

Transitional Justice in Housing Injustice: The Case of Housing Rights Violations Within Settler Democracies

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ABSTRACT

The right to housing is recognized by international human rights treaties as an integral part of the right to an adequate standard of living. Many states have ratified these treaties and incorporated protection of some aspects of housing rights into their constitutions and domestic legislation. Other states have not enacted any legislation in recognition of housing rights, but they provide judicial remedies for violations of rights. Despite that, domestic and international reports indicate that housing rights are constantly being violated in countries across the world at different levels.

This Article focuses on housing rights violations within “settler democracies.” Such countries share common features of housing rights violations including unequal distribution of land, forced evictions, massive expropriations, crowdedness, and housing demolitions within indigenous localities. Such violations are a result of structural and continued discriminatory spatial policies embedded in state legal and political systems. This Article asserts that housing rights violations should be addressed through the transitional justice theory and mechanisms that address the root causes of the systematic housing rights violations to prevent them from reoccurring in the future.

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TABLE OF CONTENTS

I.	INTRODUCTION	796
II.	SETTLER DEMOCRACIES	800
III.	THE RIGHT TO (ADEQUATE) HOUSING	802
IV.	PROTECTION AND VIOLATION OF HOUSING RIGHTS IN SETTLER DEMOCRACIES	809
	A. <i>Canada</i>	810
	B. <i>Australia</i>	813
	C. <i>The United States</i>	816
	D. <i>Israel</i>	821
V.	TRANSITIONAL JUSTICE IN SETTLER DEMOCRACIES	826
	A. <i>Transitional Justice without Transition</i>	829
	B. <i>Transitional Justice and Social Rights</i>	830
VI.	INCORPORATING TRANSITIONAL JUSTICE MECHANISMS IN HOUSING POLICY	831
	A. <i>Institutional Reform</i>	833
	B. <i>Reparations and Restitution Programs</i>	835
	C. <i>Participation as Political Constituencies</i>	836
VII.	CONCLUSION	838

I. INTRODUCTION

Housing is one of the necessities of life and fulfills a variety of critical functions in contemporary society.¹ It encompasses much more than a physical shelter and having a roof over one's head,² as it provides a sense of place, belonging, comfort, and security.³ Where people live plays a crucial role in fixing their place in society and their interaction with others because it affects the level of education they acquire and their social and economic mobility.⁴

In acknowledging its importance, the right to housing has been recognized by international human rights treaties as an integral part of the right to an adequate standard of living.⁵ Many states have

1. RACHEL G. BRATT, MICHAEL E. STONE & CHESTER HARTMAN, *Why a Right to Housing Is Needed and Makes Sense: Editors' Introduction*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 1, 3 (Temple Univ. Press 2006).

2. JESSIE HOHMANN, THE RIGHT TO HOUSING: LAW, CONCEPTS, POSSIBILITIES 4–5 (Hart Publishing 2013).

3. Kristen David Adams, *Do We Need A Right to Housing?*, 9 NEV. L. J. 275, 305–07 (2009).

4. See BRATT, STONE & HARTMAN, *supra* note 1, at 2.

5. G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948), art. 25; International Convention on the Elimination of all Forms of Racial Discrimination art. 5, Dec 21, 1965, 660 U.N.T.S 195; International Covenant on Economic, Social and Cultural Rights art. 11(1), Dec. 16, 1966, 993 U.N.T.S 3 (entered

ratified these treaties and incorporated protection of some aspects of housing rights into their constitutions⁶ and domestic legislation.⁷ Others have not enacted any legislation in recognition of housing rights⁸ but provide some legal remedies for violations of housing rights.⁹ Despite this, domestic and international reports indicate that housing rights are constantly being violated by states in differing levels and forms. Such violations include forced eviction, displacements, and discrimination in housing.¹⁰

This Article focuses on housing rights violations within “settler democracies,” which are multicultural societies that consist of two groups: (1) settlers (emigrants) who came to reside in the country and (2) indigenous groups who are natives of the place.¹¹ Such countries have been built upon the political exclusion and the marginalization of indigenous ethnic groups, citizens of their countries, through various forms of dispossession of both land and the power of self-government.¹²

Settler democracies share common features of housing rights violations committed against marginalized groups, such as unequal

into force Jan. 3, 1976); International Covenant Civil and Political Rights arts. 17, 25, Mar. 23, 1976, 999 U.N.T.S 171; Convention on the Rights of the Child art. 27, Nov. 20, 1989, 1577 U.N.T.S 3; Convention on the Elimination of all Forms of Discrimination Against Women art. 14(2), Dec. 18, 1979, 1249 U.N.T.S 13.

6. In the 1990s, the right to housing received constitutional recognition from: Armenia, Belgium, Burkina Faso, Cambodia, Colombia, Congo, Nepal, Pakistan, Paraguay, Poland, the Russian Federation, Seychelles, Slovenia, South Africa, and Vietnam. See SCOTT LECKIE, *Where it Matters the Most: Making International Housing Rights Meaningful at the National Level*, in NATIONAL PERSPECTIVES ON HOUSING RIGHTS 3, 17 (Springer 2003).

7. *Id.* at 18–24.

8. For example, the United States and Israel did not incorporate protection of housing rights within their legislative system. See Gil Gan-Mor, *Real Estate or Rights: Housing Rights and Government Policy in Israel*, ASS’N FOR C.R. IN ISRAEL, 3 (July 2008), <https://www.acri.org.il/pdf/DiurEng.pdf> [<https://perma.cc/RE82-JMX9>] (archived Sept. 8, 2019) (explaining that Israeli housing policy has leaned on privatization and the Israeli state has largely shirked its responsibility to provide affordable housing to those who cannot afford it); INT’L HUMAN RIGHTS COMM. OF THE N.Y.C. BAR ASS’N, *ADVANCING THE RIGHT TO HOUSING IN THE UNITED STATES: USING INTERNATIONAL LAW AS A FOUNDATION* 8–9 (Feb. 2016), <https://www2.nycbar.org/pdf/report/uploads/20072632-AdvancingtheRighttoHousingIHR2122016final.pdf> [<https://perma.cc/B6JH-ZCUJ>] (archived Sept. 8, 2019) (explaining that the United States Constitution does not explicitly recognize a right to housing, though federal and state programs have attempted to offer affordable housing on an *ad hoc* basis).

9. LECKIE, *supra* note 6, at 26–28.

10. See Human Rights Council, Rep. 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, U.N. Doc. A/HRC/31/54, at ¶ 23-24 (Dec. 30, 2015) (describing the ways in which public authorities enact laws that infringe on the rights of those without housing).

11. Alexandre (Sandy) Kedar, *On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda*, 5 CURRENT LEGAL ISSUES 401, 403 (2003).

12. Michael Philips, *Justice Seeking in Settler States: A Model for Thinking about Justice in Transitional Societies*, in THEORIZING TRANSITIONAL JUSTICE 81, 84 (Claudio Corradetti et al. eds., Routledge 2015).

distribution of land, forced evictions, massive expropriations, crowdedness, and housing demolitions within indigenous localities.¹³ As a result, the victimized groups remain marginalized and without resources.¹⁴ These violations are a result of structural and systematic discriminatory spatial and housing policies embedded in the legal and political systems.¹⁵ Systemic discrimination refers to the existence of a general pattern of discrimination against a particular group of people.¹⁶ The concept of systemic discrimination can be useful to identify relevant criteria for violations of economic, social, and cultural rights.¹⁷

United Nations (UN) reports indicate that addressing the root causes of conflict appears to be an important function in repairing past injustice.¹⁸ Academics have also argued that addressing past wrongs can serve to lay the foundation of the new political order.¹⁹ Based on this insight, this Article asserts that addressing the root causes of systematic housing rights violations is crucial for dealing with the housing crisis and housing rights violations of marginalized groups and for the creation of a just future and society. Accordingly, it argues that the most suitable theoretical and practical framework in this regard is the transitional justice theory and its mechanisms.²⁰

Transitional justice has become the dominant international framework for redressing mass harm and structural injustices.²¹ It is both a conceptual theory of justice and a full range of processes that provides practical mechanisms aimed at institutional changes.²²

13. See Jennifer Balint, Julie Evans & Nesam McMillan, *Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach*, in 8 THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 194, 202–03 (2014) (positing that settler states perpetuate power disparities by producing a polity that dispossesses indigenous peoples and preserves the power of the colonizer through constant marginalization).

14. Aeyal Gross, *The Dilemma of Constitutional Property in Ethnic Land Regimes: Israel and South Africa Compared*, 121 S. AFRICAN L.J. 448, 449 (2004).

15. *Id.* at 448–65.

16. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 43 (2006).

17. In his article Bagenstos shows how racial minority groups face “deep-rooted structural barriers” stemming from “significant wealth disparities” that “reflect the legacy of discrimination. *Id.* These barriers can be manifested as violations of social, economic and cultural rights and as the article suggests they should be regarded through transitional justice mechanisms. These tools were developed to address deep rooted violations.

18. U.N. High Commissioner for Human Rights, *Analytical study on human rights and transitional justice*, ¶ 59, U.N. Doc. A/HRC/12/18 (Aug. 6, 2009).

19. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 69 (Oxford Univ. Press 2000).

20. Wendy Lambourne, *Transformative Justice, Reconciliation and Peace Building*, in *TRANSITIONAL JUSTICE THEORIES* 19, 19 (Susanne Buckley-Zistel et al. eds., 2014).

21. Jennifer Balint & Julie Evans, *Transitional Justice and Settler States*, AUSTL. & N.Z. CRITICAL CRIMINOLOGY CONFERENCE 1 (2010).

22. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 765–66 (2004).

Transitional justice is characterized by legal responses that confront the wrongdoings of repressive predecessor regimes in periods of political influx.²³ It requires investigating the roots of systematic and continuous human rights violations to prevent them from reoccurring in the future.²⁴

Although transitional justice theory was developed to deal with transitions of political regimes, scholars and UN committees have expanded its application to more diverse contexts of transitions, such as situations in which there are no ongoing political transitions but are ongoing social and economic transitions.²⁵ This Article joins the developing research on expanding transitional justice and calls for its application to social rights violations within nontransition settler democracies. This Article asserts that transitional justice is the best framework to address housing rights violations within settler democracies that fulfill two conditions. The first is that such states are committed to some extent to the protection and the promotion of human rights. The second is that these states have undergone some sort of transition in their attitude towards acknowledging past injustice. Such acknowledgment would provide the basis for an application of transitional justice mechanisms.²⁶

The Article proceeds as follows: the next Part presents an overview of the concept of settler democracies. The third Part elaborates on the scope of the right to housing as defined by international treaties. The fourth Part identifies housing rights violations in four selected settler democracies that share common features: Canada, Australia, the United States, and Israel. The fifth Part introduces the transitional justice approach and makes the case that it is the most suitable theoretical and practical framework for addressing housing rights violations in settler democracies. The sixth Part provides an overview of transitional justice mechanisms that should be applied within housing policies of settler democracies. The Article concludes with a summary.

23. Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003).

