absence of a government's willingness to execute voluntarily.

11.8 PRELIMINARY REFLECTIONS

In general, all the accountability elements suggested by Helen Potts exist in Indonesia. Despite their shortcomings, including a lack of public participation, the government has tried to integrate these elements into public service delivery, particularly housing. As stated before, accountability as a process works continuously, in an endless circle. Using accountability as a process can be an avenue to improving the realisation of the right to housing in Indonesia.

Accountability is only viewed as a mechanism in Indonesia, meaning that government officials are accountable for their own misconduct. This chapter offers an understanding of accountability from a different perspective, seeing it as more comprehensive in nature, and discussing how accountability mechanisms can be included within an overall process of accountability. As a constructive and continuous process, accountability does not depend on the governments' efforts, since all stakeholders in the right to housing are involved, from the community level up, through housing officials, monitoring agencies, to judicial and non-judicial bodies and the House of Representatives. These stakeholders work in a circle to

²⁹⁷ *Kampung susun* refers to several rows of houses that are built on top of each other, with each level connected by ramps and social areas that resemble similar spaces in the real kampung. See Dames Alexander Sinaga, ‘What Is Kampung Susun and Why Do Jakarta's Urban Activists Love It?’ (JakartaGlobe, 15 March 2018) <<https://jakartaglobe.id/context/kampung-susun-jakartas-urban-activists-love/>> accessed 30 January 2019; see also Tito Murbiantoro et al, ‘Model Pengembangan Hunian Vertikal Menuju Pembangunan Perumahan Berkelanjutan’ (2009) 4 (2) Jurnal Permukiman 72 <<http://jurnalpermukiman.pu.go.id/index.php/JP/article/view/183/159>> accessed 30 January 2019.

²⁹⁸ A short conversation with the lawyers of the case - Vera Sumarwi - via social media (WhatsApp) 18 March 2019.

²⁹⁹ Masenah-Bukit Duri I case (n 83).

³⁰⁰ See also the discussion in Chapter 8.

participate, monitor and adjudicate misconducts. The government cannot tackle accountability alone.

Housing policies in Indonesia have been proved to lack public participation. Although the government has introduced a participation model starting from the smallest district, such participation cannot precisely target the affected community. This fact can be seen in numerous development projects. In future, the government needs to map the affected communities and involve them in the decision-making processes that influence their enjoyment of the right to housing. In several examples, the governments, both national and local, tend to practice the top-down approach when implementing housing policy, rather than the bottom-up approach.

Moreover, monitoring and supervision still lag behind. Although the Indonesian people are starting to realise their vital role in providing input for the government, the supervisory function of the government in monitoring housing-related programmes is still lacking. This was proven by the fact that there is no monitoring available for the development and distribution of public housing. For example, subsidised public housing can be sold or rented to other people who are not entitled to government subsidies. Individuals and NGOs have played an active role in monitoring and reporting officials' suspected misconduct in the field of housing to the supervisory bodies. Nonetheless, the government cannot take this external role for granted. The internal mechanisms for housing policies are relatively weak and need more focus.

As was discussed in previous sections, a variety of accountability mechanisms are available in Indonesia. The mechanisms can be found in the form of judicial, quasi-judicial and administrative accountability, to which individual or groups (as rights-holders) can submit a complaint on housing-related rights, to hold government officials accountable and request redress and remedy in case of any damages. Moreover, political and social accountability exist, but these two types of accountability were not central to the discussion in this book.

People affected by development projects can employ most of the available mechanisms, although the choice of mechanism will depend on the nature of their case, as well as on the parties involved. People are aware of these procedures, and they continuously employ the mechanisms to defend their rights, as has been illustrated by the number of evictions based on development projects that have been brought before the courts.³⁰¹ The court cases often use all the levels of procedure, for example from the court of the first instance to the Supreme Court. People usually claim against the government either through representatives (lawyers or NGOs), or by themselves. The success of such claims cannot be predicted, as they depend on the evidence presented before the mechanisms and on judges' interpretations of the applicable law and cases.

As was discussed above, judicial accountability does possess numerous drawbacks. Firstly, even though an individual can claim housing-related rights to the domestic courts through civil and administrative proceedings, the nature of the case is not a human rights violation. Civil proceedings emphasise more unlawful acts enshrined in the Civil Code than human rights violations. Notwithstanding the numerous human rights provisions stipulated in

³⁰¹ In addition to the cases mentioned in this article, there are also several other court cases related to evictions based on development projects, both in Jakarta and in other cities. For example, at least three cases have been brought before the Yogyakarta Administrative Court in relation to the construction of the new Jogjakarta International Airport, claiming the illegality of the project and that human rights infringements were caused by the construction of the airport.

both the Constitution and Human Rights law, as well as in other housing-related legislation, the breach of the right to housing cannot be the primary legal reasoning behind bringing the government to account. Second, the national human rights instruments (not to mention the international instruments) have often been overlooked by judges, resulting in a lack of human rights perspective in court rulings. Third, the administrative procedure, before the administrative court focuses on the final and binding administrative decisions that are directed towards individuals or groups, often seems to fail to understand the human rights dimension of the cases. Fourthly, the two domestic proceedings are private in nature, meaning that the result of the proceedings is not generally applicable and may not cause substantial changes in housing-related issues. Fifth, there are no domestic courts or institutions that can address the unconstitutionality of the governments' actions. Sixth, most of the judgements on the right to housing-related cases discussed in this chapter inherently lack legal reasoning, which include a lack of human rights law reasoning. Sixth, attention to improving and updating the judges' perspective and knowledge on human rights is vital; such an effort will enable judges to better comprehend the human rights dimension in cases related to housing rights that are brought before them.

In addition to the civil and administrative proceedings, individuals or groups can file a judicial review of legislation that is in conflict with the Constitution or a higher level of law. The first type of judicial review should be heard before the Constitutional Court, while the second type is heard before the Supreme Court. Judicial review before the Supreme Court may also be pursued, in order to annul lower level legislation that contradicts the higher-level legislation. The Court has been criticised for not being transparent and for providing short and superficial legal reasoning.

Quasi-judicial mechanisms available in Indonesia are provided by the KOMNAS HAM and Ombudsman. KOMNAS HAM deals with complaints regarding suspected human rights violations committed by the government or private actors. The Ombudsman focuses on complaints related to maladministration on the part of the government. These two bodies produce mutual agreements and recommendations for disputes which, to a certain extent, are binding for the two conflicting parties. Although, in many cases, recommendations made by these bodies are often neglected. The weakness of the quasi-judicial mechanism is that the procedure is not open to the public, and it only involves the parties and witnesses who are called by the bodies themselves. The recommendation is also not disclosed, although the Ombudsman may hold a press conference to provide public information on the cases, especially for cases involving significant public interest. In future, a more transparent process should be promoted to further advance the implementation of recommendations.

Administrative accountability is available for housing department staff who have breached their official obligations. Administrative accountability relates to disciplinary measures given to actors by their principals. People can report a breach of the internal procedural mechanism. Nonetheless, this procedure is not open to the public, particularly where it concerns the following up of reports which adversely impact the idea of accountability as a process.

The available accountability mechanisms related to the right to housing in Indonesia are limited to mechanisms that are only available at the domestic level. Indonesians cannot use mechanisms available at the international level to claim an infringement of economic, social

and cultural (ESC) rights, i.e. individual complaint procedures before the Committee on ESC rights. Such access is only applicable if the Indonesian government has ratified the Optional Protocol II of the ICESCR. At this moment, violations of ESC rights can only be brought before national mechanisms.

The other necessary elements in the concept of accountability as a process are remedy and redress. The Indonesian legal system recognises remedy and redress for any harm caused by development projects or unlawful acts committed by states' actors. The most common forms of remedy and redress practised by the Indonesian government are resettlement and compensation. The latter form is often decided through a civil proceeding before the domestic court. In certain cases, compensation may also be granted by consultation, after considering the fair price of people's possessions. This method is used to compensate for land and houses for development projects. However, compensation decided by the domestic courts is somewhat problematic and cannot be executed in the short term. There is a need to establish a procedure that enables the execution of a binding court decision and obliges the government to compensate for the loss.

Most importantly, this chapter has demonstrated that accountability mechanisms alone cannot fully advance the implementation of the right to housing in Indonesia. Although the Indonesian government has fulfilled its international obligation to establish accountability mechanisms at the domestic level, numerous measures still need to be taken to improve the processes involved in achieving full realisation of the right to housing. Full integration of accountability elements in housing-related policy making will undoubtedly boost the implementation of housing rights. Public participation and monitoring should exist from the beginning of the decision-making process right through to the process of bringing the states' actors to account. Furthermore, the monitoring process will still be needed, to ensure that the result of the accountability process is implemented, and that remedy and redress are provided to the affected people within a reasonable timeframe.

CHAPTER 12

CONCLUSIONS AND RECOMMENDATIONS

12.1 INTRODUCTION

The purpose of this study is to examine whether accountability, understood as a continuous process, can advance the realisation of the right to housing in Indonesia. As a developing country Indonesia faces alarming challenges when it comes to fostering development towards the achievement of general welfare. The vast territory and considerable population that Indonesia has have both positive and adverse effects on its development. One of the main challenges faced by the Indonesian government is the provision of affordable and adequate housing for its citizens, particularly the disadvantaged groups. Despite the international and national recognition of the right to housing as a fundamental human right, there are significant gaps in the national implementation.

The present study is underpinned by the following reasons. Firstly, there is a lack of public housing arrangements for low-income groups, a housing backlog, as well as that there are other issues related to housing in Indonesia. Access to housing remains a major issue in Indonesia, particularly for certain groups such as migrants and low income populations. Secondly, Indonesia's domestic legislation guarantees the right to housing. Moreover, in 2005 the Indonesian government ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), that guarantees the right to adequate housing. As a part of the national implementation of its international obligations based on the ICESCR, the government has adopted national housing policies. However, little attention was paid to how international obligations extend to local governments in a decentralised system. Thirdly, several infringements of the right to adequate housing were identified and practised at the local level, such as discriminatory practices and forced evictions. Therefore, this study was conducted more on the local level rather than on the national level.

For these reasons, this study has reviewed international human rights law relating to the right to adequate housing, primarily the ICESCR, to lay the international obligations which bind Indonesia. Moreover, national and local legislation related to housing have been reviewed to assess the extent to which the Indonesian government has adopted measures to progressively realise the right to housing within its territory.

This study aims to identify the barriers Indonesia faced in implementing the right to housing at the local level and to introduce the concept of accountability as a process that can be used to address the housing problems. This concept was adopted instead of mere accountability as a mechanism. Accountability as a process, as discussed in Chapter 9, involves five elements, i.e. participation, monitoring, accountability mechanisms, remedies and redresses, and enforcement measures. These five elements work continuously in a circle. Accountability mechanisms refer only to the procedure of holding the officials accountable for their actions. The preference to the concept of 'accountability as a process' was made due to two reasons. Firstly, the fact that Indonesia has recognised accountability as a principle of good governance.

Secondly, it has established relatively advanced accountability mechanisms. However, deficiencies in these mechanisms still exist, which have hindered its utilisation in hearing and adjudicating the violations of the right to housing by states' actors.

The findings and conclusions of this study will be highlighted in Section 12.2, and, subsequently, Section 12.3 will provide the contributions of this study as well as its limitations. Furthermore, Section 12.4 will suggest a few topics for future research and Section 12.5 will recommend policy changes for the housing policies and legislation of Indonesia.

12.2 SUMMARY AND CONCLUSIONS

This study is divided into four parts. Part 1 establishes the basis for this study and studies the right to housing worldwide. Moreover, the legal obligations of states on the right to adequate housing were analysed. These require the states to put into effect their international obligations on a domestic level. It also evaluates the extent to which Indonesia has implemented its obligations into its housing policies and legislation. Chapter 1 provided an introduction to the issue and set research questions for the study. Moreover, it outlined the methods, which are doctrinal and comparative as well as case study based, employed in this study to answer the research questions.

Chapter 2 focuses primarily on the international right to adequate housing, and its content, in answering the following set of questions: What does the right to adequate housing entail? What are the core obligations enshrined within it? Which are the progressive or the immediate obligations? How is the right to housing regulated and interpreted by the UN and the regional human rights bodies? The right to housing in this study does not simply mean the right to a building, but it also encompasses the right to housing as a home, which includes the relationship between inhabitants and the community. This follows the practices of the UN bodies and the regional courts have shown the extension of the protection of the right to housing to other human rights such as the right to property, the right to life, the right to health, and the right to respect private life.

Under the general comments on the right to housing, the Committee on Economic, Social and Cultural Rights (CESCR) has established the contents of the right to adequate housing encompassing both positive and negative obligations that should be implemented by states. These obligations include ensuring the security of tenure, meaning that the people can securely occupy their houses, amongst other things. Moreover, housing must also be physically accessible, adequately located, affordable, and culturally appropriate. Yet, the nature of these elements is unclear, particularly in how states should realise them. Questions may arise, such as whether member states have to fulfil all of the aspects mentioned in General Comment No. 4; whether states may pick few elements and leave the others out; If yes, how? Are the contents of the right mentioned in General Comment No. 4 hierarchical? Such an uncertain nature, makes it very difficult for states to fulfil all elements of housing adequacy and as such General Comment No. 4 needs to be further clarified.

Furthermore, the right to housing contains negative obligations, which require states to refrain from a certain action, for example, forced evictions. In addition, states are not allowed to adopt housing legislation that is contrary to the general content of the right to housing. In general, positive obligations have a progressive nature, meaning that states may gradually

achieve the full realisation of the right to housing based on its available resources. However, negative obligations are immediate in nature and should be carried out, directly, by adopting national housing policies and refraining from forced evictions and discriminatory practices. Failing to fulfil negative obligations, with no justification based on legitimate human rights limitations under Article 4 ICESCR, will likely constitute a violation of the right to adequate housing.

Unlike other socio-economic rights, the relationship between positive obligations and violations of the right to housing is not clear. There is no agreement between the advocates of the right to housing on what constitutes as a violation of the right to housing outside of a breach of negative obligations. However, the CESCR in General Comment No. 4 mentions that the “general decline in living and housing conditions caused by states’ policy and legislative decisions, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations”¹ related to the right to housing. Another means to examine whether a particular form of state practices violates the right to adequate housing is to use Article 4 of the ICESCR on the requirements for a legitimate human rights limitation.² If a practice fulfils the general limitation requirements, such practices do not constitute a violation and vice versa.

Chapter 3 investigates the applicability of international treaties in the Indonesian legal system. While the Indonesian Constitution is silent with regard to the approach towards the incorporation of international law at the domestic level, government practices have shown an ambiguity between monism, dualism and mixed approaches. In the absence of guidance in the Constitution, the Constitutional Court, in its rulings, gave its preference for the national law over international law. The Law on the Formation of Legislation which also stipulates the hierarchy of legislation in Indonesia, does not recognise international law *per se* as a part of the national law. Although it does recognise statutory laws through which international law is often ratified, it is unclear whether the statutory law recognised in the hierarchy of national legislation includes the statutory law which ratifies international instruments. However, the Indonesian Law on Human Rights suggests that international human rights treaties that have been ratified by the Indonesian government, have become national law, indicating that human rights treaties are applicable and can be invoked before domestic courts. Nonetheless, in practice, information on how to directly invoke these treaties remains scarce, as evidenced by the analysis of relevant cases provided in Chapter 11.

The examination of how Indonesia has put its international obligations on the right to adequate housing into effect, as discussed in Chapter 4, employed a normative legal method and evaluated Indonesia’s adherence to the right to adequate housing. Indonesia has started to adopt national housing policies and legislation decades before its accession to the ICESCR. Nationally, at least two ministries are involved in housing policies: the Ministry of Social Affairs and the Ministry of Public Works and Public Housing. The first Ministry deals with housing improvements for the poor, and the latter Ministry takes charge of developing houses

¹ United Nations Committee of Economic, Social and Cultural Rights, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23, para 11.