24. Balint, Evans & McMillan, *supra* note 13, at 3.

25. Thomas Obel Hansen, *The Horizontal and Vertical Expansions of Transitional Justice: Explanations and Implications for a Contested Field*, in TRANSITIONAL JUSTICE THEORIES (Susanne Buckley-Zistel et al. eds., 2014) [hereinafter Hansen I].

26. The Settler Democracies presented in the article all have experienced a change in their political attitude towards injured groups of the state. See Stephen Winter, TRANSITIONAL JUSTICE IN ESTABLISHED DEMOCRACIES: A POLITICAL THEORY 6 (Palgrave MacMillan 2014).

II. SETTLER DEMOCRACIES

Settler states are multicultural societies that consist of emigrants, who came to reside in the country, and indigenous groups, who are the native group and became socially and economically marginalized.²⁷ These states are characterized by ethnic conflict and struggle over dispossession of land, legacies of human rights violations, and the exclusion of indigenous and marginalized groups.²⁸ The emigrant group usually seeks to replace the original population with a new society of settlers who are regarded as superior.²⁹ Therefore, in their formative periods settler democracies lead a strategy of ethnic migration and settlement, which creates the country's geographic and ethnic structure.³⁰

Settler states are characterized by patterns of segregation that refrain from mixing indigenous and marginalized groups with other groups in residential spaces and school systems.³¹ Usually, land left for the indigenous groups is of poorer quality compared to that possessed by the settlers; it is often more crowded, underdeveloped, and located farther from the center of power.³²

The most troubling human rights violations are often those that occur in *democratic* settler states against indigenous ethnic groups that are citizens of the country. Such societies, which developed a liberal democratic system, are referred to as "settler democracies," and they are the focus of this Article. They include countries such as Canada, Australia, New Zealand, the United States,³³ and Israel.³⁴ These countries have progressive, liberal, and egalitarian legal systems, and they adhere to differing levels of legal protection of human rights.³⁵

27. Kedar, *supra* note 11, at 403.

28. THOMAS G. MITCHELL, *NATIVE VS. SETTLER: ETHNIC CONFLICT IN ISRAEL/PALESTINE, NORTHERN IRELAND AND SOUTH AFRICA 2* (Praeger, 2000).

29. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 388 (2006) (stating that settler colonialism has both a negative dimension of dissolving native societies and a positive dimension of erecting a new colonial society on the expropriated land base).

30. Kedar, *supra* note 11, at 403.

31. *Id.* at 401, 403.

32. MITCHELL, *supra* note 28, at 2.

33. These countries are also referred to as "Established Democracies." See Winter, *supra* note 26, at 6.

34. In his article, Kedar refers to these countries as "ethnocratic settling societies" or "ethnocratic settler societies." See Kedar, *supra* note 11, at 403.

35. See, e.g., Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 1 (2005); Gross, *supra* note 15, at 448–49.

Settler democracies are also characterized by ethnic hierarchies, and some of them are led by “ethnocratic” regimes,³⁶ which rely on ethnic criteria to ensure their continuing domination.³⁷ These regimes apply discriminatory land allocation policy that facilitates the domination of the hegemonic ethnic group (the settlers). This results in housing segregation between hegemonic and marginalized groups, such as ethnic minorities and indigenous groups.³⁸

Human rights violations within these states are usually embedded in a structural system of injustice.³⁹ These violations are troubling because they are wrapped in a complex system of allegedly neutral legal rules and enactments, which are in fact embedded in a long systemic institutional (public and legal) discriminatory spatial and housing policy. In some cases, they are committed under the auspice of the rule of law and legal doctrines, such as *terra nullius*,⁴⁰ and, therefore, are difficult to challenge before a court.⁴¹ Accordingly, the law and courts play a crucial part in the institutionalization of these socio-spatial power structures.⁴² However, the ethnocratic elements of each society differ from one country to another, depending heavily on the development of their respective legal-constitutional systems.

Before presenting the joint characteristics of housing rights violations within these countries and the need for a transitional justice approach to deal with them, the following Part presents an overview of

36. The concept of “ethnocratic societies” was developed by the political geographer Oren Yiftachel in the early nineties. Yiftachel shows that in such countries, ethnicity, rather than citizenship, constitutes the main criterion for distribution of power and resources. Oren Yiftachel, *ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE* (Univ. of Pennsylvania Press 2006); Oren Yiftachel, *Extending Ethnocracy: Reflections and Suggestions*, 8 *COSMOPOLITAN CIV. SOC'YS J.* 30 (2016). The concept was further developed by other academic researchers. See James Anderson, *Imperial Ethnocracy and Demography: Foundations of Ethno-National Conflict in Belfast and Jerusalem*, in *LOCATING URBAN CONFLICTS: ETHNICITY, NATIONALISM AND THE EVERYDAY 195–213* (Windy Pullan & Britt Baillie eds., Palgrave MacMillan 2013); Lise Morje Howard, *The Trap of Ethnocracy*, 23 *J. DEMOCRACY* 155 (2012).

37. Kedar, *supra* note 11, at 413. On the construction of such systems, see Peter H. Russell, *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence*, 61 *SASKATCHEWAN L. REV.* 247, 252 (1998). Joseph Singer provides an overview on the transfer of land in the US from American Indians to non-Indians. Joseph W. Singer, *Sovereignty and Property*, 86 *NW. U. L. REV.* 44 (1991).

38. These countries usually are divided to three major groups: founders, immigrants, and natives. See Kedar, *supra* note 11, at 413.

39. See Winter, *supra* note 26, at 6; see also Gross, *supra* note 14, at 449 (explaining that the ethnic land regime is characterized with a history of unequal allocation of land).

40. Mark McMillan & Sophie Rigney, *Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment*, 41 *ETHNIC & RACIAL STUD.* 759, 764–66 (2018).

41. Kedar, *supra* note 11, at 412–16.

42. *Id.* at 413; Singer, *supra* note 37, at 44–45.

the scope and components of housing rights manifested in international treaties.

III. THE RIGHT TO (ADEQUATE) HOUSING

Adequate housing encompasses much more than simple shelter⁴³ or “having a roof over one’s head.”⁴⁴ Housing meets some of the most fundamental human needs; it provides refuge from external physical threats and provides a material base from which to build a livelihood.⁴⁵ Housing rights are intrinsically connected with the possibility of realizing an adequate standard of living and impacts the potential for substantive human development.⁴⁶ Therefore, inadequate housing not only violates the right for housing but it also leads to violations of other rights, such as human dignity, health, and security.⁴⁷ Moreover, housing can affect peoples’ perceptions of themselves.⁴⁸ Where one lives plays a critical role in social and economic status, access to education and other public services, and social and economic mobility. As such, housing can be either a tool of social transformation for individuals or a tool for social control by the state.⁴⁹

Conceptualizing housing in a broad context as affecting many areas of life broadens the legal protection provided to it by law.⁵⁰ Courts have acknowledged the importance of housing and developed legal doctrines that provide diverse forms of housing rights protection, such as the security of tenure doctrine, requiring the state to provide decent shelter, and applying fair eviction procedures.⁵¹ A further development stressing the significance of housing rights is manifested in their recognition and inclusion in international treaties.⁵²

The right to housing was first recognized in the Universal Declaration of Human Rights (UDHR), which explicitly included housing as an aspect of the right to an adequate standard of living.⁵³

43. Tawfiq S. Rangwala, *Inadequate Housing, Israel, and the Bedouin of the Negev*, 42 OSGOODE HALL L.J. 415, 418 (2004).

44. HOHMANN, *supra* note 2, at 4–5.

45. *Id.*

46. Rangwala, *supra* note 43, at 418.

47. INT’L HUMAN RIGHTS COMM. OF THE N.Y.C. BAR ASS’N, *supra* note 8, at 16.

48. *Id.*

49. BRATT, STONE & HARTMAN, *supra* note 1, at 3.

50. Padraic Kenna, *Can International Housing Rights Based on Public International Law Really Impact on Contemporary Housing Systems*, in *THE IDEA OF HOME IN LAW: DISPLACEMENT AND DISPOSSESSION* 133, 147–48 (Lorna Fox O’Mahony & James A. Sweeney eds., 2011).

51. David. B. Bryson, *The Role of Courts and A Right to Housing*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 193, 194 (Rachel G. Bratt et al. eds., 2006).

52. LECKIE, *supra* note 6, at 3–5.

53. Universal Declaration of Human Rights, *supra* note 5, at art. 25(1), states that: “[E]veryone has the right to a standard of living adequate for the health and well-

In addition, the most evident international legal recognition of the right to housing appears in the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁵⁴ Article 11(1) states as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁵⁵

Other treaties protect the right to housing through prohibition of discrimination and unlawful interference with a person's housing or housing rights.⁵⁶ All major settler democracies—excluding the United States—have ratified the ICESCR and other treaties and are thus required to submit yearly reports on housing conditions within their

being of himself and of his family, including food, clothing, *housing* and medical care and necessary social services.” In his article, Leckie provides an overview of the period of progress of housing rights. See LECKIE, *supra* note 6, at 7–8.

54. HOHMANN, *supra* note 2, at 17; International Covenant on Economic, Social and Cultural Rights, *supra* note 5, at art. 11.

55. (Emphasis added).

56. See Universal Declaration of Human Rights, *supra* note 5; International Convention on the Elimination of all Forms of Racial Discrimination, *supra* note 5; International Covenant on Economic, Social and Cultural Rights, *supra* note 5; International Covenant Civil and Political Rights, *supra* note 5; Convention on the Rights of the Child, *supra* note 5; Convention on the Elimination of all Forms of Discrimination Against Women, *supra* note 5. For further elaboration on housing protection in subject specific international conventions, see also HOHMANN, *supra* note 2, at 32–37.

countries.⁵⁷ Some also provide internal domestic reports on housing, as well as reports produced by civil organizations.⁵⁸

International treaties deemed the right to housing a “human right” and part of human rights discourse, as opposed to merely an “ordinary” right.⁵⁹ Scholars have argued that human rights discourse is particularly powerful, since it provides higher legal protection,⁶⁰ and makes important statements on how a community sees itself and what its basic values are.⁶¹ Moreover, it is widely accepted that housing rights are forging a new discourse, and that housing rights jurisprudence is growing in its content relevance, increasingly reflecting social accountability for human rights across the world.⁶²

However, besides the theoretical scope of the “right,” its actual meaning is manifested in its practical application in reality. In order to explore the implementation of the right to housing, the following questions need to be addressed: What does the right to housing mean?

57. The following states ratified the treaty: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Plurinational State of Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Palau, State of Palestine, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, San Marino, Sao Tome and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The Republic of Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Vietnam, Yemen, Zambia, Zimbabwe. See *UN Treaty Collection: International Covenant on Economic, Social and Cultural Rights*, Jan. 3, 1976, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en [<https://perma.cc/9TCA-D79G>] (archived Sept. 8, 2019).

58. See generally AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2017/2018: THE STATE OF THE WORLD'S HUMAN RIGHTS (2018) [hereinafter AMNESTY INT'L REPORT], as an example of reports produced by civil organizations.

59. Adams, *supra* note 3, at 300.

60. Maria Foscarinis, *The Growth of a Movement for a Human Right to Housing in the United States*, 20 HARV. HUM. RTS. J. 35, 35 (2007).

61. Housing Rights Service, *Focus On*, HOUSING RTS. REV. (Ir.) 12, 12 (2006).

62. LECKIE, *supra* note 6, at 3–4.

What are its contents? Is there a need for a right to housing? Does a right to housing ensure protection and access to housing?

These questions remain unanswered in law, theory, and practice,⁶³ and it seems that a final definition of housing rights may be forever illusive.⁶⁴ Nonetheless, the UN Committee on Economic, Social, and Cultural Rights (CESCR),⁶⁵ has adopted General Comments that deal with various aspects of housing rights and provide a definition of the right to housing according to the ICESCR.⁶⁶ The CESCR states that the right to housing is integrally linked to other human rights and to the fundamental principles upon which the ICESCR is premised.⁶⁷ Therefore, the reference in Article 11(1) must be read as referring not just to housing but to a broad conception of *adequate* housing.⁶⁸ Furthermore, the CESCR states that the right to housing should not be interpreted in a narrow or restrictive sense, but it should also include the right to live somewhere with security, peace, and dignity.⁶⁹

Although CESCR's General Comments are not binding, they influence the definition of the right to housing. In fact, General Comment No. 4 is considered to be the most authoritative legal interpretation of the right to housing under international law⁷⁰ and provides the following elements:⁷¹

63. In his article three decades ago, still relevant today, Frank Michelman raised these questions and others. Frank I. Michelman, *The Advent of A Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207, 207 (1970).

64. Matthew Craven, *History, Pre-history and the Right to Housing in International Law*, in NATIONAL PERSPECTIVES ON HOUSING RIGHTS 43 (Scott Leckie ed., Springer 2003).

65. The CESCR was established in 1986 by the U.N. Economic and Social Council to monitor the implementation of the ICESCR by the states that ratified it. In this capacity, the CESCR operates reports from states parties to the ICESCR, gathers information from specialized UN agencies and NGO reports. See U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), *Introduction*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> (last visited Sept. 25, 2019) [<https://perma.cc/M7QP-GR2Z>] (archived Sept. 25, 2019).

66. See U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2001/10 (May 10, 2001).

67. "The inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take into account a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources." U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), *General Comment 4: The Right to Adequate Housing* (art. 11(1)), ¶ 7, U.N. Doc. E/1992/23 (Dec. 13, 1991), E/C.12/1991/4 [hereinafter *General Comment 4*].

68. *Id.*

69. *Id.*

70. LECKIE, *supra* note 6, at 9; see also Jessie Hohmann, *Principle, Politics and Practice: The Role of UN Special Rapporteurs in the Development of the Right to Housing in International Law*, in THE U.N. SPECIAL PROCEDURES SYSTEM (Aoife Nolan et al. eds., Brill 2017).

71. See *General Comment 4*, *supra* note 67, at ¶ 8.

(a) *Legal security of tenure*, which takes a variety of forms, including protection of rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing, informal settlements, and occupation of land or property.⁷²

(b) *Availability of services, materials, facilities, and infrastructure*, that contain certain facilities essential for health, security, comfort, nutrition, 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.⁷³

(c) *Affordability* of personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.⁷⁴

(d) *Habitability*, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, physical safety of occupants, and disease vectors.⁷⁵

72. See General Comment 4, *supra* note 67, at ¶ 18; see also General Comment 7: The Right to Adequate Housing (Art. 11.1 of the Covenant): Forced Evictions, U.N. Doc. E/1998/22 (May 20, 1997). This document sets out the state's obligation regarding evictions. Forced eviction means the eviction of people from their home or plot, against their will, without providing suitable legal assistance, sufficient advance notice, counseling, a proper process, and an alternative housing option. The ESCRs outlined basic standards to which states must comply before evicting people from their homes: 1. An early and thorough consultation with the people who will be influenced by the eviction; 2. Advance notice to the residents before the eviction; 3. Information about the planned eviction and, if possible, information on the future usage of the evicted property; 3. Government officials and their representatives should be present during the eviction; 4. Clear identification of all the workers and activists involved in the eviction; 5. The eviction should not be done in unsuitable weather conditions or at night, unless the evacuees agree to this; 6. Provision of legal counseling to people who need it, so that they can demand compensation; 7. The state must ensure that none of the evacuees become homeless as a result of the eviction, and that alternative housing is provided to those who need it. See HOHMANN, *supra* note 2, at 21–23.

73. General Comment 4, *supra* note 67, at ¶ 8(b). For further elaboration see also Hohmann, *supra* note 70, at 23–24.

74. General Comment 4, *supra* note 67, at ¶ 8(c); see also HOHMANN, *supra* note 2, at 24–25.

75. General Comment 4, *supra* note 67, at ¶ 8(d); see also HOHMANN, *supra* note 2, at 25–26.

(e) *Accessibility* to adequate housing resources to those entitled to it, including disadvantaged groups, such as the elderly, children, the physically disabled, the terminally ill, persons with persistent medical problems, the mentally ill, victims of natural disasters, and other groups should be ensured some degree of priority consideration in the housing sphere.⁷⁶

(f) *Location*, which allows access to employment options, health-care services, schools, child-care centers, and other social facilities.⁷⁷

(g) *Cultural adequacy*, or the way housing is constructed, the building materials used, and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.⁷⁸

As researchers have already noted, “[i]nternational evidence shows that proclaiming a right to shelter does not magically lead to better housing conditions.”⁷⁹ Nevertheless, the recognition of housing rights under international human rights law has influenced national policy, legislation, and practice, and countries have begun incorporating housing rights protections into their domestic legal systems.⁸⁰ The incorporation of the right to housing within a national legal system can appear in several forms: it can be protected as a constitutional right⁸¹ or a legal right in legislation.⁸² It can also be

76. General Comment 4, *supra* note 67, at ¶ 8(e); *see also* HOHMANN, *supra* note 2, at 26–27.

77. General Comment 4, *supra* note 67, at ¶ 8(f); *see also* HOHMANN, *supra* note 2, at 27–28.

78. General Comment 4, *supra* note 67, at ¶ 8(g); *see also* HOHMANN, *supra* note 2, at 28–29. This component of the right to housing is distinguished from the others as it can be referred to as a group right and not just an individual right, which can require states to take active measures in implementing it.

79. Robert Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL’Y 17, 25 (1992).

80. LECKIE, *supra* note 6, at 4. State parties to the ICESCR possess a minimum core obligation to ensure the satisfaction of essential levels of the right housing are accessible to everyone. *See id.* at 12.

81. *See id.* at 17 (providing a list of such countries).

82. For a list of such countries, *see id.* at 19–30. The major issues that were regulated in the legislation in the 1990s were forced evictions, housing rights for homeless, housing and property restitution, and compensation for refugee internally displaced persons and others. *See also* Kenna, *supra* note 50, at 147–48.

protected in court rulings⁸³ or within local or central government policy.⁸⁴ These forms can also appear simultaneously in one state legal system.⁸⁵

States that have incorporated protection of the right to housing within their national legal system have raised housing to a position of primary importance.⁸⁶ This protection obligates authorities to set housing policies and allows individuals and groups to demand that the state act to protect their right to housing and allocate needed resources to fulfill that right.⁸⁷ In the absence of an enshrined and protected right to housing, state authorities follow vague and unstable housing policies that are subject to the goodwill of the stakeholders.⁸⁸ States that do not incorporate protection of the right to housing in their legal system have limited public critique and judicial review of this right, and their citizens might be more subjected to housing rights violations.⁸⁹

According to Fiss' theory, a "right" is an abstract construct, whereas a "remedy" is the practical form of its actualization.⁹⁰ He adds that although failing to provide a remedy does not wholly destroy the existence of the right, a right without a remedy is not fully actualized.⁹¹ Based on Fiss' notion of rights, how should housing rights violations be addressed in settler democracies? Should housing policies apply, from here on, an egalitarian, color-blind policy regardless of systematic injuries of the past? Or should future policy be constructed in relation to past injustice? This Article seeks to provide answers to these questions.

83. National courts around the world have developed housing rights including the security of tenure, respect for home, non-discrimination, decent physical standards, and fair procedures in evictions. See Bryson, *supra* note 51, at 193.

84. Jaap De Visser, *A Perspective on Local Government's Role in Realising the Right to Housing and the Answer of the Grootboom Judgment*, 7 LAW DEMOCRACY & DEV. 201, 203 (2003).

85. See generally *id.*

86. HOHMANN, *supra* note 2, at 1.

87. In South Africa, for example, the right to housing is enshrined in the constitution. A group of several hundred families who waited a prolonged period for public housing assistance filed a petition to the court against the intent to evict them from where they had squatted without a permit. The Constitutional Court examined the housing plan for the area and ruled that it was unreasonable and inadequate for realizing the petitioners' housing rights. The court also obligated the state to provide temporary housing until a permanent solution could be found. *Government of the Republic of South Africa v. Grootboom*, 2001(1) SA 46 (CC).

88. GIL GAN-MOR, REAL ESTATE OR RIGHTS: HOUSING RIGHTS AND GOVERNMENT POLICY IN ISRAEL 2 (Association for Civil Rights in Israel, Report on the Right to Housing, July 2008).

89. LECKIE, *supra* note 6, at 4 (specifically, his presentation regarding the undermining of housing rights in US). Regarding the protection of housing rights in the US, see also Chester Hartman, *The Case for a Right to Housing*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 177, 180–86 (Rachel G. Bratt et al. eds., Temple Univ. Press 2006).

90. OWEN FISS, THE LAW AS IT COULD BE 44 (N.Y.U. Press 2003).

91. *Id.*

The argument presented in the Article is based on two pillars. First, remedies that address housing rights violations of indigenous and marginalized groups within settler democracies must also grapple with past injustices and injuries. Applying an egalitarian, color-blind legal system that does not take the historical, structural, and political context into account would only provide a partial solution to the crisis, and in the long run would intensify the inequality between groups in societies.⁹² Second, the transitional justice approach that embraces a set of long-term goals and seeks to provide responses to massive and systemic violations is the most compatible approach in dealing with such violations.

In order to fully comprehend the scope of this type of violation, the following Part presents the joint scale of systematic housing rights violations committed against the indigenous and marginalized groups that reside within settler democracies.