² International Covenant on Economic, Social and Cultural Rights (adopted in 16 December 1966, entered into force 3 January 1976) 993 (p3) UNTS (ICESCR). See detail in Art 4 that allows states to limit human rights if the “[...] limitations are determined by law, [...] may be compatible with the nature of these rights, and solely for the purpose of promoting the general welfare in a democratic society.”

for the low-income groups, including the development of public housing. Furthermore, a few other actors serve as stakeholders in housing policies, such as banks and private developers.

Due to the decentralised system adopted by Indonesia, housing affairs are delegated to local governments. In this regard, the national government adopted the national housing policies as a guide for local governments. Although national funding assisted in providing public housing, local governments are allowed to explore alternative financial resources to support their local housing policies. Nonetheless, not all local governments actively searched for other resources to provide access to adequate housing for their inhabitants; thus, they depend only on national funding. Even though some local initiatives were implemented (such as housing improvement programmes) this dependence limits their efforts to improve housing conditions. Nonetheless, the targeted demographic was limited to those who already owned houses and did not include homeless people.

One of the Indonesian policies related to housing is a programme to build one million low-cost houses per year. This programme was launched in 2015. For three years, the Indonesian government has not even come close to fulfilling those numbers. By the end of 2018, the targets has been fulfilled mainly by houses built by private developers. It should have been foreseeable that the backlog would increase each year and, thus, there would be more people without access to adequate housing. Past experience showed that low cost houses were bought and owned by people from the middle income or high income, and thus, the success of merely building houses is not yet sufficient. It should ideally be followed by a proper distribution and monitoring in order to ensure that the lower incomes can afford such houses. It would have been better to directly address the people in need of housing to ensure that the government does not build houses for groups that are not prioritised by the programme. It is acknowledged that low-cost houses are often built in the outskirts of the cities, which lack public transportation, and thus, discouraged potential buyers, as the settlements are too far from their workplaces. This example illustrates the need for this study to include focus on local policies by local governments, as will be the focus in its second part.

After discussing the commitments and measures adopted by the national government to realise the right to adequate housing as well as the distribution of affairs to local governments, Part II of this thesis examines the practices of four local governments (Jakarta, Surabaya, Yogyakarta and Surakarta) in relation to the national legislation and international instruments. The four local governments' practices and approaches in protecting and realising the right to adequate housing for their inhabitants are examined in Chapter 5. In addition to the normative legal approach, Chapter 5 employed an empirical approach based on qualitative research (interviews) to gain a better understanding of the government's practices, rather than only utilising information from reading legislation and theories. These four local governments have adopted local housing legislation and policies to improve inadequate houses, and for the development of rented public housing for those with low incomes. From these two approaches, it can be understood that local governments face many pervasive and persistent challenges to realise the right to housing due to a few reasons. In particular, three specific challenges were identified: the land tenure system, indirectly discriminatory practices towards certain groups in accessing public housing, and forced evictions due to development projects.

The first challenge of the land tenure system is discussed in Chapter 6. The combination of "unfinished" land registration and the tenure system in the four cities has limited the land

availability for developing housing complexes. The four cities have a variety of tenure systems resulted from a mixed system of national law, customary law and the post-colonial arrangements. In each of these cities, private parties, including palaces, rich individuals, and private companies, possess a massive amount of land. This situation has made land unaffordable or even unavailable for the poor. Additionally based on interviews with local government officials, the lack of available data on government-owned land assets created a challenge in providing the sites for settlements. The government may adopt measures to increase land availability, for example, through land consolidation or buying back land from private companies, investors or individuals. However, this requires an considerable amount of time and financial resources. The main conclusion is that there is an urgent need to solve the problem of land registration, including provide information on data of the governments' assets.

In Chapter 7, the second challenge, which relates to the existing discriminatory practices for internal migrants, is addressed. All of the local governments examined in this study have attempted to provide rented public housing for low-income groups either with the assistance of the national government or through their own local expenditures. The distribution of public housing is the responsibility of local governments. In distributing the units, the local governments prioritised communities affected by development programmes, such as the development of dams or the eradication of slums. However, the local governments further specified more detailed requirements for accessing housing. One of the requirements is the obligation to have a residence card. This requirement forms a barrier for internal migrants who had kept their previous residency. Following a thorough examination of the practices and standards enshrined in Article 4 ICESCR, General Comment Nos. 4 and 7 as well as relevant literature, Chapter 7 concludes that local regulations giving preference to locally registered residents to access public housing led to indirect discrimination against internal migrants who did not register locally. Furthermore, this preference cannot be considered as a human rights limitation, as permitted by the ICESCR, because it does not fulfil the requirements enshrined therein, as the preference is not compatible with the nature of the right to housing. Moreover, the preference does not solely aim to promote the general welfare in a democratic society. The obligation on the right to adequate housing is not limited to just providing public housing *per se*; the obligation also extends to equitable distribution to those in need.

The third challenge faced by local governments is the problem of forced evictions as a result of development projects. Chapter 8 includes a case study on forced evictions carried out by the Jakarta government. The government planned to build an embankment on the Ciliwung River which led to the government insisting on resettling people living on the riverbanks. This plan aimed to restore the function of the river to hold rainwater and to prevent Jakarta from flooding. Chapter 8 examines whether the forced evictions could be justified, or constituted a violation of the right to housing. According to the national legislation, building dams for flood prevention systems is categorised as a public interest. However, to fulfil the requirement as a justified forced eviction, a mere reason of public interest is not enough. A legal eviction should be (1) authorised/determined by law, (2) compatible with the nature of human rights, (3) undertaken solely for the purpose of promoting the general welfare, (4) reasonable and proportional, (5) carried out in accordance with international human rights standards and (6) be accompanied with full and fair compensation and rehabilitation for those affected.

Following a thorough investigation and analysis, it can be concluded that the forced evictions carried out by the Jakartan government did not comply with the standards set by the ICESCR. These non-compliances include (1) the discriminatory resettlement to rented public housing only for residents, (2) the government's ignorance towards the ongoing legal process before the domestic courts, (3) the imbalance of power, and (4) the lack of compensation for people who owned permanent buildings. To date, the forced eviction case is still ongoing, and even though the high court granted compensation for the people who lived on the riverbanks, the Supreme Court is still hearing the case.

In light of the challenges faced by local governments, this study aims to address the challenges from the perspective of accountability as a process and to what extent this concept could help the government of Indonesia to achieve the full realisation of the right to housing. Thus, Part 3 of this study investigates and lays the basis for the crucial role of accountability as a continuous process to help ensure the realisation of human rights, particularly the right to adequate housing.

More specifically, Chapter 9 provides the basis of the need for accountability as a process in realising human rights. This chapter addressed accountability as a constructive process. This concept contains elements that served as a basis to analyse the existence of accountability for the right to adequate housing in both the international and Indonesian systems. These elements are societies' participation in the decision-making process, monitoring, accountability mechanisms and the availability of remedy and redress. Moreover, Chapter 9 offers a new element to ensure the realisation of the right to housing, namely enforcement measures. Enforcement measures are missing in theories of accountability and have been proven to be the weakest part in executing the results or decisions of the accountability mechanisms. The delayed payment of the compensation for land expropriation, as experienced by the affected communities in Jakarta, may cause further deprivation from enjoying their right to housing. In this regard, and even though an accountability mechanism is accessible and can be used to claim human rights infringements, the mechanism does not succeed in upholding the human rights protections since the decisions of the mechanism's bodies are difficult to implement. The primary reason for the lack of execution of the binding decisions involving the government is that there is no applicable enforcement measure to compel the government to comply with the decisions within a reasonable time. The absence of such measure allows the government to postpone the implementation of the decision without any time limit.

Chapter 10 clarifies the term accountability in human rights literature. The UN human rights bodies have made numerous referrals about the need of accountability despite zero references to accountability in the international human rights instruments. These bodies seem to refer to the concept of accountability as mechanism rather than to refer it as a continuous process. More specifically, Chapter 10 sets up an analytical framework for accountability as a process both at an international and national level. The framework starts by differentiating between the two actors in human rights regimes, namely the duty-bearers (the states) and the rights-holders (the people). Furthermore, the framework illustrated what the rights-holders could do to uphold their human rights through the accountability elements.

Chapter 10 tests the accountability elements (public participation, monitoring, accountability mechanisms, and remedy and redress) of the right to adequate housing at the

international level. The elements of participation are similar to those at the national level. Only the national governments and specific international NGOs could participate in the international law-making process. This participation system at the international level works as a representative system in a state. Once a national government has agreed to be bound by an international treaty, the treaty will bind the entirety of its territory. Several UN bodies, through state reporting procedures and individual complaints, have carried out monitoring of the implementation of the right to housing.

The mechanism that can be used, to hold a state accountable for the violation of the right to adequate housing at the international level, is individual communications before the Committee of the Economic Social and Cultural Rights (CESCR).³ This mechanism is only available for states who have ratified the Optional Protocol to the ICESCR (OP). However, currently no enforcement mechanisms are available to ensure that the states in question will fully implement the decision of the CESCR. Moreover, the CESCR has so far adopted views on only two cases with regard to violations of the right to housing.⁴ In these cases, the Committee required states to provide alternative housing for people evicted from rental buildings.⁵ Furthermore, the Committee considered that there was a need to ensure that government authorities employ all available measures to provide maximum protections to prevent people from being evicted from their homes.⁶ However, the compliance of the member state in question (Spain) with the views of the Committee remains unclear. In any event, the individual complaint mechanism before the CESCR could be an avenue for protecting the right to adequate housing if the domestic procedure has been exhausted or when it is unavailable or ineffective.

The framework discussed in Chapters 9 and 10 is considered to be an advantageous tool, which can be used to analyse accountability as a process in the Indonesian context. Chapter 11 closes this study by analysing each element of accountability as a process for the realisation of the right to housing in Indonesia. Housing policies in Indonesia have been proven to lack public participation from the affected communities. In numerous examples, the government, at both the national and local levels, tended to practice a top-down approach when implementing these policies, rather than a bottom-up approach. Moreover, monitoring and supervision continue to be the weaker parts of accountability, particularly in the internal monitoring of the development and distribution of public housing programmes. In addition to the internal monitoring, individuals and NGOs have played an active role in monitoring and reporting officials suspected of misconduct in the field of housing to the supervisory bodies, such as KOMNAS HAM and the Ombudsman.

As a democratic state, Indonesia has established a variety of accountability mechanisms; these include judicial, quasi-judicial and administrative accountability mechanisms. These mechanisms enable individuals or groups as right-holders to submit a complaint on housing-related rights to hold the governments and the officials accountable, and to request redress and

³ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc. A/63/435.

⁴ Mohamed Ben Djazia and Naouel Bellili v Spain (005/2015) UN Doc. E/C.12/61/D/5/2015 (21 July 2017); I.D.G v Spain (002/2014) UN Doc. E/C12/55/D/2/2014 (13 October 2015).

⁵ Mohamed Ben Djazia and Naouel Bellili v Spain, *ibid*, para 13.

⁶ I.D.G v Spain (n 4) paras 12.4 and 13.1.

remedy in the case that any damages occur. However, judicial accountability does possess numerous drawbacks; for example, human rights infringement-related complaints must be based on the unlawful acts provision under the Indonesian Civil Code. The judges of the cases often did not consider the human rights elements in their judgments. Furthermore, the nature of the civil and administrative proceedings is limited only to the claimants and does not (in principle) influence the general condition of the fulfilment of the right to housing. In fact, no domestic courts or institutions that address the unconstitutionality of governments' actions are available. In theory, international human rights norms ratified by the Indonesian government can be adjudicated before domestic courts; however, court practices suggest the opposite, namely that human rights norms are not taken into consideration when involved in a civil or administrative court's proceedings. Moreover, an individual or group can file a request for the judicial review of legislation that is contrary to the Constitution, at both the Constitutional Court and the Supreme Court.

Quasi-judicial mechanisms are also available in Indonesia and these are provided by the KOMNAS HAM and Ombudsman. KOMNAS HAM deals with complaints regarding alleged human rights infringements committed by the government or private actors. The Ombudsman focuses on complaints related to maladministration conducted by the government. The weakness of the quasi-judicial mechanisms is that its procedures and the recommendations are not disclosed to the public. In addition, such closed procedures also exist in administrative accountability.

The Indonesian legal system recognises remedy and redress for harms caused by development projects or unlawful acts committed by state actors. Compensation and resettlement are the most common forms of remedy and redress that can be granted to individuals or groups. However, compensation that is decided by the courts through civil proceedings tend to face difficulties in the execution due to procedural bureaucracy. The excessive time to finally receive the compensation indicates that the procedure still does not work effectively in providing protection.

In conclusion, the government of Indonesia (national and local) has adopted numerous and specific measures to realise the right to adequate housing as enshrined in the national legislation as well as in the international human rights instruments. The measures include adopting policies and legislation related to housing. However, Indonesia clearly still faces great challenges in fulfilling the normative contents of the right to adequate housing for its poorer citizens. The country did fulfil some of its minimum core obligations, such as recognising the right to housing at a national level and establishing national housing strategies. Yet, this research also showed that to a certain extent Indonesia has not fulfilled their negative obligations related to the right to housing, particularly in adopting non-discriminatory provisions to public housing and has failed to refrain from forced evictions. To this extent, the accountability mechanisms available are ill equipped and unsuccessful in guaranteeing and protecting the human rights of the affected communities.

In addition, several lacunas between law and practice were found. For example, the right to housing not only concerns providing buildings, but is a much more encompassing right. It involves countless factors such as planning, land availability, budgeting as well as cultural norms. All of which need a comprehensive approach for the coordination and understanding of the human rights perspective from all levels of government involved in housing policies.

Most importantly, in order to give a full implementation of the right to housing, the availability of accountability mechanisms alone cannot adequately implement the right to housing in Indonesia. Although the Indonesian government has fulfilled some of its international obligations, numerous other measures still need to be improved to achieve a full realisation of the right to housing. The full integration of accountability elements in housing-related policymaking will undoubtedly boost the implementation of housing rights. The governments should ensure that public participation and monitoring exists at the beginning of the decision-making process up until the process of making the state actors accountable. Furthermore, monitoring is also needed for the executing the results of the accountability mechanisms. This monitoring aims to ensure that the remedies and redress are, in fact, provided to the affected people in a reasonable time. Additionally, it is vital to establish enforcement measures to address lack of action governments in providing remedy and redress following a binding decision. Such measures can ensure that the affected communities will not suffer any longer from any human rights infringements.

12.3 CONTRIBUTIONS AND LIMITATIONS OF THIS STUDY

12.3.1 Contributions of this study

This study makes several contributions to housing policies and to the right to housing studies. Housing research in Indonesia is mostly discussed from a spatial planning perspective and does not seem to take a human rights point of view into consideration. This study contributes to the understanding of housing as an entitlement and not as a product. It adds a deeper insight into housing and human rights literature in Indonesia. Moreover, this housing-related research focuses more on the policies at a national level. This research is of particular importance as it did not only examine the implementation of the right to housing at the national, but it also investigated the implementation at the local level. The identification of the barriers that are faced by local governments in implementing national legislation can contribute to the improvement of housing policies, and can help eliminate future obstacles, which might lead to full compliance of Indonesia's minimum core obligations related to the right to housing.

Adding to the contributions made by this research as a whole, individual parts of this study provided insights into scholarly discussions. It further proposed suggestions about how the right to housing can be better protected and implemented in Indonesia. This can be achieved, for example, through the identification of the lack of monitoring in Indonesia's housing policies as well as the conflicting national regulations with regard to the decentralisation of housing affairs as discussed in Chapter 4. This will be very beneficial for adopting housing policies in the future. Furthermore, this research suggests to address the need for clarification of the position of international law within the Indonesian domestic legal system. Such a clear position will help judges to interpret and use international human rights norms in domestic court cases.

Furthermore, the findings elaborated upon in Chapters 6, 7 and 8 suggest that more efforts should be taken to improve the implementation of housing rights. For example, Chapter 7 identifies that a seemingly neutral legislation may hinder the human rights of a certain group. This finding could assist the local governments by helping them recognise other possible provisions that might be of a discriminatory nature and, furthermore, amend these provisions.

Another example discussed in Chapter 8 is that not all evictions based on development projects are legitimate. The governments should take advantage of international guidance, as a starting point, for arranging a legitimate eviction without depriving people of their right to housing.