IV. PROTECTION AND VIOLATION OF HOUSING RIGHTS IN SETTLER DEMOCRACIES

This Part presents violations of housing rights in four selected settler democracies: Canada, Australia, the United States, and Israel. These countries share the following common characteristics:⁹³ (1) they are multicultural countries that contain indigenous and marginalized ethnic groups that are citizens of the states;⁹⁴ (2) these groups suffer and have suffered in the past from systematic violations of housing rights that resulted in inadequate housing conditions;⁹⁵ (3) their legal systems are, to differing extents, committed to human rights

92. Gross, *supra* note 14, at 448. Gross addresses this question with regard to the dilemma of constitutional property: “[a]n attempt to create an egalitarian property regime thus faces the dilemma of property: because of the past in which the denial of property rights and especially takings of land from a discriminated group were common practices, strong protection of property holdings may seem necessary for the purpose of preventing future such practices. On the other hand, such protection may entrench an existing regime of holdings that is the result of past discriminatory practices.” *Id.*

93. There are many comparative researches conducted on these countries with regard to their spatial landscape and policy. See Naama Blatman-Thomas, *From Transients to Residents: Urban Indigeneity in Israel and Australia*, 58 J. HIST. GEOGRAPHY 1, 2–5 (2017); Andrew Markus, *Attitudes to Immigration and Cultural Diversity in Australia*, 10 J. SOC. 50 (2014); Gillad Rosen & Jill Grant, *Reproducing Difference: Gated Communities in Canada and Israel*, 35 INT’L J. URB. & REG. RES. 778 (2011); Kedar, *supra* note 11.

94. Kedar, *supra* note 11, at 403.

95. Statistics Canada, *Immigration and Diversity: Key Results From the 2016 Census* (Oct. 2017), <https://www150.statcan.gc.ca/n1/en/daily-quotidien/171025/dq171025b-eng.pdf?st=CDrpX2Bg> [<https://perma.cc/3HP7-RE2T>] (archived Sept. 8, 2019); Gabriel Horenczyk & Uzi Ben Shalom, *Multicultural Identities and Adaptation of Young Immigrants in Israel*, in ETHNICITY, RACE AND NATIONALITY IN EDUCATION: A GLOBAL PERSPECTIVE 55 (N. Ken Shimahara et al. eds., Routledge 2001).

protection;⁹⁶ (4) all these countries—excluding the United States—have ratified the ICESCR, but have not incorporated any protection of housing rights into their domestic legal system;⁹⁷ and (5) they are nontransition countries with regard to their political regime but have undergone some sort of transition towards their attitude to the indigenous groups.⁹⁸ This transition is manifested in their acknowledgment of past injustice and can constitute a base for applying transitional justice mechanisms.⁹⁹ These joint characteristics can be found in other settler democracies that apply similar spatial policy and population compositions.¹⁰⁰ Therefore, the analysis presented below can be applied to them as well.

Although these countries have differing features with regard to their legal and political systems, this Article's assertion is that the above joint characteristics can provide a base for understanding the complexity of housing policies of the states and of the compatible remedies. Accordingly, the purpose of this Article is to point out the common features of housing rights violations committed by settler states against indigenous groups. As this Article will show, these violations have resulted from structural and systematic discriminatory housing policies.¹⁰¹

A. Canada

Canada contains diverse groups of aboriginal populations and immigrants from different parts of the world.¹⁰² It is a constitutional democracy that adopted by law a multicultural policy of accommodating the needs and interests of the diverse groups that

96. As shall be presented in the subparts, some of these countries, such as Canada and the United States, have constitutions or bills of rights that anchor human rights. Others, such as Australia, have neither a constitution nor a bill of rights, but do provide protection to housing and human rights.

97. See *infra* Parts IV.A–D.

98. See *id.* (emphasizing the last paragraph of each sub-part).

99. In employing transitional justice mechanisms in Canada, see Courtney Jung, *Canada and the Legacy of the Indian Residential schools: Transitional Justice for Indigenous People in a Nontransitional Society*, in IDENTITIES IN TRANSITION: CHALLENGES FOR TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES 217 (Paige Arthur ed., Cambridge Univ. Press 2014). In Australia, see McMillan & Rigney, *supra* note 40. In Israel, see Sigall Horovitz, *Transitional Justice without Transition: Or Commission and the Ethnos-National Struggle in Israel*, in LAW, IDENTITY, AND ARAB JEWISH RELATIONS IN ISRAEL 251 (Raef Zriek & Ilan Saban eds., 2017). In the United States, see Charlene K. Baker, Phyllis H. Niolon & Hilary Oliphant, *A Descriptive Analysis of Transitional Housing Programs for Survivors of Intimate Partner Violence in the United States*, 15 VIOLENCE AGAINST WOMEN 460 (2009).

100. Such as New Zealand and Sri Lanka, see Kedar, *supra* note 11, at 403.

101. See *infra* Parts IV.A–D.

102. See Statistics Canada, *supra* note 95.

reside within its borders.¹⁰³ This policy is reflected through two enactments. The first is Section 27 of the Canadian Charter of Rights and Freedoms, which states: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”¹⁰⁴ The second is the Canadian Multiculturalism Act of 1988 and constitutes the first national Multicultural law enacted by a state.¹⁰⁵ This Act was regarded as reflecting the changing reality of Canada’s racial and ethnic diversity.¹⁰⁶

With a robust economy and plentiful resources, Canada enjoys the highest standard of housing in the world.¹⁰⁷ It is a progressive country committed to safeguarding social and economic rights, especially those of disadvantaged citizens.¹⁰⁸

Canada has played an important role in the enhancement of housing rights in international treaties, and in 1976 it ratified the ICESCR.¹⁰⁹ However, there is no evidence of any commitment at the domestic level to legal protection or an explicit recognition of the right to adequate housing in Canadian law or government policy.¹¹⁰ Some even claim that Canada is withdrawing from its commitment to provide adequate housing rights to disadvantaged constituencies of the country, and by doing so it violates international treaties.¹¹¹

Similar to other places around the world, spatial segregation between the wealthy and the poor is visible in the cities of Canada.¹¹² Aboriginals (the indigenous people in the country) and recent immigrants are cited as the poor groups living in high poverty neighborhoods.¹¹³ According to national Canadian reports, the Aboriginal people live in poor, “intolerable” living conditions and suffer

103. See Keith Banting & Will Kymlicka, *Canadian Multiculturalism: Global Anxieties and Local Debates*, 23 BRIT. J. CAN. STUD. 43 (2010); MULTICULTURALISM AND THE CANADIAN CONSTITUTION PART II (Stephen Tierney ed., UBC Press 2011).

104. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, C 11 (U.K.).

105. Canadian Multiculturalism Act, R.S.C. 1988, C-31.

106. AUGIE FLERAS & JEAN LEONARD ELLIOTT, MULTICULTURALISM IN CANADA: THE CHALLENGE OF DIVERSITY 74–75 (1992).

107. Bruce Porter, *The Right to Adequate Housing in Canada*, in NATIONAL PERSPECTIVES ON HOUSING RIGHTS 107, 109–10 (Scott Leckie ed., Springer 2003); Tracy Heffernan, Fay Faraday & Peter Rosenthal, *Fighting for the Right to Housing in Canada*, 24 J.L. & SOC. POL’Y 10, 13 (2015).

108. Porter, *supra* note 107, at 109.

109. *Id.* at 107.

110. Noah Zon et al., *Three Ways the National Housing Strategy Can Support the Right to Housing*, MAYTREE (July 2017), <https://maytree.com/wp-content/uploads/Policy-Brief-Three-ways-the-National-Housing-Strategy-can-support-the-right-to-housing.pdf> [<https://perma.cc/XN4F-G9AA>] (archived Sept. 8, 2019).

111. Porter, *supra* note 107, at 109–10.

112. R. Alan Walks & Larry S. Bourne, *Ghettos in Canada’s Cities? Racial Segregation, Ethnic Enclaves and Poverty Concentration in Canadian Urban Areas*, 50 CANADIAN GEOGRAPHER 273, 274 (2006).

113. *Id.* at 273–74.

from a lack of water supply and an inadequate housing supply.¹¹⁴ Moreover, in the sixth periodic report of Canada on the implementation of the ICESCR, published in 2016,¹¹⁵ the CESCR was particularly concerned with the violation of the rights of indigenous peoples (the Inuit and First Nations). Indigenous peoples notably encounter poor housing conditions and overcrowding, which, among other factors, generate health challenges for the concerned communities.¹¹⁶

Canada's government has also been challenged with systemic violations of other components of the right to adequate housing.¹¹⁷ These violations include inclusive security of tenure protections, rental qualifications that disqualify low-income tenants, inadequate welfare rates for groups, excessive utilities costs for low-income households, and prohibitions on the temporary erection of shelters in parks.¹¹⁸ The CESCR states that the committee is concerned about the persistence of a housing crisis in the state party.¹¹⁹ It is particularly concerned by the: "(1) absence of a national housing strategy; (2) insufficient funding for housing; (3) inadequate housing subsidy within the social assistance benefit; (4) shortage of social housing units; and (5) increased evictions related to rental arrears (art. 11)."¹²⁰

The CESCR is also troubled with the increasing number of homeless persons in Canada, the lack of adequate measures to prevent homelessness, the shortage of adequate emergency shelters, and the existence of anticamping and other bylaws that penalize homeless persons in some jurisdictions.¹²¹ Women and children—who die yearly on the cold streets of Canadian cities—are the major injured group from the phenomenon of homelessness, which is identified by Porter as a "national disaster."¹²²

Moreover, the UN Special Rapporteurs on adequate housing have visited Canada on missions and have emphasized the need for institutional mechanisms through which rights to housing can be claimed and enforced.¹²³ Their report emphasizes that remedial

114. Porter, *supra* note 107, at 109.

115. See U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), Concluding Observations on the Sixth Periodic Report on Canada, ¶ B, U.N. Doc. E/C.12/CAN/CO/6 (Mar. 23, 2016) [hereinafter CESCR I].

116. *Id.* § 43.

117. *Id.* § c.

118. Bruce Porter, *Canada: Systemic Claims and Remedial Diversity*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 201, 238 (Malcolm Langford et al. eds., Cambridge Univ. Press 2017) [hereinafter Porter *Canada*].

119. CESCR I, *supra* note 115, § 39.

120. *Id.*

121. *Id.* § 41.

122. Porter, *supra* note 107, at 108.

123. Miloon Kothari (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), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 88–11, UN Doc. A/HRC/10/7/Add.3 (Feb. 17, 2009).

strategies must include coordinated national strategies that involve a range of actors and a variety of legislative and programmatic measures.¹²⁴

The fact that Canada is an affluent country with a constitutional regime that is committed to human rights and prides itself on a high standard of living blurs systematic housing rights violations of the disadvantaged citizens and makes it difficult to challenge them.¹²⁵ Therefore, despite certain promising developments and the government's commitment to review its legal protection of rights, the violation of economic, social, and cultural rights remains generally difficult to challenge in Canadian domestic courts.¹²⁶

An important change in Canada's attitude towards its indigenous constituencies occurred in 1991 when the Canadian government established "The Royal Commission on Aboriginal Peoples."¹²⁷ The Commission's mandate was to investigate the social, economic, and political conditions of the aboriginal people of Canada and to develop recommendations with regard to the First Nations and the Crown.¹²⁸ Although Canada did not undergo any political transition, this initiative symbolizes a move towards its acknowledgment of past injustice and the need to address violations of indigenous groups' rights.¹²⁹

Some aspects of the housing rights violations of indigenous groups discussed here also appear in other settler democracies, such as in Australia, the focus of the following subpart.

B. Australia

Australia is a settler state that has maintained a stable liberal, constitutional, and democratic political system. It is a diverse country in which immigrants, originating from England, New Zealand, China, India, and the Philippines, account for 26 percent of its population.¹³⁰ The Aborigines and the Torres Strait Islander people, who are the indigenous groups in Australia, account for 3 percent of the population.¹³¹ The country ranks high in quality of life, housing, health, education, economic freedom, civil liberties, and political rights, and most of its citizens live in adequate housing.¹³²

124. *Id.*

125. Porter *Canada*, *supra* note 118, at 236.

126. CESCR I, *supra* note 115, at ¶ C.5.

127. The Royal Commission on Aboriginal Peoples (1991).

128. Jung, *supra* note 99, at 219.

129. *Id.* at 223.

130. United Nations, Department of Economic and Social Affairs, Population Division, *International Migration*, in INT'L MIGRANT STOCK (2015).

131. ABORIGINAL AND TORRES STRAIT ISLANDER POPULATION, AUSTL. BUREAU OF STAT. (2017).

132. Org. for Econ. Cooperation & Dev., *Developments in Individual OECD and Selected Non-Member Economies*, 1 OCEC ECON. OUTLOOK 109 (2018).

Until 1962, Australia maintained an explicit segregationist policy towards indigenous groups through the creation of reserves and missions in the nineteenth and early twentieth centuries and the imposition of the Aborigines Act 1911.¹³³ This Act empowered the Chief Protector of Aborigines with extreme legal control over most aspects of the lives of Aboriginal people in the state and resulted in segregation between the Aboriginal and non-Aboriginal people.¹³⁴ For many decades, indigenous people lived in remote and underdeveloped neighborhoods, towns, and cities away from the rest of the population.¹³⁵

The passage of the Racial Discrimination Act 1975, among other reforms in the 1970s, signaled the beginning of an era of formal legal equality and led to a wave of Aboriginal migration from reserves into hegemonic towns and cities.¹³⁶ Recent statistics from 2016 report that more Aboriginal and Torres Strait Islander people are living in large towns and cities than ever before.¹³⁷ However, they tend to live in different neighborhoods, towns, and cities than the rest of the population.¹³⁸ Indigenous peoples also often face the compounded barrier of discrimination in the housing market, which forces many Aboriginal people into substandard housing while reinforcing negative stereotypes.¹³⁹

Even though Australia does not have a bill of rights and housing is not recognized as a constitutional right,¹⁴⁰ protections of some aspects of housing rights exist through various enactments.¹⁴¹ In 1976, Australia ratified the ICESCR but did not enact any legislation that incorporated social (and housing) rights.¹⁴² In 2017, the CESCR published the periodic (fifth) report on Australia.¹⁴³ It expressed concern that the covenant provisions are still not fully incorporated

133. FAY GALE, URBAN ABORIGINES 72 (1972).

134. This control included the legal segregation of Aboriginal people into reserves and missions, as well as controls over freedoms to marry, rear children, and own property. See NICHOLAS BIDDLE & FRANCIS MARKHAM, INDIGENOUS RESIDENTIAL SEGREGATION IN TOWNS AND CITIES, 1976–2016 2 (2016).

135. NICHOLAS BIDDLE, RESIDENTIAL SEGREGATION: INCOME AND HOUSING DIMENSIONS 1 (2013).

136. BIDDLE & MARKHAM, *supra* note 134.

137. *Id.* at 1.

138. BIDDLE, *supra* note 135, at 1.

139. UNITED NATIONS HOUSING RIGHTS PROGRAMME, INDIGENOUS PEOPLES' RIGHT TO ADEQUATE HOUSING 1 (2005); see also Sarah Prout & Nicholas Biddle, *The Social Geographies of Indigenous Population and Housing in Australia's Regional Urban Centres*, 46 AUSTL. GEOGRAPHER 51 (2015).

140. ANNE MARIE DEVEREUX, *The Right to Adequate Housing in Australia*, in NATIONAL PERSPECTIVES ON HOUSING RIGHTS 87 (Scott Leckie ed., Springer 2003).

141. *Id.* at 87, 92–100.

142. DAN NICHOLSON, THE HUMAN RIGHT TO HOUSING IN AUSTRALIA 5, 34–35 (Rivkah Nissim & Kate Colvin eds., 2004).

143. U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), Concluding Observations on the Sixth Periodic Report on Australia, U.N. Doc. E/C.12/AUS/CO/5 (July 1, 2017).

into the state party's domestic legal order and therefore not justiciable in domestic courts.¹⁴⁴ The committee was also concerned that the definition of "human rights" within the Australian Human Rights Commission Act 1986 does not include economic, social, and cultural rights.¹⁴⁵

With regard to housing rights, the committee pointed to the:

(a) persistent shortage of affordable housing, including rental housing and social housing; (b) Increased number of homeless persons (estimated at 105,000 in 2014), of whom the majority are youth, victims of domestic violence, asylum seekers and indigenous peoples; (c) Proposed amendments to a local law in Melbourne that have the effect of criminalizing homelessness; (d) Overcrowding and severe shortage of housing for indigenous peoples living in remote areas; (e) Continued practice of forced evictions disproportionately affecting indigenous peoples in Western Australia.¹⁴⁶

The CESCR recommended the development of a comprehensive national housing strategy that considers the human rights of those most vulnerable to homelessness: youth, victims of domestic violence, asylum seekers, and indigenous peoples.¹⁴⁷ It also recommended an increase in the state's investment in affordable housing and social housing.¹⁴⁸ With reference to indigenous peoples living in remote areas, the CESCR recommended the allocation of financial resources to address precarious housing conditions and advised that the state should refrain from relocating them because of geographical considerations.¹⁴⁹

The catalyzing event in the country's attitude towards the indigenous people was the establishment of the federal Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) in 1995.¹⁵⁰ The commission was established to investigate the separation of Aboriginal and Torres Strait Islander children from their families (the "Stolen Generations Inquiry").¹⁵¹ This was considered by researchers as a truth commission (a mechanism of transitional justice) and as a step towards seeking justice with regard to past injustice and reconciliation with the indigenous people of the state.¹⁵² According to this Article's assumption, this step of acknowledging past injustice constitutes a base for the application of

144. *Id.* § 5.

145. *Id.* § 9.

146. *Id.* § 41.

147. *Id.* § 42.

148. *Id.* § 42(b).

149. *Id.* § 42(d).

150. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION: ANNUAL REPORT 1995-96 (Australian Gov't Pub. Service 1996).

151. Nicola Henry, *From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies*, 9 INT'L J. TRANSITIONAL JUST. 199, 203 (2015).

152. *Id.* at 203-05.

transitional justice mechanisms as remedies for housing rights violations.

C. *The United States*

Similar to Canada and Australia, the United States is identified as a settler state.¹⁵³ It is inhabited by several ethnic groups including: white Americans, African Americans, Native Americans, Asian Americans, and Native Hawaiian and Other Pacific Islanders.¹⁵⁴ The white Americans, referred to as the settlers, are the majority people living in the country. Native Americans, also known as American Indians, are the recognized indigenous group of America and, as will be elaborated on below, they suffer greatly from housing rights violations. The other groups that experience serious structural housing rights violations are the African American and immigrant groups who came into the country during the past century from Asia and Latin America.¹⁵⁵

There is no implicit legal or constitutional protection of the right to housing in the United States.¹⁵⁶ The Fair Housing Act (FHA) provides one form of housing rights protection against discrimination.¹⁵⁷ However, this legal recognition does not provide a positive right and does not require the government to take any actions towards achieving the right to housing.¹⁵⁸ The United States did not ratify the ICESCR,¹⁵⁹ and therefore no CESCR reports have ever been conducted on housing violations, or any violations of the ICESCR.¹⁶⁰ The only available data consists of domestic reports, which indicate several forms of housing rights violations.¹⁶¹

153. Kedar, *supra* note 11, at 403.

154. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997).

155. See *infra* Part IV.B below for the presentation on these groups' housing violations.

156. Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 257 (2015).

157. *Id.*

158. *Id.*

159. Katherine Barrett Wiik, *Justice for America's Homeless Children: Cultivating a Child's Right to Shelter in the United States*, 35 WILLIAM MITCHELL L. REV. 875, 919 (2009).

160. International Covenant on Economic, Social and Cultural Rights, *supra* note 5, at art. 16(1) ("The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein." Since the United States is not a party of the covenant no CESCR reports were found or ever conducted.)

161. The Office of Fair Housing and Equal Opportunity publishes annual reports on diverse issues concerning housing conditions in the United States. See USA.GOV, <https://search.usa.gov/search?affiliate=usagov&query=reports> (last visited Aug. 8, 2019) [<https://perma.cc/KJL2-ADLZ>] (archived Aug. 8, 2019).

Homelessness is considered the most extreme violation of the right to housing in the United States.¹⁶² The 2017 report of the Office of Fair Housing and Equal Opportunity found there are 553,742 homeless people in the United States.¹⁶³ The data on homelessness in America portrays a mirror image on ethnic and marginalized group discrimination: 45 percent of all homeless individuals are African American, despite being only 12 percent of the total population.¹⁶⁴ LGBTQ youth are 40 percent of the teen population defined as homeless (despite them being only 7 percent of all teens).¹⁶⁵ The disabled are 40 percent of all homeless (and are only 16 percent of the total population in the United States).¹⁶⁶ Thus, these groups are effectively doubly excluded from society—both due to their identity, as well as their homelessness.¹⁶⁷

In order to deal with the growing numbers of homeless people, many states began criminalizing different lifestyle characteristics, such as vagrancy and sleeping on benches, among others.¹⁶⁸ These steps led to an increase in the number of individuals defined as “criminals” among the homeless.¹⁶⁹ This policy has extreme implications, since a criminal record makes it difficult for an individual to find employment, and without proper income, the homeless cannot escape this cycle.¹⁷⁰

The United States is dealing with a severe shortage of affordable housing, which is also the main reason for the increase in homelessness.¹⁷¹ Numerous families dedicate a large portion of their income to housing expenses.¹⁷² The shortage in affordable housing leads marginalized groups to spend money on housing at the expense of food, healthcare, clothing, and other essential needs.¹⁷³ Many people are unable to afford this economic burden, and the government does not provide a suitable remedy.¹⁷⁴ The Department of Housing and Urban Development’s budget for affordable housing has been slashed

162. INT’L HUMAN RIGHTS COMM. OF THE N.Y.C. BAR ASS’N, *supra* note 8, at 12.

163. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, VIOLATIONS OF THE HUMAN RIGHTS OF PERSONS EXPERIENCING HOMELESSNESS IN THE UNITED STATES 2 (2017) [hereinafter VIOLATIONS OF THE HUMAN RIGHTS].

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING RIGHTS FOR ALL: PROMOTING AND DEFENDING HOUSING RIGHTS IN THE UNITED STATES 16 (2011).

172. *Id.* at 64.

173. *Id.* at 7.