The final part of this thesis contributes to the identification of the need to integrate accountability as a process in adapting housing policies. In previous literature, accountability has only been seen as a mechanism to hold actors accountable and, as seen from the discussion in Chapter 11, it has been proven that the existing mechanisms have inherited numerous deficiencies. By adopting the concept of accountability as a process, accountability could benefit the realisation of the right to housing, starting from the decision-making process to the enforcement of the decisions of accountability mechanism bodies. In short, the government could benefit from adopting this integral approach in adopting a comprehensive housing policy, while at the same time ensuring and protecting the right to housing. Indeed, this approach could also be implemented in other human rights, particularly in economic, social and cultural rights.

The final contributions of this research would be the idea of including enforcement measures as one of the elements of accountability as a process. Although the existence of other elements is recognisable, without a proper and effective procedure to execute court rulings (as well as other accountability bodies' recommendations, if applicable) with regard to compensation payment, the affected communities may continue to suffer.

12.3.2 Limitation of this study

This research has addressed numerous issues on Indonesian housing policies in relation to their compliance with Indonesia's international obligations on the right to housing; however, there are a few limitations.

The first limitation is related to location. This study did not aim for a generalisation with regard to housing conditions across Indonesia. The empirical research of this study only consists of four regions and all of these regions are only located on the island of Java. Although it is undeniable that the findings indicate a more general picture of how the Indonesian government has implemented its obligations to respect, protect and fulfil the right to housing, more research needs to be carried out in different regions and islands to localise the knowledge and obtain a more thorough picture.

The second limitation observed is the unavailability of court cases related to the evictions that are discussed in this study. As explained in the methodology section, not all court rulings, particularly those of the courts of the first instances, are available. The analysis of the court cases in this study mostly depended on the Supreme Court's judgments as the decisions become final and binding at this level. The decisions of the district courts are crucial if the Supreme Court has delivered either a similar or a contrasting judgment. In these two situations, the Court seldom mentioned the legal reasoning of the courts of the first instances. If the Court has its own legal reasoning, it is sometimes very scant; therefore, it was challenging to analyse and compare the available court cases.

In light of the limitations identified above, a few research topics to fill the discrepancies, and to supplement this study, will be suggested in the following section.

12.4 SUGGESTIONS FOR FUTURE RESEARCH

Drawing on the analysis, results and limitations of this study, further research can be conducted to investigate housing-related issues in Indonesia. Such research could advance the domestic implementation of the right to housing. There are four topics of research that deserve special attention in future work of housing research.

Firstly, concerning the vast territory of Indonesia, research investigating the practice of local governments in providing access to public housing in other cities, particularly the eastern provinces, is required. The variety of local cultures, regulations and regional customary laws might influence the housing policies. Together with the results of this present study, a study on other cities can be used to urge the government to supervise local governments more stringently and to comply with international and national legislation on the right to adequate housing.

Secondly, research on either the effectiveness of judicial accountability on the violation of human rights in general or, in particular, the right to housing is needed. The focus of this future research should be to investigate court decisions in cities that experience problems with housing. As Indonesia's territory is very large, this type of research may need to be conducted several times and perhaps annually. The results can be used to build a database on court decisions on housing issues and it can be used to analyse a court's effectiveness in dealing with housing cases.

Thirdly, research about judicial accountability could also be conducted with a case study approach. The research may examine how domestic judges interpret or employ international human rights norms, both in civil and administrative proceedings, related to the violation of the right to adequate housing. Moreover, the research could address a question on legal transplanting, particularly on how Indonesian judges could "borrow" judgements from courts in other countries that have dealt with cases of a similar nature to those brought before Indonesian courts. This research could be conducted by interviewing judges and investigating their opinions on transplanting foreign or international norms to the Indonesian courts.

Fourthly, another potential research line could be on the evictions from public housing. With the increased usage of public housing by the low-income groups in big cities, there might be a possibility that numerous evictions will occur due to the breach of the rental agreement, such as rent arrears or the tenants infringing upon public housing regulations. This research seemingly would not fall under the right to housing, as the eviction would stem from a breach of civil agreement. However, the CESCR, in one of its views related to eviction, has confirmed that the obligation to provide alternative accommodation has been extended to people evicted from rental premises. Since the government has not yet paid too much attention to this sector, despite at the same time resettling people living in slums to the rented public housing, it can be predicted that the potential eviction from this sector will be high. Research on this topic would assist the government in adopting policies that comply with their international obligations related to the right to housing.

This study has provided a normative overview and analysis on the implementation of, as well as the need to employ, accountability as a process to advance the realisation of the right to housing in Indonesia. Supplementing the normative and qualitative work presented in this study with quantitative research would provide a crucial contribution towards seeing more vividly and clearly the sheer amount of eviction cases, the number of discriminatory practices

of local governments and the number people affected by such policies. Since research on housing related issues, particularly those related to human rights, is still lacking, more research on housing related issues is required in order to contribute to the development of housing policies and promote the full realisation of the right to adequate housing in Indonesia and worldwide.

12.5 RECOMMENDATIONS FOR ACTORS WORKING IN THE HOUSING-RELATED FIELD

In light of the analysis provided in the previous chapters, it can be noted that although the Indonesian government, both at a national and local level, has initiated efforts to realise the right to adequate housing, several deficiencies exist in policies, legislation and accountability. These obstacles hinder everyone's equal access to the right to adequate housing. An issue then arises on how to address such deficiencies. This section provides recommendations and suggestions for the government to address the grievances, and to advance the right to adequate housing in Indonesia, as guaranteed by the Constitution and numerous national legislations.

The first recommendation is the national government should adopt national strategies based on human rights by integrating elements of accountability as a process. The governments, particularly local governments, should involve the communities in which the policy will be targeted, for example the resettlement or development projects. This involvement will ensure the effectiveness of housing policies and will ensure the implementation of Indonesia's international obligations on the right to housing. Furthermore, the existing national and local programmes related to housing are very much project-based that are derived or decided from the national government. This project-based approach is often not sustainable in the long-run. Numerous programmes were fragmented and discontinued because the period of the projects have ended. Often, housing programmes for the poor were offered due to a political promise that was heavily dependent on the leadership of the time. These two conditions have created an assumption that housing is a matter of political will and does not involve human rights. Therefore, the government needs to adopt sustainable housing policies to further support the realisation of the right to housing, as enshrined in national legislation and the international human rights instruments accepted by the Indonesian government.

In addition, the housing policies of Indonesia are still very centralised, despite the decentralised system that mandated some housing affairs to local governments. The two conflicting national legislations between the Law on Local Governments and the Law on Housing and Settlements created confusion at the local level and gave the impression that local governments could take a more passive stance and rely on the national government to adopt policies and allocate funding for the housing programmes. Such confusion can only be solved by amending the legislation and outlining the distribution of housing affairs in a clear manner.

In one of the discussions, land tenure was found to be one of the causes that hindered the land availability for settlements. To ensure that the land availability problems are reduced, the national government (via the National Land Agency) should speed up the registration process and make the data on the governments' assets available.

Furthermore, Indonesia will continue to develop its infrastructure. Development often collides with human rights issues, particularly the right to housing, the right to land and the right to property. Development could affect people's lives as, up until now, Indonesia does not have a national policy on how evictions based on development projects should be carried out. The forced evictions that often occurred have shown the dire need to establish such guidance to prevent human rights violations from happening. The guidance may be in the form of new legislation or an additional provision to the existing law on land procurement for the development on the basis of public interests.

In addition, the government needs to pay more attention to the regulation of the rental housing market. It is evidenced from this study that rental housing plays a crucial role in providing cheap housing, particularly for migrants and the low income groups who cannot afford to own a house. However, currently, the rental market is not properly regulated, and it is up to landlords to decide rental prices and housing conditions. Having considered that public housing provided by local governments is also under a tenancy system and there is an increasing trend of living in rented accommodations, it is pivotal to regulate this sector to provide protection for tenants against landlords.

From the interviews with the housing officials, it became clear that they are not familiar with national human rights norms, not to mention the international human rights norms, and all of the obligations therein. This condition needs attention from the central government to continuously promote international human rights to the local officials; hence they can integrate human rights in their daily performance. A human rights perspective on the local officials is crucial in comprehending the impact of their policies and measures in regard to people's human rights.

The next recommendation for the local governments is to review the local legislation that adversely affects the human rights of a particular group. Based on this study, legislation to access public housing is evidenced to be discriminatory and therefore should be amended or repealed. With knowledge of human rights, government officials can detect the possible infringements that may be contained in provisions of housing-related legislation. Furthermore, it is urgent to adopt local housing legislation that ensures open, accountable monitoring and review mechanisms, as well as avenues to claim the right to housing, for those who have been deprived of the right to adequate housing and continue to be homeless.

In addition, the fact that human rights considerations are lacking in courts' rulings shows that there is an urgent need to provide education for judges on human rights issues. The training should not only cover the human rights norms and their interpretation by the UN bodies, but it should also include case studies on how national judges from other countries deal with human rights to housing. This knowledge will enhance the judges' understanding of the cases that involve government misconduct because it will have a human rights dimension. In general, an understanding of human rights would enhance the mechanisms within accountability as a process.

Another recommendation would be to change the procedural bureaucracy in compensation payments stemming from a judicial decision. As the procedure currently stands, it constitutes a barrier to the guarantee of remedy and redress as a result of the development process. To eliminate this barrier, the government needs to amend or adopt a new policy that could perhaps reduce the waiting time in realising the compensation. In addition, the

government should prioritise the court's ruling, when it becomes final, and the amount should be put immediately into next year's government expenditures; hence, the affected communities should receive their payments within a year and do not need to suffer from another human rights violations in the long-term.

The final recommendation would be for the vital need to ratify the Optional Protocol to the ICESCR, that enables an individual complaints mechanism for the violations of economic, social and cultural rights. This study has identified that to a certain extent the national accountability mechanism has not provided a satisfactory result with regard to the complaints on the right to housing. By ratifying this OP, an alternative mechanism at the international level can then be employed, following the exhaustion of all national mechanisms. In addition, such a mechanism is pivotal in bringing issues of the implementation of the right to adequate housing (as well as other ESC rights) in Indonesia to the international community's attention. In the end, the mechanism might contribute to Indonesia's compliance with its international obligations. The international attention could put more pressure on the Indonesian government to deal with any incompliance with treaty obligations or violations of ESC rights. Although the enforcement power of the individual complaints mechanism under the Optional Protocol to the ICESCR is still somehow questionable, it provides a potential avenue for a complementary adjudication of the ESC rights violations.

By identifying the international and national obligations at play and the shortcomings of the existing mechanisms and by proposing an innovative framework of analysis, this study constitutes a basis for the Indonesian government to effectively ensure the right to adequate housing.

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ANNEXES

Annex 1 List of Local Regulations containing requirements for accessing either public housing or government assistance for housing upgrading programmes

Jakarta	Surabaya	Yogyakarta	Surakarta
<p>Governor Regulation No. 111/2014 on the Occupancy Mechanism for Rented Modest Multi-Storey Housing (<i>Peraturan Gubernur DKI Jakarta No. 111/2014 tentang Mekanisme Penghunian Rumah Susun Sederhana Sewa</i>)</p>	<p>Local Regulation No. 15/2012 and Local Regulation No 2/2010 on the Use of Multi Storey Housing (<i>Peraturan Daerah Kota Surabaya No 15/2012 jo No 2/2010 tentang Pemakaian Rumah Susun</i>).</p>	<p>Mayor Regulation No. 44/2009, as amended by Mayor Regulation No. 55/2014 on the Management of Multi-Storey Housing owned by the Yogyakarta Municipality. Several articles of this legislation have been annulled by Mayor Regulation No. 65/2014 on the Establishment of a Technical Unit for Rented Multi-Storey Public Housing in Yogyakarta (<i>Peraturan Walikota No. 44/2009 sebagaimana diubah dengan Peraturan Walikota No. 55/2014 tentang Pengelolaan Rumah Susun Sederhana Sewa Milik Pemerintah serta dirubah sebagian dengan Peraturan Walikota No. 65/2014 tentang Pembentukan, Susunan, Kedudukan, Fungsi dan Rincian Tugas Unit Pelaksana Teknis Rusunawa Pada Dinas Kimpraswil Kota Yogyakarta</i>).</p>	<p>Mayor Regulation No 13/2007, as amended by Mayor Regulation No.15/2007 on Guidelines for the Implementation of a Subsidy for Housing Improvement for the Poor in Surakarta (<i>Peraturan Walikota No 13/2007 sebagaimana diubah dengan Peraturan Walikota No 15/2007 tentang Pedoman Pelaksanaan Pemberian Bantuan, Pembangunan/Perbaikan Rumah Tak Layak Huni bagi Masyarakat Miskin Kota Surakarta Tahun 2007</i>)</p>