174. *Id.*

by 56 percent since 1978, so that in 2017, only one out of four families entitled to housing assistance actually received any.¹⁷⁵

In this regard, data shows that less than half of the Hispanic and African-American populations are homeowners, compared to more than 75 percent of the white-American population.¹⁷⁶ The economic status of underprivileged and marginalized groups prevents them from owning homes.¹⁷⁷ This is due to the fact that they do not have seed money for purchasing a house; banks give these groups higher-interest and higher-risk loans compared to the rest of the population, which makes mortgages very expensive for them.¹⁷⁸

Discrimination in housing in the United States is another major feature of housing right violation, in relation to marginalized ethnic groups. The origin of housing discrimination lies in the racial segregation of residential areas that was customary in the nineteenth century and largely enabled by the law and the courts.¹⁷⁹ For decades, African-American families were not able to purchase a home due to restrictive covenants that prohibited homeowners to sell to African-American individuals.¹⁸⁰ In 1948, in the case of *Shelley v. Kraemer*,¹⁸¹ the court declared such a prohibition as unenforceable by the court, as it violates the Equal Protection Clause.¹⁸² However, the restrictive covenants remained common practice, *inter alia*, because the court did not declare them unconstitutional, nor did it abolish them.¹⁸³

As part of a sweeping effort to put an end to discrimination in various areas of life, such as education, voting, and housing, among others, Title VIII of the 1968 Civil Rights Act, known as the Fair Housing Act, was enacted.¹⁸⁴ In addition, the government enacted numerous housing reforms.¹⁸⁵ However, as the following data show, the aim of the government reforms has not yet been achieved. In 2017, 28,843 complaints claiming discrimination and violation of housing rights were filed.¹⁸⁶ These make up only a very small percentage of the total discrimination violations, which amount to approximately 4

175. VIOLATIONS OF THE HUMAN RIGHTS, *supra* note 163, at 1.

176. INT'L HUMAN RIGHTS COMM. OF THE N.Y.C. BAR ASS'N, *supra* note 8, at 18.

177. *Id.*

178. *Id.*

179. Swati Prakash, *Racial Dimensions of Property Value Protection*, 101 CAL. L. REV. 1437, 1446 (2013).

180. Mark Tushent, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 384 (1988); Carol Rose, *Shelley v. Kraemer*, PROP. STORIES 169 (Gerald Korngold et al. eds., 2004).

181. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *see also* *Barrows v. Jackson*, 346 U.S. 249 (1953) (stating once more that these agreements are unenforceable).

182. *Id.*

183. Paul Schiff Berman, *Cyberspace and State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private' Regulation*, 71 U. COLO. L. REV. 1263, 1304 (2000).

184. Prakash, *supra* note 179, at 1459.

185. *Id.*

186. NAT'L FAIR HOUS. ALL., 2018 FAIR HOUSING TRENDS REPORT 13 (2018).

million per year.¹⁸⁷ In the same year, 16,337 cases regarding discrimination in housing in the United States were heard in the United States courts, out of which 55.5 percent were filed in relation to discrimination on the basis of disability, 15.6 percent on the basis of race, 8.7 percent on the basis of personal status, and the rest on the basis of gender, color, and origin.¹⁸⁸

Scholars assert that statements justifying discrimination, such as those associating decline in property value to minorities' housing are still voiced. These statements enable racial discrimination in housing.¹⁸⁹ Scholars further assert that the Fair Housing Act's efficacy was greatly damaged by courts' unwillingness to intervene in discrimination cases.¹⁹⁰

Besides these reforms, in 2008 and 2009 the U.S. House of Representatives and the Senate recognized and apologized for past injustices committed against African Americans during the enslavement and racial segregation periods.¹⁹¹ These acts were preceded by apologies by cities, churches, corporations, and institutions for their involvement with slavery.¹⁹² While scholars argue whether this step provided any actual remedy for the structural atrocities,¹⁹³ it can definitely be regarded as a turn towards the application of the transitional justice approach and mechanisms.¹⁹⁴

Another troubling violation of housing rights in the United States relates to the 3.1 million Native Americans who live in remote reservations and suffer from a very high rate of poverty.¹⁹⁵ For decades, and until 1996, reservation land was held "in trust" for Native Americans by the federal government.¹⁹⁶ Land in trust is usually owned by tribes or individual Indians and managed by the Bureau of Indian Affairs for their benefit.¹⁹⁷ In practice this legal status of the land subjects Indians to restriction by the United States against selling or giving the property to anyone.¹⁹⁸ Consequently, it kept Native

187. *Id.* at 50.

188. *Id.* at 52.

189. Prakash, *supra* note 179, at 1462.

190. *Id.* at 1463.

191. S. Con. Res. 26, 111th Cong. (2009) (enacted); Winter, *supra* note 26, at 251.

192. Angelique M. Davis, *Apologies, Reparations, and the Continuing Legacy of the European Slave Trade in the United States*, 45 J. BLACK STUD. 271, 272 (2014).

193. *Id.*

194. Winter, *supra* note 26, at 254.

195. See generally TINA NORRIS, PAULA L. VINES, & ELIZABETH M. HOEFFEL, *THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010* (2012).

196. Robert S. Kenison, *Implementing NAHASDA: Brave New Word*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 253, 254 (1999).

197. George H. Cortelyou, *An Attempted Revolution in Native American Housing: The Native American Housing Assistance and Self-Determination Act*, 25 SETON HALL LEGIS. J. 429, 436–37 (2001).

198. Jennifer R. Sunderlin, *One Nation, Indivisible: American "Indian Country" in the Wake of City of Sherrill v. Oneida Indian Nation*, 70 ALB. L. REV. 1563, 1565–66 (2007).

Americans contained to these lands, restricted their development, and harmed their ability to acquire mortgages and purchase homes, because no bank could ever foreclose on a property.¹⁹⁹ It also resulted in a serious housing crisis, a lack of adequate and affordable housing, and an underdeveloped infrastructure.²⁰⁰

In order to deal with the housing crisis that has resulted from the federal government's long-established policies, the Native American Housing Assistance and Self-Determination Act (NAHASDA) was enacted in 1996.²⁰¹ Formally, the NAHASDA simplifies and reorganizes the system of providing housing assistance to federally recognized Native American tribes in order to help improve their housing conditions and infrastructure.²⁰² It reduced the regulatory strictures that burdened tribes and, essentially, provided for block grants so that they could apply funds to building or renovating housing as they saw fit.²⁰³ Moreover, a new program division was established at the Department of Housing and Urban Development (HUD) that combined several previous programs into one block-grant program committed to tribal housing.²⁰⁴ This was in line with other federal programs that recognized the sovereignty of tribes and allowed them to manage the funds according to their own priorities.²⁰⁵

The NAHASDA was designed to recognize the unique relationship and history of the United States and the sovereign American Indian nations, and to assist in the development of housing, housing services, housing management services, crime prevention, and safety activities in Native American communities.²⁰⁶ As such, it can be regarded as a step towards acknowledging the past injustice committed towards Native Americans in relation to housing. However, and despite these efforts, Native American reservations are still overcrowded, lack adequate infrastructure, and are characterized by a low rate of ownership.²⁰⁷ Overall, there is a lack of adequate housing in Native American communities.²⁰⁸

199. Cortelyou, *supra* note 197, at 436–37, 454.

200. *Id.* at 438.

201. Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101–4195 (Supp. 1996) [hereinafter NAHASDA].

202. Cortelyou, *supra* note 197, at 431.

203. *Id.* at 441.

204. *Id.* at 446–52.

205. *Id.* at 442–46.

206. Kenison, *supra* note 196, at 253–54.

207. U.S. DEP'T OF HOUSING & URB. DEV., CONTINUITY AND CHANGE: DEMOGRAPHIC, SOCIOECONOMIC, AND HOUSING CONDITIONS OF AMERICAN INDIANS AND ALASKA NATIVES 50–67 (2014).

208. U.S. GOV'T ACCOUNTABILITY OFFICE, NATIVE AMERICAN HOUSING: ADDITIONAL ACTIONS NEEDED TO BETTER SUPPORT TRIBAL EFFORT 33 (2014).

D. Israel

Israel's population of approximately eight million is comprised of 74.7 percent Jews,²⁰⁹ 20.8 percent Arab Palestinians, who make up an indigenous group,²¹⁰ and 4.5 percent a group defined by the Israeli Central Bureau of Statistics (ICBS) as "others."²¹¹ Twenty-five percent of the Arab population live alongside the Jewish citizens in eight urban-mixed cities and the rest live in distinct and separate Arab localities.²¹² The Arab localities are isolated from the center of economic power and are situated at the bottom of the socioeconomic scale.²¹³ Compared to Jewish localities they are very crowded; their ability to build new residential neighborhoods is limited; and they suffer from continuous risk of house demolitions, inaccessibility, and unaffordable houses.²¹⁴

The separation between the Arab and Jewish localities is a result of a joint effect of communal preferences together with the state's

209. I here refer to violations of housing rights within the borders of the State of Israel, commonly referred to as the "green line." I do not address the vicious violations of housing and human rights in the occupied territories.

210. The questions of Israel's status as a settler state have long been debated in historical and postcolonial literature. See Neve Gordon & Moriel Ram, *Ethnic Cleansing and the Formation of Settler Colonial Geographies*, 53 *POL. GEOGRAPHY* 20, 24 (2016). It is worth noting here that the Israeli government persists in denying the state's colonial heritage and the indigeneity of Palestinians. See Oren Yiftachel, Batia Roded & Alexandre (Sandy) Kedar, *Between Rights and Denials: Bedouin Indigeneity in the Negev/Naqab*, 48 *ENV'T & PLAN. A: ECON. & SPACE* 2129, 2130 (2016).

211. Referring to non-Arab Christians, members of other religions, and persons not classified by religion in the Population Registry. CENT. BUREAU OF STATISTICS, STATE OF ISRAEL, *On the Eve of Israel's 69th Independence Day—8.7 Million Residents in the State of Israel* (2017), http://www.cbs.gov.il/www/hodaot2017n/11_17_113e.pdf [<https://perma.cc/QMM4-U8CR>] (archived Sept. 8, 2019).

212. According to ICBS data, the term "mixed cities" describes localities in which there is a significant (national) minority that reaches up to 10 percent of the population. According to this classification, there are eight mixed cities in Israel: Acre, Haifa, Tel Aviv-Jaffa, Ramleh, Lod, Ma'alot-Tarshiha, Jerusalem, and Natzeret Illit. See CENT. BUREAU OF STATISTICS, STATE OF ISRAEL, *Introduction—Explanatory Notes, Definitions and Sources, Population Summary Tables* (2017), http://www.cbs.gov.il/shnaton68/download/st_eng02.doc [<https://perma.cc/E8KA-6PUS>] (archived Sept. 8, 2019). Over the course of the last few years, additional mixed cities have been formed as a result of a process of migration of Arab families from the surrounding Arab villages and cities to Jewish cities. But because the Arab residents in these cities amount to less than 10 percent of the total population, these localities are not classified by the ICBS as "mixed cities." AMNON BARI-SOLICIANO & URI GOFFER, *MIXED CITIES AND REGIONS: THE FUTURE FACE OF ISRAEL* 5–6, 9 (2009) (Hebrew).

213. THE GALILEE SOCIETY, *PALESTINIAN ARAB LOCALITIES IN ISRAEL AND THEIR LOCAL AUTHORITIES—A GENERAL SURVEY* 3 (2006).

214. See Naama Blatman-Thomas, *Commuting for Rights: Circular Motilities and Regional Identities of Palestinians in a Jewish-Israeli Town*, 78 *GEOFORUM* 22, 26 (2017); Hagai Amit, *The Real Housing Crisis in Israel Is in Its Arab Towns*, *HAARETZ* (Feb. 10, 2017, 4:32 AM), <https://www.haaretz.com/israel-news/business/the-real-housing-crisis-in-israel-is-in-its-arab-towns-1.5432007> [<https://perma.cc/B8MH-RJ92>] (archived Aug. 9, 2019).

ongoing policy advocated initially by the Zionist ideology, which promoted two key principles.²¹⁵ The first is the housing of Jewish immigrants who came to the newly Jewish established state.²¹⁶ The second is “Judaizing the space” through the distribution of the (Jewish) population throughout the country and across the border as a security measure aimed at preserving and protecting uninhabited spaces and areas close to the border, peripheral regions, and areas with a high percentage of Arab population.²¹⁷

These principles created a discriminatory ethnic land regime that privileged the Jewish citizens of the country and were the basis of state policy, legal enactments, and court rulings that affected the distinct and separate development of Jewish and Arab localities in three ways.²¹⁸ First, following the establishment of the state, the Minister of Interior Affairs granted the Arab localities legal recognition as independent local authorities.²¹⁹ However, their areas of jurisdiction were restricted only to the built-up area of the localities, which limited their development and ability to build new residential neighborhoods.²²⁰ In contrast, Jewish localities received wide areas of jurisdiction, not confined to the buildup settlements, which enabled them to develop new residential and industrial areas later on.²²¹

Second, for many decades, the Israeli planning system has focused on the development of existing Jewish localities and the building of new ones.²²² Arab localities were excluded from the allocation of public land.²²³ Most of the Arab localities lack updated and adequate planning schemes that enable the construction of new housing units and the development of industrial and commercial areas according to their needs.²²⁴

215. Haim Yacobi & Erez Tzfadia, *Multiculturalism, Nationalism, and the Politics of the Israeli City*, 41 INT'L J. MIDDLE E. STUD. 289, 292 (2009); Alexandre (Sandy) Kedar & Oren Yiftachel, *Land Regime and Social Relations in Israel*, in REALIZING PROPERTY RIGHTS: SWISS HUMAN RIGHTS BOOK 129, 135–38 (F. Cheneval et al. eds., 2006).

216. Manal Totry-Jubran, *Law, Space and Society: Legal Challenges of Middle-Class Ethnic Minority Flight*, 34 HARV. J. ON RACIAL & ETHNIC JUST. 57, 65 (2018).

217. *Id.* at 65–66.

218. *Id.* at 66; see also Jeremy Forman & Alexandre (Sandy) Kedar, *From Arab Land to 'Israel Lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948*, 22 ENV'T & PLAN. D: SOC'Y & SPACE 809, 822 (2004).

219. THE GALILEE SOCIETY, *supra* note 213, at 1.

220. Oren Yiftachel, *Lands, Planning and Inequality: The Division of Space Between Jews and Arabs in Israel*, Position Paper, The Adva Center (2000) (Hebrew).

221. Totry-Jubran, *supra* note 216, at 66.

222. *Id.*

223. Amnon Lehavi, *Residential Communities in a Heterogeneous Society: The Case of Israel*, in PRIVATE COMMUNITIES AND URBAN GOVERNANCE: THEORETICAL & COMPARATIVE PERSPECTIVES 95, 101–09 (Amnon Lehavi ed., 2016).

224. For a comprehensive overview of the planning problems within the Arab localities, see THE ARAB CTR. FOR ALT. PLANNING, OUTLINE PLANNING FOR ARAB LOCALITIES (2012) [hereinafter OUTLINE PLANNING]; see also BIMKOM, VIOLATIONS OF CIVIL AND POLITICAL RIGHTS IN THE REALM OF PLANNING AND BUILDING IN ISRAEL AND THE OCCUPIED TERRITORIES SHADOW REPORT 8–10 (2014).

The problem of deficient development is also a result of the zoning of land inside the Arab localities for agricultural use and the inability to change the zoning for residential and commercial building.²²⁵ The authorities use this zoning as a pretext to deny building permits to the inhabitants of the Arab localities.²²⁶ For example, no permit for residential buildings can be issued by the planning authority despite the serious housing shortage in the crowded Arab localities. Therefore, most of new construction in the Arab localities is classified as “unlawful” since it is not permitted by law and thus is slated for demolition.²²⁷ This policy intensifies the housing crisis and violates the Arab community’s housing rights.

Third, Arab localities receive less in government transfer payments than Jewish localities,²²⁸ which has resulted in disparities between Arab and Jewish localities in infrastructure; deficient roads; underdeveloped public transportation; lack of access to housing; and low standard of social services,²²⁹ such as health care and education.²³⁰ In addition, studies have shown that most of the built-up areas of Arab towns are used for residential purposes, with little area reserved for public use (education, welfare, recreation, and sports)²³¹ or for economic and commercial use.²³² These factors have increased residential density and limited job opportunities within the localities.²³³ The economic status of the Arab localities is also affected by problems related to their limited capacity to collect local (municipal) taxes and unique communal practices that also limit economic and social development.²³⁴

In light of the absence of a formal written constitution or bill of rights, researchers disagree on whether Israel has a constitutional regime.²³⁵ In 1992, two laws, Basic Law: Human Dignity and Liberty²³⁶ and Basic Law: Freedom of Occupation,²³⁷ were enacted and were together regarded as a “constitutional revolution”²³⁸ since they

225. BIMKOM, *supra* note 224, at 10–11.

226. *Id.* at 7.

227. Amit, *supra* note 214.

228. THE GALILEE SOCIETY, *supra* note 213, at 2.

229. Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Israel, Thirtieth Session, ¶ 16, U.N. Doc. E/C.12/1/Add.90 at ¶ 16 (May 23, 2003).

230. THE GALILEE SOCIETY, *supra* note 213, at 4–5.

231. OUTLINE PLANNING, *supra* note 224, at 9.

232. *Id.*

233. *Id.* at 2.

234. Rassem Khamaisi, *Barriers to Developing Employment Zones in the Arab Palestinian Localities in Israel and Their Implications*, in PALESTINIANS IN THE ISRAELI LABOR MARKET 185, 199 (Nabil Khattab & Sami Miaari eds., 2013).

235. Ariel L. Bendor, *Is It a Duck? On the Israeli Written Constitution*, 6 YALE ISR. J. 53, 53 (2005).

236. Basic Law: Human Dignity and Liberty, 5752-1992, S.H. No. 1391 (Isr.).

237. Basic Law: Freedom of Occupation, 5754-1994, S.H. No. 1454, 90 (Isr.).

238. Michal Tamir, *The Freedom to Exclude*, 49 ISR. L. REV. 237, 238 (2016).

ratify and ensure human rights values and provide those values with some form of constitutional supremacy.²³⁹ The Basic Law: Human Dignity and Liberty is the major legislation that anchors basic human rights—dignity, life, freedom, privacy, property, and the right to leave and enter the country—but it contains no provision for equality or for the right to housing.²⁴⁰

In 1991, Israel ratified the ICESCR but did not enact any legislation to anchor social rights protections.²⁴¹ In fact, all attempts to enact a law of social rights that includes protection of housing rights have failed.²⁴² A limited protection of social rights (including the right to housing) was provided by the Supreme Court of Justice under Article 2 of the Basic Law: Human Dignity and Liberty, which states: “There shall be no violation of the life, body or dignity of any person as such.”²⁴³ The Supreme Court of Justice stated that it is the state’s duty to provide shelter for citizens to live in and to fulfill their need of privacy, family life, and protection from outside effects, decent sanitation conditions, and health services.²⁴⁴

However, so long as the right to adequate housing is not enshrined in the Basic Law or enactment, the courts lack the power to protect the full scope of this right, which includes much more than just a roof overhead, but also an adequate level of housing.²⁴⁵ Consequently, in its most updated periodic report on Israel (excluding the occupied territories),²⁴⁶ published in 2011, the CESCR expressed its concerns regarding the consequences of the lack of legal protection of housing

239. *Id.* at 237–38.

240. *Id.* at 240–43.

241. It also ratified the International Covenant on Civil and Political Rights the same year, 1966, and in 1979 it ratified the International Convention on the Elimination of all Forms of Racial Discrimination. See Yoram Rabin & Yuval Shany, *The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?*, 37 *ISR. L. REV.* 299, 301 (2004).

242. Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice, Lessons from South Africa and Israel*, 40 *STAN. J. INT’L. L.* 47, 95–96 (2004) [hereinafter Gross II].

243. HCJ 10662/04 Hassan v. The National Insurance Institute of Israel, unpublished (2012); HCJ 366/03 The Association of Peace Commitment and Social Justice v. the Minister of Finance, PD S(3) 464 (2005).

244. It also stated that an individual’s right to dignity includes the right “to live his ordinary life as a human being, unvanquished by poverty that leaves him in unbearable destitution”. *Id.* at 482–83.

245. Adams, *supra* note 3, at 305–07.

246. The right to housing of residents of the Occupied Territories, like other basic rights, is violated in manifold ways – demolishing homes, allowing for unsuitable living conditions, denying the right to choose one’s place of residence, etc. This subject is worthy of its own report, and has been raised in the publications of other organizations. See, e.g., UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, ‘LACK OF PERMIT’ DEMOLITIONS AND RESULTANT DISPLACEMENT IN AREA C 210 (2008). Housing demolitions and evictions. The Committee is deeply concerned about home demolitions and forced evictions in the West Bank, particularly in Area C, as well as in East Jerusalem, by Israeli authorities, military personnel and settlers.

rights.²⁴⁷ It stated that: “in spite of the fact that domestic courts have referred to Covenant rights in judicial decisions, the Covenant rights have not been incorporated in the domestic legal order with the consequence that the citizens cannot directly invoke the rights contained in the Covenant before domestic courts.”²⁴⁸

The report also pointed to a lack of social housing units, limited availability of affordable housing, and the lack of regulation of the private rental market.²⁴⁹ The committee was concerned with the forced evictions and relocation of the Arab-Bedouin villages in new settlements and the resulting negative effect on their cultural rights.²⁵⁰ A more updated report was published in 2018 by Amnesty International on human rights violations worldwide and pointed out the problem of demolitions of Palestinian homes inside Israel that were claimed to have been built without permits.²⁵¹

One turning point of the state towards its Arab citizens is the “Or Commission” established in 2000. Sigall Horovitz argues that it can be regarded as a truth commission, and part of a developing process of applying transitional justice mechanisms in Israel.²⁵² The Or Commission investigated the causes for the killing of twelve Israeli-Arab citizens by armed forces during demonstrations against the eruption of the second “Intifada.”²⁵³ The Or Commission heard the testimony of government representatives, professionals, and citizens, and based on the testimony submitted its recommendations to the government.²⁵⁴ The commission emphasized the urgent need to take immediate long-term corrective measures, and to “initiate, develop and operate programs and allocation of budgets that will close gaps in education, housing, industrial development, employment and services.”²⁵⁵

To conclude this Part, reviewing the violation of housing rights in settler democracies indicates that they share the following features. First, indigenous people and marginalized groups within settler democracies live in separated localities that are remote, crowded, and lack proper housing conditions and supplies.²⁵⁶ These groups usually

247. Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee on Economic, Social, and Cultural Rights, Forty-Seventh Session, § 6, U.N. Doc. E/C.12/ISR/CO/3 (Dec. 16, 2011).