<p>Art 4</p> <p>(1) Members of the targeted population who may stay in rented public housing must meet several criteria, which include: (Masyarakat terprogram yang dapat menjadi calon penghuni rusunawa harus memenuhi persyaratan sebagai berikut):</p> <p>a. Owning a local residency card and a local family card (<i>memiliki Kartu Tanda Penduduk (KTP) Daerah dan Kartu Keluarga (KK) Daerah</i>);</p> <p>b. Having a (monthly) salary, proven by a letter from employers (<i>memiliki penghasilan dibuktikan dengan surat keterangan penghasilan</i>);</p> <p>c. Having a Tax Identification number (<i>memiliki Nomor Pokok Wajib Pajak (NPWP)</i>);</p> <p>d. Be married, proven by a marriage certificate or other official letters (<i>sudah menikah dibuktikan dengan surat nikah atau dokumen yang dipersamakan</i>);</p>		<p>Art 5</p> <p>(1) Any inhabitants of Surabaya who wish to stay in public housing must obtain a permit from the Mayor (<i>Setiap penduduk Surabaya yang memakai Satuan Rumah Susun wajib memperoleh izin terlebih dahulu dari Kepala Daerah</i>).</p> <p>(2) In order to obtain a permit, inhabitants must send a written application to the Mayor, attaching several requirements, as listed below (<i>Untuk memperoleh izin sebagaimana dimaksud pada ayat</i></p> <p>(1), setiap penduduk Surabaya harus mengajukan permohonan secara tertulis kepada Kepala Daerah dengan dilampiri persyaratan sebagai berikut):</p> <p>a. For an initial permit to use a public housing unit (<i>Pemberian Izin Pemakaian Rumah Susun</i>):</p> <p>1. A copy of their local residency card (<i>foto copy Kartu Tanda Penduduk pemohon yang masih berlaku</i>);</p>	<p>Art 4</p> <p>The aim, in constructing multi-storey public housing to rent, is to provide houses in tenancy tenure for (<i>Sasaran pembangunan Rusunawa adalah memberikan fasilitas rumah dengan sistem sewa untuk</i>):</p> <p>a. Low-income people who live in the city of Yogyakarta, particularly those who live on the riverbanks and in other locations which are targeted for spatial re-development (<i>masyarakat berpenghasilan rendah yang berdomisili di daerah administrasi Kota Yogyakarta, diutamakan masyarakat yang berada di wilayah sekitar pinggiran sungai maupun tempat-tempat yang berkaitan dengan penataan lingkungan permukiman</i>);</p> <p>b. Inhabitants whose houses have been relocated, due to the construction of public housing or other public facility development projects (<i>masyarakat yang tempat</i></p>	<p>Art 10, para 3</p> <p>In order to receive assistance from the Surakarta Municipality, several requirements must be met, which include: (<i>Persyaratan yang harus dipenuhi calon penerima bantuan sebagai berikut</i>):</p> <p>(a) Be a local resident, proven by a copy of a local resident card and a family card for the City of Surakarta (<i>Penduduk di wilayah setempat yang dibuktikan dengan foto copy KK dan KTP Kota Surakarta</i>).</p> <p>(b) A copy of proof of land ownership, or a written letter from the landowners that allows for either the demolition or construction of houses or buildings if the applicants do not actually live on their land (<i>Menyerahkan foto copy Bukti Kepemilikan Tanah yang telah disyahkan oleh Kepala Kelurahan setempat dan atau menyerahkan Surat Ijin pemugaran/pembangunan rumah bila tanah yang ditempati bukan milik sendiri</i>).</p>
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<p>e. Not yet be the owner of a house, proven by an official letter from the head of the village (<i>tidak memiliki tempat tinggal milik sendiri dibuktikan dengan surat keterangan Lurah setempat</i>); and (<i>dan</i>)</p> <p>f. Provide a written statement that, as tenants, they will be willing to pay the rental fee, electricity, water, and any other bills decided by the head of the housing unit (<i>sanggup membayar biaya sewa rusunawa, biaya listrik, biaya air dan/atau biaya lainnya yang ditetapkan oleh Kepala UPRS dibuktikan dengan surat pernyataan kesanggupan</i>).</p>	<p>2. A copy of their family card (<i>foto copy Kartu Keluarga</i>);</p> <p>3. Two recent photographs of themselves with dimensions of 4x6 cm (<i>pas foto berukuran 4 x 6 cm (empat kali enam sentimeter) terbaru sebanyak 2 (dua) lembar</i>);</p> <p>4. A written statement affirming that the applicants do not yet have a house, or have not already made use of a public housing unit that is managed by the local government. The statement should be approved by the head of neighbourhoods and districts (<i>Surat Pernyataan yang menerangkan bahwa Pemohon belum mempunyai rumah tinggal/belum memakai satuan rumah susun yang dimiliki, dikelola atau dalam penguasaan Pemerintah Daerah yang diketahui oleh Ketua Rukun Tetangga, Ketua Rukun Warga dan Lurah setempat</i>);</p> <p>5. A salary slip from employers, or a written statement of income, for applicants who are entrepreneurs (<i>Surat</i></p>	<p><i>tinggalnya direlokasi untuk pembangunan rumah susun atau pembangunan sarana prasarana fisik yang lain</i>);</p> <p>c. 'Low-income people', as described in paragraph a., include (<i>masyarakat berpenghasilan rendah sebagaimana dimaksud pada huruf a adalah</i>):</p> <ol style="list-style-type: none"> 1. Those who have a family income of once to twice the amount of the Regional Minimum Income (<i>pendapatan keluarga tiap bulan sebesar 1 (satu) sampai dengan 2 (dua) kali UMP</i>); 2. Those who do not yet have a permanent place of residence (<i>belum memiliki rumah tinggal yang tetap</i>). 	
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		<p><i>Keterangan gaji/penghasilan yang dikeluarkan oleh Pimpinan pada instansi/perusahaan tempat kerja atau Surat Pernyataan yang menerangkan tentang jumlah penghasilannya apabila pemohon bekerja sebagai pekerja swasta atau wiraswasta yang diketahui oleh Lurah);</i></p> <p>6. A written statement that only family members named on the Family Card will live in the unit with the applicant (<i>Surat Pernyataan yang menerangkan bahwa satuan rumah susun akan dihuni oleh satu Keluarga dalam 1 (satu) Kartu Keluarga Pemohon</i>).</p> <p>b. For an extended permit (<i>Perpanjangan Izin Pemakaian Rumah Susun</i>):</p> <p>1. A copy of the expired permit (<i>Surat Izin Pemakaian Rumah Susun yang telah habis masa berlakunya</i>);</p> <p>2. A copy of the local residency card (<i>foto copy Kartu Tanda Penduduk yang masih berlaku</i>);</p>	
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		<p>3. A copy of the Family Card (<i>foto copy Kartu Keluarga</i>);</p> <p>4. A recent photograph of themselves with dimensions of 4x6 cm (<i>pas foto berukuran 4 x 6 cm (empat kali enam sentimeter) terbaru</i>);</p> <p>5. A written statement affirming that the applicants either do not have a house, or have not used a unit in public housing that is managed by the local government. The statement should be approved by the neighbourhood leaders and the head of villages (<i>Surat Pernyataan yang menerangkan bahwa Pemohon belum mempunyai rumah tinggal yang diketahui oleh Ketua Rukun Tetangga, Ketua Rukun Warga dan Lurah setempat</i>);</p> <p>6. A salary slip from employers, or a written statement of income, for applicants who are entrepreneurs (<i>Surat Keterangan gaji/penghasilan yang dikeluarkan oleh Pimpinan pada instansi/perusahaan tempat kerja atau Surat Pernyataan</i></p>		
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	<p><i>yang menerangkan tentang jumlah penghasilannya apabila pemohon bekerja sebagai pekerja swasta atau wiraswasta yang diketahui oleh Lurah);</i></p> <p>7. A written statement that only family members named on the Family Card will live in the unit with the applicant (<i>Surat Pernyataan yang menerangkan bahwa satuan rumah susun akan dihuni oleh satu Keluarga dalam 1 (satu) Kartu Keluarga Pemohon</i>).</p>		
<p>Art 6 sets up the requirements for accessing public housing for low-income people who are not affected by development programmes, but who wish to stay in public housing. The requirements stay the same, but applicants need to prove that they are categorised as low-income group of people.</p>	<p>Mayor Regulation No 30/2013 on the Services for Usage of Multi-Storey Housing (Peraturan Walikota Surabaya Nomor 30 Tahun 2013 Tentang Pelayanan Di Bidang Pemakaian Rumah Susun)</p>	<p>Art 6 Any individuals living in the city of Yogyakarta, who are administratively registered as local inhabitants, or who meet the requirements stipulated in Art 4, are entitled to stay in rented multi-storey public housing (<i>Setiap warga masyarakat yang berdomisili di Kota Yogyakarta dan secara administratif tercatat sebagai penduduk Kota Yogyakarta dan atau sebagaimana Ketentuan Pasal 4 Peraturan ini berhak untuk menjadi penghuni Rusunawa</i>).</p>	

<p>Arts 17-19 stipulate sanctions that can be taken against tenants who have committed fraud and violated the rules applicable within the housing units. These sanctions vary and may take the form of either administrative or criminal sanctions. Administrative sanctions include warnings, fines, termination of the permit, and eviction (the language used in the regulation is “<i>penerbitan</i>”, which translates literally into English as “control” or “restraint”. However, in public housing and illegal settlement discussions, the word means something similar to “being evicted from public housing”.</p>	<p>Art 3 stipulates similar requirements to those enshrined in the above-mentioned local regulation.</p>	<p>Art 10 (1) Any inhabitants who wish to stay in rented multi-storey public housing must meet the requirements listed below (<i>Setiap warga masyarakat yang akan menghuni Rusunawa harus memenuhi persyaratan sebagai berikut</i>):</p> <p>a. Be an inhabitant of the city of Yogyakarta, proven by a local residency card and a family card (<i>penduduk Kota Yogyakarta dan berdomisili di Kota Yogyakarta yang dibuktikan dengan KTP dan Kartu Keluarga</i>);</p> <p>b. Have a permanent job, in either the informal sector or the formal sector, proven by a statement letter, either from employers, or from the head of neighbourhoods or districts - for those who work in informal sectors (<i>memiliki pekerjaan tetap, baik bekerja di sektor formal maupun informal yang dibuktikan dengan Surat Keterangan dari pimpinan bagi yang bekerja secara formal dan Surat Keterangan dari RT, RW, Lurah, dan Camat bagi yang bekerja secara informal</i>);</p>	
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		<p>c. The total family income equals once or twice the Minimum Regional Income, proven by a statement letter, either from employers, or from the head of neighbourhoods or districts - for those who work in the informal sector (<i>penghasilan keluarga rendah dengan pendapatan antara 1 (satu) sampai dengan 2 (dua) kali UMP yang dibuktikan dengan struk gaji bagi karyawan swasta yang ditandatangani oleh pengelola gaji dan rincian pendapatan bagi yang bukan karyawan yang diketahui oleh RT, RW, Lurah dan Camat</i>);</p> <p>d. Be married, proven by a marriage certificate (<i>sudah berkeluarga/ menikah dengan dibuktikan Surat Nikah</i>);</p> <p>e. Have a maximum number of five family members, proven by a family card (<i>maksimal anggota keluarga adalah 5 (lima) orang yang dibuktikan dengan kartu keluarga</i>);</p> <p>f. Does not yet have a permanent place of residence, proven by a statement letter from the head of neighbourhoods or districts</p>	
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			<i>(belum memiliki rumah tinggal tetap yang dibuktikan dengan Surat Pernyataan diatas kertas bermaterai dan diketahui oleh RT, RW, Lurah dan Camat).</i>	
		Arts 9-15 lay out the conditions under which permits to stay in public housing can be revoked due to tenant misconduct, such as being in arrears, subletting to other tenants, nuisance behaviour, or criminal conduct.		

Annex 2 List of Questions for Interviews

Interviewees: Government officials, at both national and local levels, whose work relates to the implementation of the right to housing; the housing state enterprise; state monitoring bodies (KOMNAS HAM and the Ombudsman); and civil societies (NGOs).

I. Indonesian Housing Policy: the history of the policy, and current policy on providing housing for low-income groups.

(The main aim here is to get an idea of how Indonesia adopted its housing policy for the poor, both before and after its ratification to the ICESCR: Did ratification make any difference, particularly in fulfilling Indonesia's obligation on the right to housing? What are the success stories/good practices, and what challenges might there be in future? How does the division of responsibility between national and local authorities work, in terms of providing housing for the poor?)

1. How effective was Indonesian housing policy, particularly in providing access to housing for the low-income groups,:
 - a. before 2002 (before the decentralisation era);
 - b. from 2002-2005 (when the decentralisation law was enacted and implemented); and
 - c. from 2006–present (after ratification)?
2. What are the policy considerations that may be taken into account when providing housing for the community? In particular, what were the relevant policy considerations before adoption of the Human Rights Law in 1999, and amendment of the Constitution in 2002? Further, what were the relevant policy considerations after adoption of the Human Rights Law?
3. What legal instruments were enacted to fill the gap before official recognition of the right to housing?
4. What policy changes were made after official recognition of the Human Rights Act (such as increasing the budget for public housing)?
5. Indonesia ratified the ICESCR at the end of 2005. Are you aware of this ratification? Has the ratification made any difference to the adopted housing policy? If so, in what respect?
6. Are you aware of article 11 of the covenant on the right to housing and the obligation enshrined therein?
7. How have obligations under the covenant been implemented in Indonesia? Does the national government provide any guidance in legislation (or legislative guidelines) when implementing the international obligations, both at national and local levels? If so, what is the guidance?
8. Were new regulations relating to housing policy adopted after the ratification?
9. How was your institution involved in decision making for the policy?
(An introduction to the human rights-based approach in relation to development, especially the elements of community participation in decision making and accountability issues).
10. Has civil society been involved in decision-making? If so, could you please tell us how they were involved?
11. What lessons can be learned from current national housing policy for the poor?

12. What were the main difficulties in implementing the national policy (in general) - financing, the involvement of private parties, housing allocation or distribution, monitoring and evaluation, and cooperation with private parties in implementing policy - and what are the main challenges for the future? Any plans to overcome the obstacles?

(Specific questions addressed to local officials)

13. To what extent are local policies influenced by national policy? What impact does this have on local policies?
14. Were these policies in conflict with each other, to a certain extent? In what respects?
15. Is there any specific procedure for adopting local policies on housing for the poor?
16. What happens if the local policies conflict with national policies, in terms of both the laws and the implementation?

II. Existing accountability mechanisms:

(The aim here is to understand the established accountability mechanisms available under the Indonesian legal system, which are guaranteed by national law), e.g. internal monitoring, administrative, legal, etc.)

1. What accountability mechanisms are available?
2. Which mechanism is mainly used by people who are suffering from the impact of housing policy?
3. Will employing such a mechanism help the people to achieve their aims?
4. Are you aware of the other accountability mechanisms? Why are those not being employed, or being employed but not that often? Any reason(s)?
5. What accountability mechanisms can be employed by the people, if the infringement of the right to adequate housing involves private parties? Has any case been heard before an accountability institution?

III. The experience of accountability (national and local levels):

(This part of the interview aims to understand the unique experience of the use of accountability mechanisms against government authorities, both at national and local level. How effective and accessible are the mechanisms? These questions will be addressed to government officials - at national and local levels - and to housing institutions).

Before asking the questions, the interviewer will first introduce the meaning of “accountability” in the context of this research, including the internal and external types of accountability.

1. When necessary, how do you hold your staff accountable for their wrongdoing?
2. What internal mechanisms are available to hold staff accountable? On average, how often are these mechanisms used in the course of one year?
3. What triggers the accountability mechanisms?
4. What are the results of employing the mechanisms?
5. What about external mechanisms?
6. Which mechanism is employed the most?

7. Which level of accountability is usually employed - national or local? Why?
8. How are the conflicts or claims addressed to an institution?
9. Did the adopted decision on the accountability issue influence either the future of decision making or the public service provision provided by the institution?

IV. Interview of the monitoring bodies: the Ombudsman (national and local – Surabaya and Yogyakarta) and the National Human Rights Institutions - KOMNAS HAM:

(The purposes of these questions are: to explore the accountability mechanisms that have been used before these institutions, and to analyse the role of monitoring institutions in facilitating fulfilment of the right to adequate housing):

1. What mechanisms are available through your institutions?
2. Are the people aware of them, and consequently employing them if any case of infringement occurs?
3. How many cases are heard within a year, on average? What are the bases of the claims?
4. Is there any specific procedure for hearing complaints in your institution? Do the parties accept the decision or suggestion adopted by your institutions? Please explain!
5. Will there be any further action from the government or private parties regarding your recommendations on certain cases? How were the recommendations monitored?
6. What happens if the responsible parties do not follow the recommendations? Do the people then search for a mechanism with a more binding result?
7. What is the role of your institutions in promoting the condition of human rights within housing?

V. Interview with civil society (NGOs in housing or the urban poor sector, and the legal aid institution):

(These questions are specifically addressed to the NGOs and civil societies involved in participating in the decision-making and monitoring of government policies for housing affairs. Participation and monitoring are considered to be elements of accountability. Before the interview starts, the interviewer will explain the elements of accountability and accountability mechanisms. In terms of questions on housing policy and accountability mechanisms, the interviewer will ask the same questions stated in paragraph I and paragraph II, respectively.

1. Are you aware of the importance of your position in ensuring accountability?
2. How do you put your role into practice?
3. Does the government provide a chance for your institutions to be involved in decision making on housing policies? In what respects?
4. Are you currently involved in advocating or litigating the right to housing in a certain area? Could you please explain this current activity?
5. Are you also involved in raising people's awareness of their participatory role in decision-making for policy influencing their human rights? How do you manage this?

6. Are you also providing recommendations to governments (or to international organisations, such as UN-Habitat or the UN) in the field of the right to housing in Indonesia?
7. Are the governments in favour of your recommendations and willing to discuss certain problems within the field of housing policy?
8. What will you do if the governments are not willing to follow your recommendations and continue to implementing their own policy, in spite of violating or infringing people's rights?

SAMENVATTING

Huisvestingsomstandigheden beïnvloeden de gezondheid van mensen, de relaties tussen leden van het huishouden en hun sociale leven. Daarmee speelt adequate huisvesting een centrale rol speelt in het leven van mensen. Veel landen, zowel ontwikkeld als in ontwikkeling, worstelen om voldoende huisvesting te realiseren. Als ontwikkelingsland staat Indonesië voor schrikwekkende uitdagingen bij de zorg voor betaalbare en adequate huisvesting voor haar burgers, met name de achtergestelde groepen.

Deze studie is uitgevoerd om uiteenlopende redenen. Ten eerste bestaat er een gebrek aan regelgeving voor volkshuisvesting voor lage-inkomensgroepen, een woningtekort, en zijn er andere problemen in verband met huisvesting in Indonesië. Toegang tot huisvesting blijft een groot probleem in Indonesië, met name voor bepaalde achtergestelde groepen, zoals interne migranten en bevolkingsgroepen met een laag inkomen. Ten tweede garandeert de nationale wetgeving van Indonesië het recht op huisvesting en heeft Indonesië het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten (ICESCR) geratificeerd, dat eveneens het recht op adequate huisvesting waarborgt. Als onderdeel van de nationale uitvoering van haar internationale verplichtingen op basis van de ICESCR heeft de regering nationaal huisvestingsbeleid en -wetgeving aangenomen. Ondanks de internationale en nationale erkenning van het recht op huisvesting als een fundamenteel mensenrecht, bestaan er belangrijke lacunes in de nationale implementatie. Bovendien werd weinig aandacht besteed aan de wijze waarop internationale verplichtingen zich uitstrekken tot lokale overheden in een gedecentraliseerd systeem. Ten derde werden op lokaal niveau relevante inbreuken op het recht op adequate huisvesting vastgesteld, zoals discriminerende praktijken en gedwongen uitzettingen. Daarom richt deze studie zich meer op het lokale niveau dan op het nationale niveau.

Deel I legt de basis voor deze studie, bespreekt het recht op huisvesting wereldwijd en analyseert de wettelijke verplichtingen van staten met betrekking tot het recht op adequate huisvesting. Deze vereisen dat de staten hun internationale verplichtingen op nationaal niveau nakomen. Dit deel evalueert de mate waarin Indonesië zijn verplichtingen in zijn huisvestingsbeleid en wetgeving heeft geïmplementeerd.

Hoofdstuk 1 biedt een inleiding tot het probleem en formuleert onderzoeksvragen voor deze studie. De primaire onderzoeksvraag richt zich op de rol van '*accountability as process*' in de context van het recht op adequate huisvesting, en hoe dit de realisatie van het recht op adequate huisvesting in Indonesië kan verbeteren. Bovendien schetst dit hoofdstuk de methoden die worden gebruikt om de onderzoeksvraag in de volgende hoofdstukken te beantwoorden. Deze methoden omvatten doctrinaire, verticale 'top down' vergelijkende, empirische en case studies.

Hoofdstuk 2 richt zich primair op het internationale recht op adequate huisvesting en de inhoud ervan zoals vervat in internationale instrumenten. In General Comment nr 4 inzake het recht op huisvesting stelt Het Comité inzake Economische, Sociale en Culturele Rechten (CESR) vast dat de inhoud van het recht op adequate huisvesting zowel positieve als negatieve

verplichtingen omvat die door staten moeten worden uitgevoerd. Deze verplichtingen omvatten het waarborgen van de huurbescherming, fysieke toegankelijkheid, passende locatie, betaalbaarheid en culturele geschiktheid. Toch is de kern van deze elementen vaag, vooral over de wijze waarop staten ze moeten realiseren. Een dergelijke onzekere aard maakt het voor staten erg moeilijk om alle elementen van huisvesting adequaat in te vullen. Bijgevolg moet General Comment nr. 4 verder worden verduidelijkt.

Bovendien bevat het recht op huisvesting negatieve verplichtingen, die staten dwingen zich te onthouden van bepaalde acties, bijvoorbeeld gedwongen uitzettingen. Bovendien mogen staten geen woonwetgeving aannemen die in strijd is met de algemene inhoud van het recht op huisvesting. Over het algemeen hebben positieve verplichtingen een progressief karakter, wat betekent dat staten geleidelijk de volledige verwezenlijking van het recht op huisvesting mogen bereiken op basis van de beschikbare middelen. Negatieve verplichtingen zijn echter onmiddellijk van aard en moeten rechtstreeks worden uitgevoerd door nationaal huisvestingsbeleid vast te stellen en af te zien van niet-toegelaten acties zoals gedwongen uitzettingen en discriminerende praktijken. Niet-nakoming van negatieve verplichtingen, zonder rechtvaardiging op basis van legitieme beperkingen van de mensenrechten op grond van artikel 4 ICESCR, vormt waarschijnlijk een schending van het recht op adequate huisvesting.

Het verband tussen positieve verplichtingen en schendingen van het recht op huisvesting is niet duidelijk, met name wanneer een schending van het recht op huisvesting plaats vindt buiten een schending van negatieve verplichtingen. Twee criteria kunnen worden gebruikt om staatspraktijken te beoordelen. In de eerste plaats zou het bestaan van een algemene achteruitgang van de woon- en leefomstandigheden als gevolg van het beleid en de wetgevende beslissingen van staten, samen met het ontbreken van maatregelen om de achteruitgang te voorkomen of te stoppen, als niet-naleving kunnen worden beschouwd. Ten tweede kan artikel 4 ICESCR worden gebruikt om te onderzoeken of een bepaalde overheidspraktijk het recht op adequate huisvesting schendt. Als een praktijk aan de algemene beperkingseisen voldoet, vormt de praktijk geen overtreding en vice versa.

Hoofdstuk 3 onderzoekt de toepasbaarheid van internationale verdragen in het Indonesische rechtssysteem. De Indonesische grondwet zwijgt over de aanpak van de integratie van internationaal recht op nationaal niveau. De overheidspraktijk laat echter een dubbelzinnigheid zien tussen monisme, dualisme en gemengde benaderingen. Bij gebrek aan richtsnoeren in de Grondwet gaf het Grondwettelijk Hof in zijn uitspraken de voorkeur aan het nationale recht boven het internationale recht. De wet inzake de vorming van wetgeving, die ook de hiërarchie van wetgeving in Indonesië bepaalt, erkent het internationale recht als zodanig niet als onderdeel van het nationale recht. Hoewel het wetten erkent waarmee internationale recht wordt geratificeerd, is het onduidelijk of het recht dat in de hiërarchie van de nationale wetgeving wordt erkend, het wettelijke recht omvat dat internationale instrumenten ratificeert. De Indonesische Wet inzake Mensenrechten suggereert echter dat internationale mensenrechtenverdragen die zijn geratificeerd door de Indonesische regering, nationaal recht zijn geworden, wat aangeeft dat mensenrechtenverdragen van toepassing zijn en kunnen worden ingeroepen voor nationale rechtbanken. Desalniettemin blijft informatie over hoe rechtstreeks een beroep is te doen op deze verdragen schaars, zoals blijkt uit de analyse van relevante gevallen in hoofdstuk 11.

Hoofdstuk 4 onderzoekt hoe Indonesië zijn internationale verplichtingen op het gebied van adequate huisvesting in praktijk heeft gebracht. Dit hoofdstuk maakt gebruik van een normatieve juridische methode en evalueert de naleving door Indonesië van het recht op adequate huisvesting. Indonesië is al tientallen jaren vóór de toetreding tot de ICESCR begonnen met het aannemen van nationaal huisvestingsbeleid en -wetgeving. Actoren die bij het beleid zijn betrokken, omvatten statelijke actoren (ministeries) en niet-statelijke actoren (banken en particuliere ontwikkelaars). Vanwege het gedecentraliseerde bestuursstelsel van Indonesië worden huisvestingszaken gedelegeerd aan lokale overheden. In dit verband heeft de nationale overheid het nationale huisvestingsbeleid aangenomen als leidraad voor lokale overheden. Hoewel nationale financiering beschikbaar is voor sociale woningbouw, staat het lokale overheden vrij om alternatieve financiële middelen te zoeken om hun lokale huisvestingsbeleid te ondersteunen. Niet alle lokale overheden proberen actief andere middelen te vinden om hun bewoners toegang te bieden tot adequate huisvesting; ze zijn dan afhankelijk van nationale financiering. Hoewel sommige lokale initiatieven werden geïmplementeerd (zoals programma's voor woningverbetering), beperkt deze afhankelijkheid hun inspanningen om de woonomstandigheden te verbeteren. Bovendien was de doelgroep veelal beperkt tot degenen die al huizen bezaten en sloot daklozen uit.

Eén van de Indonesische beleidsmaatregelen op het gebied van huisvesting is een programma om één miljoen goedkope woningen per jaar te bouwen. Dit programma werd in 2015 gelanceerd, maar is slechts gedeeltelijk gerealiseerd. Bovendien zijn veel van de goedkope huizen gekocht door mensen met een gemiddeld inkomen of een hoog inkomen en de eigenlijke doelgroep niet bereikt is. Voorts wordt onderkend dat goedkope huizen vaak worden gebouwd aan de rand van de steden, waar openbaar vervoer ontbreekt en dus potentiële bewoners worden ontmoedigd omdat de woonwijk te ver van hun werkplek is.

Deel II, dat bestaat uit vier hoofdstukken (5-8), onderzoekt de praktijken van vier lokale overheden (Jakarta, Surabaya, Yogyakarta en Surakarta) met betrekking tot de wettelijke verplichtingen die voortvloeien uit de nationale wetgeving en internationale instrumenten.

De praktijken en benaderingen van de vier lokale overheden bij het beschermen en realiseren van het recht op adequate huisvesting voor hun inwoners worden onderzocht in **hoofdstuk 5**. Dit hoofdstuk maakt gebruik van zowel normatieve als empirische benaderingen op basis van kwalitatief onderzoek (interviews). Er wordt vastgesteld dat de vier lokale overheden lokale huisvestingswetgeving en -beleid hebben aangenomen om inadequate huizen te verbeteren en huurwoningen te ontwikkelen voor de lage inkomensgroepen. Dit hoofdstuk laat echter ook zien dat lokale overheden voor veel en voortdurende uitdagingen staan om het recht op huisvesting te realiseren. In het bijzonder worden drie specifieke uitdagingen geïdentificeerd: het grondbezit, indirect discriminerende praktijken jegens bepaalde groepen bij de toegang tot sociale woningbouw, en gedwongen uitzettingen als gevolg van ontwikkelingsprojecten.

Hoofdstuk 6 bespreekt de eerste uitdaging: het stelsel van grondbezit dat als een factor wordt beschouwd die de realisatie van het recht op huisvesting belemmert. De combinatie van 'onafgemaakte' grondregistratie en het "tenure" systeem van grondbezit in de vier steden beperkt de beschikbaarheid van grond voor het ontwikkelen van wooncomplexen. Deze steden hebben verschillende eigendomsstelsels die voortvloeien uit een gemengd systeem van

nationaal recht, gewoonterecht en de postkoloniale regelingen. In elk van deze steden bezitten private partijen, waaronder traditionele Paleizen, rijke burgers en particuliere bedrijven, een enorme hoeveelheid land. Deze situatie heeft land onbetaalbaar of zelfs onbeschikbaar gemaakt voor de armen. Het gebrek aan bruikbare gegevens bij de overheid over landbezit zorgt voor een extra uitdaging bij de selectie van de geschikte locaties voor woningbouw. De overheid kan maatregelen nemen om de beschikbaarheid van land te vergroten, bijvoorbeeld door middel van landconsolidatie of het terugkopen van land van bedrijven, investeerders of particulieren. Dit vereist echter een aanzienlijke hoeveelheid tijd en financiële middelen. Dit hoofdstuk concludeert dat er een dringende behoefte is om het probleem van landregistratie op te lossen, inclusief het verstrekken van informatie over het grondbezit van de lokale overheden.

De tweede uitdaging, die betrekking heeft op de discriminerende praktijken tegen interne migranten, wordt behandeld in **hoofdstuk 7**. De vier lokale overheden die zijn onderzocht, bieden sociale huurwoningen voor groepen met lage inkomens, hetzij met de hulp van de nationale overheid of met behulp van hun eigen lokale budget. De distributie van sociale woningbouw valt onder de verantwoordelijkheid van lokale overheden, die vaak prioriteit geven aan gemeenschappen die worden getroffen door ontwikkelingsprogramma's, zoals de ontwikkeling van dammen of de afbraak van sloppenwijken. De lokale overheden specificeren echter gedetailleerde vereisten voor toegang tot huisvesting, zoals de verplichting om een lokale verblijfskaart te hebben. Deze eis vormt een barrière voor interne migranten die veelal administratief geregistreerd blijven in hun vorige verblijfplaats. Na een onderzoek van de praktijken en normen in het licht van artikel 4 ICESCR, General Comments nrs. 4 en 7 en relevante literatuur, concludeert hoofdstuk 7 dat lokale voorschriften die de voorkeur geven aan lokaal geregistreerde inwoners leiden tot indirecte discriminatie van interne migranten die zich niet lokaal hebben geregistreerd. Bovendien kan deze voorkeur niet worden beschouwd als een beperking van de mensenrechten zoals door de ICESCR is toegestaan, omdat deze niet voldoet aan de daarin gestelde eisen en omdat de voorkeur niet verenigbaar is met de aard van het recht op huisvesting. Bovendien is de voorkeur niet alleen gericht op het bevorderen van het algemeen welzijn in een democratische samenleving. De verplichting op het recht op adequate huisvesting beperkt zich niet tot het verstrekken van sociale woningen op zich; de verplichting strekt zich ook uit tot een billijke verdeling.

Hoofdstuk 8 onderzoekt de derde uitdaging voor lokale overheden: het probleem van gedwongen uitzettingen als gevolg van ontwikkelingsprojecten. Het onderzoekt of de gedwongen uitzettingen gerechtvaardigd zijn, of als een schending van het recht op huisvesting dienen te worden beschouwd. Dit hoofdstuk bevat een case study over gedwongen uitzettingen uitgevoerd door de regering van Jakarta die door de ontwikkeling van een dijk bij de Ciliwung-rivier op gang waren gebracht. Volgens de nationale wetgeving is het bouwen overstromingspreventiesystemen gecategoriseerd als een openbaar belang. Om aan de eis als een gerechtvaardigde gedwongen uitzetting te voldoen, is echter een reden van algemeen belang alleen niet voldoende. Een juridische ontruiming moet (1) zijn gebaseerd op wettelijke voorschriften (2) verenigbaar zijn met de aard van de mensenrechten, (3) uitsluitend worden uitgevoerd ter bevordering van het algemeen welzijn, (4) redelijk en proportioneel zijn, (5) uitgevoerd worden overeenkomstig internationale mensenrechtennormen en (6) vergezeld gaan van volledige en billijke compensatie en herstel voor de getroffen.

Na onderzoek en analyse wordt geconcludeerd dat de gedwongen uitzettingen door de overheid van Jakarta (2015-2016) niet voldeden aan de normen van de ICESCR. Deze niet-naleving omvat (1) de discriminerende herhuisvesting van alleen lokaal geregistreerde inwoners, (2) het gebrek aan respect van de overheid voor nog lopende gerechtelijke procedures voor de nationale rechtbanken, (3) de onevenwichtige balans in machtsposities en (4) het ontbreken van compensatie voor huiseigenaren. Tot op heden loopt de gedwongen uitzettingszaak nog voor het Hooggerechtshof (Supreme Court), en hoewel het gerechtshof compensatie toekende aan de mensen die aan de rivieroever woonden.

In het licht van de uitdagingen waarmee lokale overheden worden geconfronteerd, beoogt deze studie de uitdagingen aan te pakken vanuit het perspectief van accountability als een proces en in hoeverre dit concept de Indonesische regering kan helpen om het recht op huisvesting volledig te realiseren. Het onderzoek naar de rol van verantwoordelijkheid voor de realisatie van mensenrechten en de praktijken ervan wordt besproken in **deel III**, dat bestaat uit **hoofdstukken 9 tot en met 11**.

Hoofdstuk 9 legt de basis voor de noodzaak van accountability als een proces voor het realiseren van mensenrechten. Dit concept bevat elementen die als basis dienen voor het analyseren van verantwoordelijkheid in het recht op adequate huisvesting binnen zowel de internationale als de Indonesische context. Deze elementen omvatten deelname van samenlevingen aan het besluitvormingsproces, monitoring, accountabilitymechanismen en de beschikbaarheid van rechtsmiddelen en verhaalmogelijkheden. Bovendien suggereert **hoofdstuk 9** een nieuw element om de realisatie van het recht op huisvesting te waarborgen, namelijk handhavingsmaatregelen. Dergelijke maatregelen ontbreken in theorieën over verantwoording en zijn het zwakste onderdeel gebleken bij het uitvoeren van de resultaten of beslissingen van de accountabilitymechanismen. De vertraagde betaling van de vergoeding voor onteigening van grond, zoals ervaren door de getroffen gemeenschappen in Jakarta, kan ertoe leiden dat hun recht op huisvesting verder wordt ontnomen. In dit opzicht, en hoewel een accountabilitymechanisme toegankelijk is en kan worden gebruikt om mensenrechtenschendingen te claimen, slaagt het mechanisme er niet in de bescherming van de rechten te handhaven doordat de beslissingen van de organen van het mechanisme moeilijk te implementeren zijn. De primaire reden voor het gebrek aan uitvoering van de bindende beslissingen waarbij de overheid is betrokken, is dat er geen toepasselijke handhavingsmaatregel is om de overheid te dwingen de beslissingen binnen een redelijke termijn na te leven. Door het ontbreken van een dergelijke maatregel kan de regering de uitvoering van het besluit zonder enige tijdslimiet uitstellen.

Hoofdstuk 10 verduidelijkt de term ‘accountability in mensenrechtenliteratuur. De VN mensenrechtenorganen hebben talloze verwijzingen gedaan naar de noodzaak van accountability ondanks het ontbreken van verwijzingen naar accountability in de internationale mensenrechteninstrumenten. Deze organen lijken het concept van accountability te beschouwen als een mechanisme in plaats van het een continu proces. Hoofdstuk 10 toetst de elementen van accountability (publieke participatie, monitoring, accountabilitymechanismen en herstel en compensatie) van het recht op adequate huisvesting op internationaal niveau. Het element van participatie in het internationale proces van rechtschepping is vergelijkbaar met dat op nationaal niveau, behalve dat internationaal alleen de nationale regeringen, internationale

organisaties en specifieke internationale NGO's kunnen deelnemen aan. De verschillende toezichthoudende internationale mensenrechtenorganen bieden een verbinding met nationale participatie via rapportageverplichtingen van staten en individuele klachten.

Hoofdstuk 11 sluit deze studie af door elk element van accountability als een proces te analyseren in de context van de realisatie van het recht op huisvesting in Indonesië. Het is bewezen dat het huisvestingsbeleid in Indonesië geen publieke participatie kent van de getroffen gemeenschappen. In tal van voorbeelden toont de overheid, zowel op nationaal als op lokaal niveau, de neiging om een top-down benadering te hanteren bij de uitvoering van beleid, in plaats van een bottom-up benadering. Bovendien blijven monitoring en toezicht de zwakkere onderdelen van accountabilityplicht, met name bij de interne monitoring van de ontwikkeling en distributie van sociale woningbouwprogramma's. Naast de interne monitoring hebben personen en ngo's een actieve rol gespeeld bij het monitoren en rapporteren van ambtenaren die verdacht worden van wangedrag op het gebied van huisvesting aan toezichthoudende instanties, zoals KOMNAS HAM en de Ombudsman.

Als democratische staat heeft Indonesië een verscheidenheid aan accountabilitymechanismen ingesteld, waaronder gerechtelijke, quasi-gerechtelijke en administratieve accountabilitymechanismen. Deze mechanismen stellen individuen of groepen als rechthebbenden in staat om een klacht in te dienen over huisvestingsgerelateerde rechten om de regeringen en de ambtenaren verantwoordelijk te houden, en om schadeloosstelling en herstel te vragen in geval van schade. Accountability via de rechter heeft tal van nadelen; klachten over schendingen van mensenrechten moeten bijvoorbeeld gebaseerd zijn op de bepaling inzake onwettige handelingen volgens het Indonesisch burgerlijk wetboek. In deze gevallen houden de rechters vaak geen rekening met de mensenrechtenelementen in hun uitspraken. Bovendien is de aard van de civiele en administratieve procedures alleen beperkt tot de eisers en heeft deze (in principe) geen invloed op de algemene voorwaarde voor de vervulling van het recht op huisvesting. In theorie kunnen internationale mensenrechtennormen die zijn geratificeerd door de Indonesische regering worden ingeroepen voor nationale rechtbanken; rechtbankpraktijken suggereren echter het tegenovergestelde. Mensenrechtennormen worden niet in acht genomen in civiele of administratieve gerechtelijke procedures. Een individu of groep kan een verzoek indienen voor de rechterlijke toetsing van wetgeving die in strijd is met de Grondwet, zowel bij het Grondwettelijk Hof als bij het Hooggerichtshof.

Quasi-gerechtelijke mechanismen zijn ook beschikbaar in Indonesië in de vorm van de KOMNAS HAM en de Ombudsman. KOMNAS HAM behandelt klachten over vermeende mensenrechtenschendingen begaan door de overheid of particuliere actoren. De Ombudsman richt zich op klachten in verband met (wan)beheer door de overheid. Het zwakke punt van de quasi-gerechtelijke mechanismen is dat de procedures en aanbevelingen niet openbaar worden gemaakt. Dergelijke gesloten procedures bestaan ook voor administratieve accountability. Het Indonesische rechtssysteem erkent herstel en schadeloosstelling voor schade veroorzaakt door ontwikkelingsprojecten of onwettige handelingen begaan door statelijke actoren. Compensatie en herhuisvesting zijn de meest voorkomende vormen van genoegdoening die aan individuen of groepen kunnen worden verleend. Een schadevergoeding die door de rechter via een civiele procedure wordt bepaald, ondervindt echter vaak problemen bij de uitvoering vanwege

procedurele bureaucratie. De buitensporige tijd om uiteindelijk de vergoeding te ontvangen, geeft aan dat de procedure niet een effectieve bescherming biedt.

Hoofdstuk 12 bevat de bevindingen van de hoofdstukken 1-11 en doet aanbevelingen voor verschillende actoren die werkzaam zijn op het gebied van huisvesting. Hoewel het bestuur van Indonesië (nationaal en lokaal) tal van en specifieke maatregelen heeft genomen om het recht op adequate huisvesting te realiseren, zoals vastgelegd in de nationale wetgeving en in de internationale mensenrechteninstrumenten, staat het duidelijk nog steeds voor grote uitdagingen bij het voldoen aan de normatieve inhoud van het recht op adequate huisvesting voor de armere burgers. Deze studie toont aan dat Indonesië tot op zekere hoogte niet heeft voldaan aan zijn negatieve verplichtingen met betrekking tot het recht op huisvesting, met name door het voortbestaan van discriminerende bepalingen voor toegang tot sociale woningbouw en door niet af te zien van gedwongen uitzettingen. In zoverre zijn de accountabilitymechanismen onvoldoende ontwikkeld en falen ze bij het waarborgen en beschermen van de mensenrechten van de getroffen gemeenschappen.

Bovendien werden verschillende lacunes tussen recht en praktijk geconstateerd. Het recht op huisvesting heeft bijvoorbeeld niet alleen betrekking op het aanbieden van gebouwen, maar is een veel ruimer recht. Het gaat om talloze factoren zoals planning, beschikbaarheid van land, budgettering en culturele normen die een alomvattende aanpak vergen voor de coördinatie en het begrip van het mensenrechtenperspectief op alle overheidsniveaus die bij het huisvestingsbeleid betrokken zijn.

Om een volledige uitvoering van het recht op huisvesting in Indonesië te bereiken, is de beschikbaarheid van accountabilitymechanismen alleen niet voldoende. Het bestuur moet ervoor zorgen dat publieke participatie en monitoring bestaan aan het begin van het besluitvormingsproces en een verantwoordelijk zijn van de statelijke actoren. Verder is monitoring ook nodig om toe te zien op de uitvoering van de resultaten van de accountabilitymechanismen, zoals door ervoor te zorgen dat compensatie binnen een redelijke termijn aan de getroffen personen worden verstrekt. Bovendien is het van vitaal belang om handhavingsmaatregelen vast te stellen om het bestuur te dwingen bindende beslissingen na te komen. Dergelijke maatregelen kunnen ervoor zorgen dat de getroffen gemeenschappen en individuen niet langer slachtoffer zijn van mensenrechtenschendingen. Deze studie betoogt dat de volledige integratie van accountabilityelementen in huisvestingsbeleid de implementatie van het recht op huisvesting zal bevorderen.

Andere maatregelen die door de beleidsmakers en wetgevers kunnen worden genomen om de bovengenoemde uitdagingen aan te gaan, zijn onder meer (1) het versnellen van het landregistratieproces en de publicatie van gegevens over de publieke grondbezit; (2) het vaststellen van richtlijnen voor ontruimingsprocedures om schendingen van de mensenrechten te voorkomen; (3) meer aandacht te besteden aan de regulering van de huurwoningenmarkt; (4) het continu bevorderen van respect voor (internationale) mensenrechten bij de lokale functionarissen en de integratie van mensenrechten in hun dagelijkse werk.

Een andere belangrijke en cruciale sprong die moet worden gemaakt, is dat lokale overheden de lokale wetgeving moeten herzien die de mensenrechten van een bepaalde groep ongunstig beïnvloedt. Op basis van deze studie is gebleken dat regelgeving voor toegang tot sociale woningbouw discriminerend is en daarom moet worden gewijzigd of ingetrokken. Uit

het feit dat mensenrechtenoverwegingen ontbreken in de uitspraken van rechtbanken, blijkt bovendien dat er dringend behoefte is aan scholing van rechters over mensenrechtenkwesties. De training moet niet alleen betrekking hebben op de mensenrechtennormen en hun interpretatie door de VN-organen, maar moet ook case study's bevatten over hoe nationale rechters uit andere landen omgaan met mensenrechten op gebied van huisvesting.

Een andere aanbeveling is om maatregelen te nemen tegen de procedurele bureaucratie in compensatiebetalingen na een rechterlijke beslissing, in het bijzonder door de wachttijd voor de compensatie te verkorten. Bovendien moet de overheid prioriteit geven aan uitvoering van rechterlijke uitspraken wanneer deze definitief zijn door benodigde bedragen direct in de overheidsbudget van volgend jaar op te nemen zodat de getroffen gemeenschappen hun betalingen binnen een jaar ontvangen.

Tot slot, en niet in het minst, is het van vitaal belang om het optionele protocol bij de ICESCR te ratificeren; dit protocol voorziet in een individueel klachtrecht bij vermeende schendingen van economische, sociale en culturele rechten. Deze studie heeft aangetoond dat nationale accountabilitymechanismen onvoldoende resultaat hebben opgeleverd met betrekking tot de klachten over het recht op huisvesting. Door dit protocol te ratificeren, wordt een aanvullend mechanisme op internationaal niveau geboden dat kan worden gebruikt na uitputting van alle nationale rechtsmiddelen.

Door het identificeren van de internationale en nationale verplichtingen en de tekortkomingen van de bestaande accountabilitymechanismen en door een innovatief analysekader voor te stellen, hoopt deze studie de Indonesische regering te ondersteunen om op een effectieve wijze het recht op adequate huisvesting te waarborgen.

RINGKASAN BAHASA INDONESIA

Kondisi fisik rumah akan berpengaruh terhadap kehidupan penghuninya; dimulai dari kesehatan, hubungan diantara anggota rumah tangga hingga hubungan antar anggota dengan kehidupan sosial mereka. Sehingga bisa dikatakan bahwa rumah yang layak akan berperan utama dalam kehidupan manusia. Berbagai negara, baik negara maju maupun berkembang, masih berusaha merealisasikan hak atas perumahan yang layak secara penuh. Demikian pula di Indonesia, hambatan pada tahap yang mengkhawatirkan juga dialami dalam hal penyediaan rumah yang layak dan terjangkau, terutama bagi kalangan yang tidak beruntung.

Disertasi ini ditulis dengan latar belakang sebagai berikut. Pertama, terdapat kekurangan pengadaan rumah-rumah publik (rumah susun sewa) yang dibangun oleh pemerintah dan yang ditujukan untuk kelompok yang kurang mampu, kekurangan pembangunan rumah, serta beberapa permasalahan lain yang berkaitan dengan perumahan di Indonesia. Demikian juga, akses terhadap rumah yang masih menjadi permasalahan utama di Indonesia, terutama sekali untuk kelompok-kelompok tertentu seperti kelompok pendatang dan kelompok dengan pendapatan rendah lainnya. Alasan kedua, meskipun peraturan nasional Indonesia telah mengakui hak atas perumahan dan juga meratifikasi Kovenan Internasional tentang Hak-hak Ekonomi, Sosial dan Budaya (KIHESB), implementasi hak tersebut masih belum maksimal. Selain itu, kurangnya perhatian para ahli hak asasi manusia (HAM) pada bagaimana kewajiban internasional yang dimiliki oleh negara dapat diberlakukan kepada pemerintah daerah melalui proses desentralisasi. Alasan ketiga adalah adanya beberapa pelanggaran hak atas perumahan yang lebih teridentifikasi dan terjadi pada tingkat daerah, seperti praktek yang mengarah pada diskriminasi serta penggusuran paksa. Untuk alasan yang terakhir inilah, mengapa penelitian ini lebih banyak ditekankan pada tingkat daerah (atau lokal) daripada tingkat nasional.

Bagian pertama dari buku ini yang terdiri dari empat bab (Bab 1 – Bab 4), memberikan dasar serta mempelajari hak atas perumahan secara umum. Selain itu, bagian ini juga memberikan analisa atas kewajiban-kewajiban hukum yang timbul dari hak atas perumahan yang layak. Kewajiban-kewajiban hukum ini mengharuskan negara untuk melaksanakannya pada tingkat domestik. Bagian pertama ini juga mengevaluasi sejauh mana Indonesia telah mengimplementasikan kewajiban-kewajiban internasional tersebut dalam kebijakan serta legislasi yang berkaitan dengan hak atas perumahan yang layak.

Bab 1 memberikan pengantar kepada permasalahan yang diangkat dalam penelitian ini. Selain itu, rumusan permasalahan juga diberikan dalam bab ini. Permasalahan utama yang akan dijawab dalam studi ini adalah bagaimana peran konsep ‘akuntabilitas sebagai proses’- *‘accountability as a process’* dalam konteks hak atas perumahan yang layak, dan bagaimana konsep tersebut dapat membantu meningkatkan pemenuhan hak atas perumahan yang layak. Sebagai tambahan, Bab 1 juga menggarisbawahi metode penelitian yang digunakan dalam menjawab rumusan permasalahan dalam setiap bab. Metodologi yang digunakan dalam penelitian ini termasuk metode doktrinal, metode perbandingan hukum secara *‘top-down’*, metode empiris serta studi kasus.

Fokus utama pada Bab 2 adalah hak atas perumahan yang layak pada tingkat internasional beserta unsur-unsurnya menurut interpretasi pada level internasional. Komite

PBB tentang Hak Ekonomi, Sosial dan Budaya melalui Komentar Umum telah memberikan interpretasi atas isi dari hak atas perumahan yang layak. Termasuk di dalamnya adalah kewajiban positif dan kewajiban negatif yang harus dipenuhi oleh negara pihak dalam Kovenan. Kewajiban-kewajiban ini termasuk menjamin kepastian atas kepemilikan (penggunaan) sebuah rumah. Artinya bahwa individu dapat tinggal secara jangka panjang dalam sebuah rumah. Selain itu rumah haruslah memenuhi kelayakan untuk dapat diakses secara fisik, lokasi, terjangkau serta memadai menurut nilai-nilai budaya yang dianut dalam masyarakat. Namun demikian, sifat atau karakter dari elemen hak atas perumahan yang layak yang dimaksud di atas tampaknya belum begitu jelas. Hal ini tentu saja akan memberikan tantangan tersendiri bagi negara anggota untuk dapat memenuhi semua unsur kelayakan sebagaimana dimaksud oleh Komite. Untuk itu, studi ini berpendapat bahwa Komentar Umum No. 4 tentang hak atas perumahan yang layak, terutama untuk isi norma dari hak tersebut perlu untuk diklarifikasi lebih lanjut.

Lebih jauh, hak atas perumahan yang layak mengandung kewajiban positif dan negatif. Pada umumnya, kewajiban positif atas hak perumahan adalah bersifat progresif atau bertahap. Artinya, negara dapat secara bertahap dalam memenuhi hak atas perumahan yang layak sesuai dengan sumber daya yang dimilikinya. Sedangkan kewajiban negatif mensyaratkan negara untuk menahan diri dan tidak melakukan sesuatu. Contoh konkretnya adalah untuk tidak melakukan pengusuran paksa. Disamping itu, negara tidak diperbolehkan untuk mengadopsi suatu kebijakan perumahan apabila bertentangan dengan isi dari hak atas perumahan. Khusus untuk kewajiban negatif ini dalam hal tidak melakukan pengusuran paksa atau tidak mengambil kebijakan yang bersifat diskriminatif, adalah bersifat segera atau serta merta harus dilaksanakan. Ketidakterhasilan negara dalam hal pemenuhan kewajiban negatif tanpa ada justifikasi berdasarkan syarat-syarat pembatasan hak asasi manusia sebagaimana tercantum dalam Pasal 4 KIHESB, akan dapat dikategorikan sebagai pelanggaran terhadap hak atas perumahan yang layak.

Selain itu, hubungan antara kewajiban positif dengan pelanggaran hak atas perumahan tidak jelas. Terutama mengenai hal apa yang dapat disebut sebagai pelanggaran hak atas perumahan di luar pelanggaran yang disebabkan karena tidak dilakukannya kewajiban negatif oleh negara. Setidaknya ada dua kriteria yang dapat digunakan untuk menguji praktek negara atas pemenuhannya terhadap kewajiban positif. Pertama, secara umum terdapat penurunan kualitas standar hidup dan kondisi perumahan yang disebabkan oleh kebijakan negara dan/atau keputusan badan legislatif. Adanya fakta penurunan kondisi disertai dengan ketidakadaan langkah-langkah untuk mencegah atau menghentikan kondisi penurunan tersebut, dapat disimpulkan bahwa negara tidak melaksanakan kewajibannya sesuai dengan yang diharuskan dalam hak atas perumahan, sehingga dapat dikategorikan sebagai bentuk pelanggaran terhadap kewajiban negara. Kedua, penggunaan Pasal 4 KIHESB mengenai persyaratan pembatasan HAM yang sah untuk menguji apakah praktek negara bisa dikatakan sebagai pelanggaran hak perumahan atau tidak. Jika suatu praktek negara memenuhi persyaratan umum pembatasan HAM, maka praktek tersebut bukan merupakan pelanggaran demikian pula sebaliknya.

Bab 3 mengkaji penerapan perjanjian internasional dalam sistem hukum Indonesia. Konstitusi Indonesia (UUD 1945) tidak mengambil sikap dalam hal pendekatan untuk memasukkan atau menggabungkan hukum internasional dalam hukum nasional. Demikian halnya pemerintah pada prakteknya juga memperlihatkan ketidakjelasan antara pendekatan

monis, dualis ataupun campuran keduanya. Dengan absennya petunjuk dari UUD 1945, Mahkamah Konstitusi dalam putusannya memberikan preferensi kepada hukum nasional dibandingkan dengan hukum internasional. Undang-Undang tentang Pembentukan Peraturan Perundang-Undangan No. 12/2011 yang mengatur mengenai kedudukan peraturan perundang-undangan di Indonesia juga tidak mengenal hukum internasional sebagai bagian dari hukum nasional. Meskipun peraturan tersebut mengenal ‘undang-undang’ sebagai salah satu bentuk legislasi yang sering dipakai untuk meratifikasi perjanjian internasional, status undang-undang ratifikasi tidak dijelaskan apakah termasuk dalam susunan perundang-undangan tersebut atau tidak. Namun demikian, Undang-Undang Hak Asasi Manusia No. 39/1999 (Pasal 7) menyatakan bahwa instrumen HAM internasional yang telah diratifikasi oleh Indonesia menjadi bagian dari hukum nasional. Hal ini memberikan indikasi bahwa instrumen HAM internasional berlaku dan dapat dimohonkan dalam proses pengadilan nasional. Namun sebagaimana ditemukan dalam penelitian ini, informasi mengenai bagaimana instrumen internasional dapat secara langsung dimohonkan masih sangat jarang, sebagaimana dapat dilihat dalam analisa kasus-kasus pengadilan dalam Bab 11.

Bab 4 menguji bagaimana Indonesia telah melaksanakan kewajiban-kewajiban internasional yang berkaitan dengan hak atas perumahan yang layak. Bab ini menggunakan pendekatan normatif dan bertujuan untuk mengevaluasi ketaatan Indonesia pada hak atas perumahan. Indonesia telah mengambil kebijakan dan peraturan atas perumahan semenjak beberapa dekade yang lalu bahkan jauh sebelum Indonesia meratifikasi KIHESB. Para pelaku bidang perumahan termasuk didalamnya adalah aktor negara (misalnya kementerian) dan bukan negara (seperti perbankan dan kontraktor swasta). Berdasarkan sistem desentralisasi yang dianut oleh Indonesia, urusan perumahan diserahkan kepada pemerintah daerah. Dalam hal ini, pemerintah nasional menyusun kebijakan nasional bidang perumahan untuk dijadikan acuan bagi pemerintah daerah untuk mengambil kebijakan yang sesuai dengan karakteristik daerah masing-masing. Pemerintah nasional dalam beberapa hal juga menyediakan dana untuk program perumahan bagi orang miskin. Walaupun demikian, pemerintah daerah juga diharapkan untuk lebih aktif untuk menggali sumber daya daerah sebagai alternatif untuk mendukung program perumahan lokal. Kendati ada kewajiban mencari dana alternatif, tidak semua pemerintah daerah yang menjadi obyek penelitian ini mencari dan menggunakan sumber lain selain sumber daya dari pemerintah nasional. Ketergantungan akan dana dari pemerintah pusat dapat menghambat program perbaikan kondisi rumah warga miskin, walaupun beberapa inisiatif lokal juga telah dilaksanakan. Dalam hal perbaikan kondisi rumah hanya terbatas kepada mereka yang telah memiliki rumah namun kondisinya tidak layak untuk ditempati, sedangkan orang yang tidak atau belum memiliki rumah tidak bisa mengakses program ini.

Salah satu kebijakan Indonesia yang berhubungan dengan perumahan adalah pembangunan satu juta rumah murah setiap tahun. Program ini telah diluncurkan pada tahun 2015. Selama tiga tahun, pemerintah Indonesia belum dapat mencapai target. Baru pada akhir 2018, target tersebut terpenuhi, dimana sebagian besar rumah murah lebih banyak dibangun oleh kontraktor swasta. Seharusnya sudah dapat diperkirakan bahwa jumlah kekurangan bangunan rumah dapat diprediksi akan meningkat setiap tahun. Hal ini juga berarti bahwa akan lebih banyak orang yang tidak memiliki akses terhadap rumah setiap tahunnya. Pengalaman di masa lalu menunjukkan bahwa rumah murah lebih banyak dibeli dan dimiliki oleh kalangan menengah ke atas daripada kalangan bawah. Dengan demikian, kesuksesan membangun rumah

secara fisik dalam jumlah tertentu belum dapat dikatakan cukup untuk memenuhi hak atas perumahan. Sudah seharusnya pembangunan perumahan diikuti dengan pembagian serta pengawasan yang mendukung sehingga dapat menjamin bahwa program rumah murah dapat benar-benar diakses dan dinikmati oleh kalangan berpendapatan rendah. Akan lebih baik jika kebijakan dapat diarahkan secara langsung bagi perorangan yang membutuhkan rumah, sehingga pemerintah dapat lebih membangun rumah bagi orang yang tepat dan bukan bagi kelompok yang tidak diprioritaskan. Selain itu lokasi pembangunan rumah murah biasanya terletak di pinggiran kota dan jauh pusat kota. Oleh karena transportasi umum sangat terbatas akibatnya calon pembeli tidak tertarik untuk memiliki rumah tersebut karena lokasi yang jauh dari tempat pekerjaan. Salah satu contoh ini memberikan gambaran mengenai kebutuhan untuk lebih fokus kepada kebijakan yang diambil oleh pemerintah daerah, sebagaimana akan dilakukan pada bagian dua buku ini.

Bagian II yang terdiri dari empat bab (Bab 5-8) menguji praktik empat pemerintah daerah dalam kaitannya dengan kewajiban hukum yang bersumber dari peraturan-peraturan nasional dan internasional tentang hak atas perumahan yang layak. Keempat daerah tersebut yaitu Jakarta, Surabaya, Yogyakarta dan Surakarta.

Pendekatan dan praktik yang dilakukan oleh keempat pemerintah daerah dalam melindungi dan memenuhi hak atas perumahan yang layak bagi warganya akan dibahas pada Bab 5. Bab ini menggunakan metode pendekatan baik normatif maupun empiris yang berdasarkan penelitian kualitatif (wawancara). Dapat diketahui bahwa keempat pemerintah daerah telah mengambil kebijakan dan peraturan daerah tentang perumahan. Kebijakan-kebijakan tersebut ditujukan untuk perbaikan atau peningkatan kondisi rumah tidak layak, maupun untuk membangun rumah susun sederhana sewa (rusunawa) bagi kelompok berpendapatan rendah. Namun demikian bab ini juga menemukan bahwa pemerintah daerah menemui kesulitan serta tantangan untuk mewujudkan hak atas perumahan yang layak. Khususnya ada tiga tantangan yang dapat diidentifikasi dalam penelitian ini yaitu: sistim kepemilikan tanah, praktik diskriminasi tidak langsung yang dialami oleh kelompok tertentu untuk mendapatkan akses terhadap rumah umum (rusunawa) yang disediakan atau dikelola oleh pemerintah daerah, serta penggusuran paksa yang diakibatkan oleh proyek pembangunan untuk kepentingan umum.

Bab 6 membahas mengenai tantangan pertama yang dapat menghambat pemenuhan hak atas perumahan yang layak. Tantangan tersebut adalah sistim kepemilikan tanah yang dapat dikategorikan sebagai salah satu faktor. Kombinasi antara belum selesainya program pendaftaran tanah nasional dan juga sistem kepemilikan tanah di empat lokasi tersebut menyebabkan keterbatasan lahan untuk lokasi pembangunan perumahan. Kota-kota ini memiliki berbagai macam metode penguasaan dan pemilikan tanah yang timbul karena adanya percampuran sistim antara hukum nasional, hukum adat, dan pengaturan yang berlaku pada masa kolonialisme. Pada setiap kota-kota ini terdapat beberapa pihak yang memiliki tanah yang sangat luas. Pihak-pihak tersebut termasuk keraton, individu yang kaya atau perusahaan swasta. Kondisi ini menyebabkan harga tanah menjadi tidak terjangkau lagi dan bahkan tidak tersedia bagi kaum miskin. Sebagai tambahan, berdasarkan wawancara dengan otoritas daerah yang bertanggung jawab untuk urusan perumahan, ketidaktersediaan data atas aset tanah yang dimiliki pemerintah daerah juga memberikan tantangan tersendiri dalam menyediakan lokasi

pembangunan perumahan. Pemerintah dapat mengambil langkah-langkah untuk meningkatkan ketersediaan tanah, misalnya konsolidasi tanah atau membeli kembali tanah dari individu atau perusahaan swasta. Namun demikian, langkah-langkah ini membutuhkan sumber daya berupa finansial dan waktu yang tidak sedikit. Bab ini menyimpulkan bahwa diperlukan langkah segera untuk menyelesaikan proses pendaftaran tanah termasuk ketersediaan informasi mengenai daftar aset berupa tanah yang dimiliki oleh pemerintah daerah.

Tantangan kedua yaitu berkaitan dengan praktik diskriminasi kepada imigran dalam negeri yang akan dibahas pada Bab 7. Perlu dipahami bahwa keempat pemerintah daerah yang menjadi obyek dari penelitian ini telah berusaha untuk menyediakan rumah sewa yang mereka kelola bagi kalangan berpendapatan rendah, baik dengan bantuan dari pemerintah pusat maupun melalui dana masing masing pemerintah daerah. Dalam mendistribusikan rumah susun, pemerintah daerah lebih sering memberi prioritas kepada masyarakat yang terdampak oleh program pembangunan, seperti pembuatan bendungan atau program penghapusan lingkungan kumuh. Namun demikian, selanjutnya pemerintah daerah mengatur persyaratan yang lebih detail mengenai akses atas rumah susun, misalnya dengan kewajiban untuk memiliki kartu tanda penduduk (KTP) lokal. Persyaratan ini dianggap dapat menghambat para imigran lokal yang memilih untuk tidak melakukan pindah domisili dalam mengakses rumah susun yang disediakan oleh pemerintah daerah di mana mereka bertempat tinggal. Setelah melakukan pengujian secara menyeluruh mengenai persyaratan tersebut dengan dihadapkan dengan standar yang ada menurut Pasal 4 KIHESB, Komentar Umum No. 4 dan 7, serta literatur yang berkaitan dengan isu tersebut. Bab 7 menyimpulkan bahwa peraturan daerah yang memberikan preferensi khusus untuk mengakses rumah susun hanya kepada penduduk yang terdaftar secara resmi dapat mengarah kepada praktek diskriminasi secara tidak langsung pada para imigran lokal yang tidak melakukan pendaftaran penduduk. Selanjutnya, preferensi yang diberikan juga tidak dapat dikategorisasikan sebagai pembatasan hak yang diperbolehkan dalam KIHESB. Hal ini disebabkan karena praktek tersebut terbukti tidak memenuhi persyaratan serta tidak sesuai dengan tujuan hak atas perumahan yang layak. Selain itu, preferensi yang dilakukan oleh pemerintah daerah tidak mempunyai tujuan utama untuk mempromosikan atau menuju kepada kesejahteraan umum dalam masyarakat demokratis. Kewajiban hukum yang termaksud dalam hak atas perumahan tidak hanya berhenti pada penyediaan rumah publik saja tapi juga termasuk dalam bagaimana rumah publik dapat didistribusikan secara setara dan adil.

Bab 8 mendiskusikan mengenai tantangan ketiga yang dihadapi oleh pemerintah daerah, yaitu mengenai masalah penggusuran paksa akibat proyek pembangunan. Bab ini menguji apakah penggusuran paksa yang dilakukan dapat dijustifikasi ataukah merupakan pelanggaran hak atas perumahan yang layak. Bab ini mencakup studi kasus atas penggusuran paksa yang dilakukan oleh Pemerintah DKI Jakarta yang diakibatkan oleh pembangunan tanggul pada bantaran Sungai Ciliwung. Menurut peraturan tingkat nasional, pembangunan bendungan atau tanggul dalam rangka program pencegahan banjir dapat dikategorikan sebagai pembangunan yang ditujukan untuk kepentingan umum. Namun demikian untuk dapat dikategorikan sebagai penggusuran yang dapat dilegalkan, alasan tersebut belumlah cukup. Penggusuran yang legal mempunyai kriteria (1) diperbolehkan secara hukum, (2) sesuai dengan tujuan HAM, (3) utamanya dilaksanakan dalam rangka untuk cita cita kesejahteraan umum, (4) mempunyai alasan yang pantas dan seimbang-proporsional, (5) dilaksanakan dengan berdasarkan standar

hukum internasional, dan (6) disediakan kompensasi secara penuh dan adil serta rehabilitasi bagi masyarakat terdampak.

Setelah dilakukan investigasi dan analisa secara menyeluruh, pengusuran yang dilakukan oleh pemerintah DKI Jakarta, tidak memenuhi standar yang tercantum KIHESB. Ketidaksesuaian ini termasuk: (1) pembedaan perlakuan dalam program pemukiman kembali masyarakat terdampak, (2) pemerintah daerah tidak menunggu atau tidak menghormati proses hukum yang sedang berjalan, (3) ketidakseimbangan kekuatan antara masyarakat dengan pemerintah, dan (4) Tidak adanya kompensasi bagi para pemilik bangunan permanen. Sampai tahun akhir tahun 2019, gugatan yang diajukan oleh masyarakat terdampak atas penggusuran yang terjadi pada tahun 2016 masih belum diputuskan oleh Mahkamah Agung dalam tingkat kasasi.

Berkaitan dengan beberapa tantangan yang dihadapi oleh pemerintah daerah, penulisan ini bertujuan untuk mengatasi tantangan tersebut melalui perspektif ‘akuntabilitas sebagai suatu proses’ dan bagaimana konsep ini dapat dipakai untuk membantu pemerintah Indonesia dalam mencapai pemenuhan hak atas perumahan yang layak. Investigasi atas konsep ini dalam kaitannya dengan pemenuhan HAM dan prakteknya akan dibahas dalam Bagian 3, yang terdiri dari Bab 9 sampai 11.

Bab 9 menyediakan dasar atas kebutuhan akan konsep ‘akuntabilitas sebagai suatu proses’ dalam merealisasikan HAM. Konsep ini memiliki beberapa elemen yang dapat digunakan sebagai dasar untuk melakukan analisa dalam hak atas perumahan yang layak, baik pada tingkat internasional maupun nasional. Elemen ini meliputi: partisipasi publik dalam pengambilan keputusan, pengawasan (*monitoring*), mekanisme akuntabilitas, dan ketersediaan ganti rugi dan rehabilitasi yang layak. Lebih jauh, Bab 9 juga mengusulkan untuk menambahkan satu elemen dalam konsep ini, yaitu elemen: langkah penegakan (*enforcement measures*). Elemen ini tidak dikenal dalam teori akuntabilitas dan telah terbukti menjadi masalah klasik dalam melakukan eksekusi atau melaksanakan hasil putusan dari mekanisme-mekanisme yang tersedia. Penangguhan pembayaran yang dialami masyarakat terdampak dalam proses pengadaan tanah untuk kepentingan umum, sebagaimana dialami oleh masyarakat terdampak di Jakarta, dapat menyebabkan penderitaan berkepanjangan. Akibatnya masyarakat tidak dapat menikmati hak atas perumahan yang layak. Dalam hal ini, meskipun mekanisme akuntabilitas tersedia dan dapat diakses untuk menggugat pelanggaran atas HAM, mekanisme tersebut belum berhasil memberikan perlindungan HAM. Alasannya adalah karena keputusan-keputusan institusi yang berwenang tersebut sulit atau tidak dapat dilaksanakan karena kurangnya atau tidak adanya mekanisme pelaksanaan yang dapat menekan atau memaksa pemerintah untuk melaksanakan keputusan tersebut dalam waktu yang tidak begitu lama (layak). Ketidakadaan mekanisme pelaksanaan dapat dipakai oleh pemerintah sebagai alasan untuk menunda pelaksanaan keputusan badan-badan tersebut dalam waktu yang tidak ditentukan.

Bab 10 mengklarifikasi istilah akuntabilitas dalam literatur mengenai HAM. Badan-badan HAM PBB telah beberapa kali merujuk mengenai perlunya akuntabilitas meskipun sebenarnya konsep akuntabilitas tidak dapat ditemukan dalam instrumen HAM. Badan-badan ini sepertinya merujuk konsep akuntabilitas sebagai suatu mekanisme daripada merujuk pada

konsep ‘akuntabilitas sebagai proses’. Bab 10 menguji elemen-elemen akuntabilitas sebagai sebuah proses dalam hak atas perumahan layak pada tingkat internasional.

Elemen partisipasi dapat dikatakan serupa dengan partisipasi yang ditemukan dalam tingkat nasional. Hanya saja, yang dapat berpartisipasi dalam pembentukan hukum atau kebijakan tingkat internasional hanyalah pemerintah pusat dan lembaga swadaya internasional. Cara kerja sistem partisipasi dalam proses *decision-making* pada tingkat internasional sama dengan sistem perwakilan pada level nasional. Sedangkan untuk pengawasan serta pengajuan komplain atau keberatan atas pelaksanaan hak atas perumahan yang layak dapat dilakukan melalui badan-badan lain.

Mekanisme yang dapat digunakan untuk membuat negara akuntabel atas pelanggaran hak atas perumahan yang layak di tingkat internasional adalah mekanisme komplain individual melalui Komite Ekonomi, Sosial dan Budaya. Namun demikian, sampai saat ini belum ada mekanisme yang dapat digunakan untuk memaksa negara yang bersangkutan dengan komplain tersebut untuk melaksanakan putusan Komite. Walaupun demikian, mekanisme komplain tersebut dapat digunakan sebagai sarana alternatif untuk memberikan perlindungan bagi pelaksanaan hak atas perumahan yang layak, jika mekanisme tingkat nasional sudah digunakan atau jika mekanisme nasional tidak ada ataupun ada tapi tidak efektif.

Bab 11 menutup penelitian ini dengan menganalisa setiap elemen akuntabilitas sebagai proses untuk pemenuhan hak atas perumahan yang layak di Indonesia. Partisipasi publik dari masyarakat terdampak dalam kebijakan bidang perumahan di Indonesia terbukti masih kurang. Dalam berbagai contoh, baik itu pemerintah nasional maupun pemerintah daerah lebih cenderung mempraktekkan pendekatan *top-down* daripada *bottom-up*. Selain itu, monitoring serta supervisi dalam distribusi rumah susun yang terjangkau juga masih belum maksimal. Perorangan dan lembaga swadaya masyarakat (LSM) juga melaksanakan peran pengawasan dan secara aktif melaporkan kepada lembaga pengawas yaitu Ombudsman dan KOMNAS HAM, jika ada dugaan pelanggaran berkaitan dengan masalah perumahan.

Sebagai sebuah negara demokratis, Indonesia juga telah membentuk mekanisme akuntabilitas melalui beberapa jalur, seperti yudisial, semi yudisial, serta jalur administrasi. Mekanisme-mekanisme ini memudahkan para individu atau group untuk mengajukan keberatan atau gugatan kepada otoritas publik atas pelanggaran atau komplain yang berkaitan dengan permasalahan perumahan, termasuk untuk meminta ganti rugi dan rehabilitasi jika ada kerugian yang ditimbulkan. Mekanisme hukum memiliki beberapa macam kelemahan, misalnya gugatan yang berkaitan dengan pelanggaran HAM sering dihubungkan dengan perbuatan melawan hukum berdasarkan Kitab Undang-Undang Hukum Perdata. Dalam beberapa kasus, para hakim sepertinya tidak mempertimbangkan HAM di dalam keputusannya. Selain itu secara prinsip hasil putusan pengadilan pada kasus-kasus perdata dan administrasi hanya berlaku pada para pihak saja, dan tidak mempunyai dampak besar bagi kondisi pemenuhan hak atas perumahan yang layak. Menurut teori, norma-norma HAM internasional yang telah diratifikasi oleh pemerintah Indonesia dapat digunakan sebagai dasar gugatan pada pengadilan domestik. Pada akhirnya putusan pengadilan di Indonesia tidak menunjukkan hal tersebut. Norma HAM sepertinya tidak begitu mendapat perhatian dalam kasus-kasus perdata atau administrasi. Selain prosedur perdata dan administrasi, perorangan atau group dapat mengajukan keberatan atas suatu peraturan perundang-undangan (*uji materi/judicial review*) yang bertentangan dengan Konstitusi melalui Mahkamah Konstitusi dan Mahkamah Agung.

Mekanisme semi yudisial juga tersedia dalam hukum Indonesia, melalui KOMNAS HAM dan OMBUDSMAN. Lembaga yang pertama berhubungan dengan laporan yang berkaitan dengan dugaan pelanggaran HAM yang dilakukan oleh negara ataupun pihak bukan negara. Ombudsman lebih fokus kepada laporan yang berkaitan dengan maladministrasi yang dilakukan oleh pemerintah. Kelemahan dari prosedur semi yudisial ini adalah prosedur dan hasilnya tidak diumumkan secara terbuka. Hal ini juga berlaku bagi mekanisme akuntabilitas internal.

Sistem hukum Indonesia mengenal keberadaan ganti rugi dan rehabilitasi atas kerugian yang disebabkan oleh proyek pembangunan maupun akibat dari perbuatan melawan hukum yang dilakukan oleh negara ataupun agennya. Kompensasi berupa sejumlah uang dan pemukiman kembali adalah dua bentuk yang paling sering ditemui dalam ganti rugi karena proyek pembangunan. Namun demikian kompensasi yang diputuskan melalui prosedur hukum perdata sering menghadapi kesulitan dalam pelaksanaannya. Hal ini terutama disebabkan birokrasi yang terlalu panjang, sehingga menyebabkan pemberian ganti rugi memerlukan waktu yang lama serta tanpa ada batas waktu yang jelas. Akibatnya sangat merugikan pihak masyarakat yang terdampak sekaligus membuktikan bahwa prosedur yang sekarang ada tidak memberikan perlindungan yang efektif kepada masyarakat.

Bab 12 menggabungkan antara hasil studi dari Bab 1-11 dan memberikan rekomendasi bagi beberapa pihak yang bekerja dalam bidang perumahan. Pemerintah Indonesia, baik nasional dan lokal, telah mengadopsi beberapa kebijakan untuk mewujudkan hak atas perumahan yang layak sebagaimana terdapat dalam peraturan nasional maupun internasional. Namun demikian, beberapa kesenjangan ditemukan antara peraturan hukum dan pelaksanaan di lapangan. Pemerintah masih menemui tantangan serius dalam pemenuhan elemen-elemen hak atas perumahan yang layak bagi masyarakat kalangan bawah. Studi ini telah membuktikan bahwa dalam beberapa hal pemerintah Indonesia belum berhasil memenuhi kewajiban negatif yang berkaitan dengan hak atas perumahan, misalnya dalam mengambil kebijakan non-diskriminatif untuk mendapatkan akses atas rumah susun atau telah gagal untuk tidak melakukan penggusuran. Dalam hal ini, mekanisme akuntabilitas masih belum berfungsi maksimal dan belum berhasil dalam menjamin dan melindungi HAM bagi masyarakat yang terdampak.

Hak atas perumahan yang layak tidak hanya fokus kepada penyediaan bangunan untuk perumahan. Hak tersebut mencakup hal yang lebih luas. Hak atas perumahan memerlukan dan bersinggungan dengan macam-macam faktor, seperti perencanaan, ketersediaan tanah, ketersediaan anggaran, serta norma-norma budaya. Kesemua faktor tersebut perlu dilakukan pendekatan secara komprehensif oleh pemangku kepentingan yang berkaitan dengan pemenuhan hak atas perumahan. Selain itu diperlukan juga pemahaman mengenai perspektif HAM dari pemerintah di semua tingkat dalam upaya pemenuhan hak atas perumahan.

Lebih penting lagi, dalam rangka mewujudkan hak atas perumahan secara penuh, ketersediaan mekanisme akuntabilitas saja tidaklah cukup. Pemerintah harus menjamin eksistensi partisipasi publik serta pengawasan dalam proses pengambilan kebijakan sampai pada proses pertanggungjawaban pemerintah. Selain itu, pengawasan juga masih diperlukan dalam hal pelaksanaan keputusan badan-badan yang berwenang untuk menjamin bahwa ganti rugi dan rehabilitasi bagi kelompok terdampak dapat dilaksanakan dalam waktu yang pantas. Lebih jauh lagi, pembentukan tindakan penegakan hukum untuk menghadapi keterlambatan

atau ketidakmauan pemerintah dalam menghormati keputusan mengikat, misalnya dari pengadilan. Langkah penegakan ini diperlukan untuk menjamin bahwa masyarakat yang mengalami pelanggaran hak atas perumahan tidak akan mengalami penderitaan yang tidak perlu. Studi ini berpendapat bahwa pengintegrasian secara penuh atas elemen-elemen ‘akuntabilitas sebagai proses’ tidak akan diragukan lagi dapat mendorong pelaksanaan hak atas perumahan yang layak.

Langkah-langkah lain yang dapat diambil oleh pembuat kebijakan dan peraturan untuk menghadapi tantangan yang didiskusikan pada paragraf di atas, termasuk (1) perlunya percepatan proses pendaftaran tanah dan ketersediaan data mengenai asset pemerintah, (2) mengadopsi prosedur tata cara pengurusan untuk pencegahan pelanggaran HAM, (3) lebih memberikan perhatian dalam hal pengaturan pasar rumah sewa yang pada saat ini belum teregulasi dengan jelas, (4) secara terus menerus mempromosikan norma HAM internasional pada otoritas lokal, sehingga mereka mampu mengintegrasikan prinsip-prinsip HAM dalam pelaksanaan tugas mereka.

Satu lagi langkah vital yang dapat dilakukan oleh pemerintah daerah adalah meninjau ulang legislasi lokal yang dapat menyebabkan efek negatif bagi pelaksanaan hak asasi kelompok tertentu. Berdasarkan penelitian ini, peraturan yang berkaitan dengan akses terhadap rumah susun yang disediakan oleh pemerintah daerah terbukti diskriminatif, sehingga legislasi tersebut perlu untuk diamandemen.

Selain itu, fakta yang menunjukkan bahwa pertimbangan HAM dalam putusan pengadilan yang terlihat kurang menonjol membuktikan adanya kebutuhan untuk memberikan pendidikan HAM kepada para hakim. Pendidikan ini tidak hanya mencakup norma-norma HAM dan interpretasi yang diberikan oleh badan HAM PBB, akan tetapi juga harus mencakup studi kasus. Hal ini berfungsi untuk mengetahui bagaimana hakim-hakim dari negara lain menggunakan norma norma HAM dalam kasus-kasus domestik.

Rekomendasi lain berupa penggantian prosedur birokrasi dalam hal pembayaran kompensasi berdasarkan putusan pengadilan bagi masyarakat terdampak. Prosedur yang saat ini berlaku menghambat pemenuhan ganti kerugian dan pemulihan bagi para korban proyek-proyek pembangunan. Untuk menghapus hambatan ini, pemerintah perlu untuk melakukan perubahan atau mengambil kebijakan baru yang memungkinkan untuk mengurangi waktu tunggu dalam hal perealisasi ganti rugi. Selain itu pemerintah harus memberikan prioritas atas keputusan pengadilan. Setelah putusan pengadilan mempunyai kekuatan hukum tetap, anggaran yang diperuntukkan untuk pembayaran kompensasi, selambat-lambatnya harus direncanakan untuk masuk ke dalam anggaran pemerintah pada tahun berikutnya. Dengan demikian masyarakat terdampak akan menerima ganti rugi pada tahun depan dan mereka tidak perlu untuk merasakan penderitaan atau kerugian yang lebih lama lagi.

Rekomendasi terakhir, terdapat kebutuhan mendesak untuk segera melakukan ratifikasi terhadap Protokol Opsional (OP) KIHESB, yang dapat memberikan kesempatan kepada individu untuk mengajukan komplain pada mekanisme internasional atas pelanggaran hak-hak ekonomi, sosial dan budaya, termasuk hak atas perumahan yang layak. Penelitian ini telah mengidentifikasi bahwa mekanisme yang tersedia pada tingkat nasional belum memberikan hasil yang memuaskan jika berkaitan dengan komplain atas pelanggaran hak atas perumahan. Dengan meratifikasi OP maka akan tersedia mekanisme alternatif pada tingkat internasional yang bisa dipakai setelah semua mekanisme nasional telah dipakai.

Dengan mengidentifikasi kewajiban-kewajiban internasional dan nasional dalam pelaksanaannya oleh negara serta hambatan dan tantangan atas mekanisme yang telah ada serta menawarkan kerangka inovatif dalam melakukan analisa hukum, penelitian ini meletakkan dasar bagi pemerintah Indonesia untuk lebih efektif dalam menjamin pemenuhan hak atas perumahan yang layak.

CURRICULUM VITAE

Erna Dyah Kusumawati (Indonesia, 1977) started her PhD research in 2014 at the Department of Transboundary Legal Studies, Faculty of Law, University of Groningen in the Netherlands. Her research focussed on the implementation of the right of housing, particularly at local level in Jakarta, Yogyakarta, Surakarta and Surabaya. Her PhD was funded by the Indonesian Endowment Fund for Education (LPDP) as provided by the Ministry of Finance.

Erna holds a LLM degree from the LLM program on International law and the Law of International Organisations (with specialisation in Human Rights) from the Faculty of Law, University of Groningen. The Ford Foundation, through its International Fellowship Program, has granted her a full scholarship to pursue her Master in 2010-2011.

Since 2004, Erna has been a staff member of the Faculty of Law, Sebelas Maret University, Surakarta. She was actively involved in human rights advocacy via the Human Rights Research Centre of Sebelas Maret University, where she served as the chief of the centre. In 2006, together with several other women lawyers, she established a Legal Aid institution 'Sarasvati' serving mainly women facing criminal charges in Surakarta Region. Prior to 2004, she served as a lawyer at 'Achiel Suyanto S and Partners' in Yogyakarta.

Following her PhD, Erna is expected to return to the Sebelas Maret University, continuing her tasks both as a lecturer and a researcher.