248. *Id.*

249. *Id.* § 25.

250. *Id.*

251. These include homes in the Palestinian towns and villages in the Triangle, the Galilee, and in “unrecognized” Bedouin villages in the Negev/Naqab region. AMNESTY INT’L REPORT, *supra* note 58.

252. Horovitz, *supra* note 99.

253. *Id.*

254. *Id.*

255. OR COMMISSION, ISRAELI ARAB: THE OFFICIAL SUMMATION OF THE OR COMMISSION REPORT 1 (2003).

256. *See infra* Parts IV.A–D.

suffer from housing rights violations manifested in discrimination in acquiring housing, homelessness, and lack of affordable housing.²⁵⁷ They also suffer from criminalization of their acts resulting from the housing violations, such as criminalizing homelessness in Canada and the United States and criminalizing building houses against planning permits in Israel.²⁵⁸ In some states, they also suffer from unsecure tenure due to forced evictions and sometimes from house demolitions.²⁵⁹ These violations are a result of an embedded structural discriminatory and systematic legal and spatial policy.²⁶⁰

Second, although the states discussed above (excluding the United States) all have ratified international treaties, they have not enacted any statutes that incorporate the right to adequate housing, as manifested in international law.²⁶¹ The lack of legal protection of housing rights in domestic law makes it difficult to challenge the violation of these rights and restricts the ability of vulnerable groups to approach domestic courts to find an action on a breach of the state's obligation to the ICESCR.²⁶²

However, the application of transitional justice on nontransition states and with regard to social rights encounters several challenges. The following Part presents the components of the transitional justice approach and the challenges of its application within settler democracies in relation to housing rights violations.

V. TRANSITIONAL JUSTICE IN SETTLER DEMOCRACIES

The transitional justice theory was developed as “a *conception* of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”²⁶³ It is associated with the notion that acknowledging past injustices contributes to the consolidation of sustainable peace and democracy.²⁶⁴ Its chief goals are preventing the recurrence of abuses and establishing accountability for human rights violations committed by previous repressive regimes.²⁶⁵ Another goal is condemning the horrors of the past, and assuring the commitment to a future of human

257. See *infra* Parts IV.A–D.

258. See *id.*

259. This is especially apparent in the Israeli context. See *infra* Part IV.D.

260. See *infra* Parts IV.A–D.

261. In the Canadian context, see *infra* Part IV.A; in the Australian context, see *infra* Part IV.B; in the Israeli context, see *infra* Part IV.D.

262. This is because as long as there is no legal commitment from the state part to provide any form of protection as required by ICESCR, it would be difficult to base a legal claim of breach of right.

263. Teitel, *supra* note 23, at 69.

264. Paige Arthur, *How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 323 (2009).

265. *Id.*

rights.²⁶⁶ In achieving these goals, transformative regimes apply a variety of mechanisms—including: criminal trials, truth commissions, reparation and restitution programs, justice-sensitive systems, and institutional reforms.²⁶⁷

Societies in transition confront a tension between the role of law in preserving and entrenching norms and the *status quo* of groups and the role of law as a mechanism for transformation.²⁶⁸ Ruth Teitel explains that “transitional law disclaims past illiberal values and asserts new liberal norms. In the period of political change, transitional law is constructive and constitutive both by and of the transition.”²⁶⁹

Accordingly, mechanisms of transitional justice are based on three pillars: retrospective justice, prospective justice, and the adjustment of contending legal and political order.²⁷⁰ The retrospective form of transitional justice seeks to repair past events.²⁷¹ A prospective form is invoked when parties are willing to change their society for the future and reconstruct it differently on more just foundations.²⁷² Within this form, the parties seek to arrange relations within the society so that each party is treated appropriately moving forward.²⁷³

The third form, which is challenging legal and political order, involves a determination of the boundaries of the society and its membership.²⁷⁴ It may include discussions regarding the constitutional makeup of the state and the structures of local authority and autonomy.²⁷⁵ This form of transitional justice is extremely relevant to settler democracies because such a form can direct the state towards agreements between indigenous groups and the state regarding rights in land, cultural heritage, and various forms of self-government.²⁷⁶ It also addresses the relationship between these rights and liberal citizenship rights.²⁷⁷

Continuous and systematic violations of housing rights (and of rights in general) committed against an identified group require a tailored, unique form of remedy that can bring a better realization of the right. Some states that have undergone political transformations from regimes that systematically abused human rights to democratic and liberal regimes, applied transitional justice mechanisms. These

266. Teitel, *supra* note 23.

267. Jung, *supra* note 99, at 217.

268. Teitel, *supra* note 23, at 3.

269. *Id.* at 11.

270. Jeremy Webber, *Forms of Transitional Justice*, in TRANSITIONAL JUSTICE 98, 102–113 (Melissa S. Williams et al. eds., 2012).

271. *Id.* at 102–03.

272. *Id.* at 103–08.

273. *Id.*

274. *Id.* at 108–13.

275. *Id.*

276. Philips, *supra* note 12, at 84.

277. *Id.* at 82–83.

mechanisms require back-looking measures aimed at promoting forward-looking futures of human rights protection. This Article asserts that the framework and mechanisms of transitional justice can provide a platform for such an appropriate remedy for housing rights violations. Other remedies that disregard structural injustice are incomplete and provide only a partial solution.

In his book *Transitional Justice in Established Democracies*, Stephan Winter explores state redress as a legitimating process of the state.²⁷⁸ In examining four states, which are also settler democracies, he argues that states repair the damage that authorized wrongdoings inflict upon political legitimacy.²⁷⁹ However, the application of transitional justice theory in settler democracies in the case of housing rights violations and social rights in general is still undertheorized and faces two main challenges.²⁸⁰ First, transitional justice was developed to address human rights violations in periods of *major political transition* from conflict to peace, or from nondemocratic to democratic regimes. Since not all settler democracies have gone through any sort of political transition, a process of compatibility of the mechanisms applied is required.²⁸¹ Second, transitional justice was introduced to deal mainly with a set of *civil- and political-rights violations* (as opposed to social rights) committed by authoritarian regimes, such as extrajudicial executions, disappearances, torture, displacement, and lack of rule of law.²⁸²

In recent years, the transitional justice approach has been expanded to apply to the redress of economic, social, and cultural rights.²⁸³ It was also expanded to apply to democratic-liberal countries (such as settler democracies) that have not undergone any major regime change²⁸⁴ but that have undergone other forms of transformative change, such as economic and social change.²⁸⁵ The

278. Winter, *supra* note 26, at 250 (discussing New Zealand, the United States, Canada, and Australia).

279. *Id.* at 7.

280. See generally Rama Mani, *Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development*, 2 INT'L J. TRANSITIONAL JUST. 253 (2008); Lambourne, *supra* note 20, at 28; Ismael Muvingi, *Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies*, 3 INT'L J. TRANSITIONAL JUST. 253, 163 (2009).

281. See Teitel, *supra* note 23, at 71 (discussing how major regime transitions accrued after the collapse of the Soviet Union in Eastern Europe and the end of the military rule in South America. This was followed by transitions in Africa and Central America).

282. U.N. Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

283. Lisa Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*, 2 INT'L J. TRANSITIONAL JUST. 331, 331 (2008).

284. Zinaide Miller, *Effects of Invisibility: In Search of the "Economic" in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 266 (2008); Henry, *supra* note 151.

285. Hansen I, *supra* note 25, at 106.

following subparts will elaborate on these expansions with regard to the adequacy of the application of transitional justice to social rights (including housing rights) violations within nontransitional settler democracies.

A. *Transitional Justice without Transition*

Hansen divides the application of transitional justice to nontransitional countries into two categories: “Deeply Conflicted Societies” (such as Kenya, Colombia, and Uganda)²⁸⁶ and “Consolidated Democracies” (such as Canada, Australia, New Zealand, and the United States).²⁸⁷ Some consolidated democracies are also settler democracies that share legacies of human rights violations, marginalization, and exclusion of indigenous and marginalized groups.²⁸⁸

Nontransitional states, including settler democracies such as Canada and Australia, are already using transitional justice mechanisms to address the demands of indigenous peoples.²⁸⁹ These countries do not necessarily aim at achieving a political or peaceful transition, but rather wish to provide redress to victims, even in the absence of a regime transition.²⁹⁰ Some researchers criticize the application of transitional justice mechanisms by settler states to the violations of the rights of indigenous groups and claim that they reassert the sovereign and legal authority and political control of the settlers and do not necessarily aim to resolve historic injustice.²⁹¹

In any case, the importance of applying transitional justice in nontransitional states is animated by claims of indigenous groups for political and constitutional justice.²⁹² Through the mechanisms of transitional justice, these claims can be transformed into political participation and the power to decide upon issues affecting these groups’ key interests, while fully considering the background of structural injustice.²⁹³

286. Thomas Obel Hansen, *Transitional Justice: Toward a Differentiated Theory*, 13 OR. REV. INT’L L. 13, 25–43 (2011) [hereinafter Hansen II].

287. *Id.* at 43–44.

288. Balint, Evans & McMillan, *supra* note 13, at 194–95.

289. Research on Canada and Australia has developed during the last decade, but they do not focus on housing rights. See Rosemary L. Nagy, *The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission*, 7 INT’L J. TRANSITIONAL JUST. 52 (2013); McMillan & Rigney, *supra* note 40. For additional recent research on incorporating transitional mechanisms in Israel, see Horovitz, *supra* note 99; see also Teitel, *supra* note 23, at 71–72.

290. Hansen I, *supra* note 25.

291. For a detailed overview on these complexities and challenges drawing from the Canadian experience in the residential schools, see Jung, *supra* note 99.

292. Philips, *supra* note 12, at 83.

293. *Id.* at 83.

Accordingly, significant progress is currently taking place in the fields of land rights and self-government; this is especially true in states that do not have a constitution.²⁹⁴ In such states, the application of transitional justice can offer a constitutional transformation and social justice, particularly regarding social rights.²⁹⁵ The subsequent subpart will provide insights regarding the application of transitional justice mechanisms on housing rights violations of nontransitional settler democracies. But first, an overview of its application to social rights is required.

B. *Transitional Justice and Social Rights*

Transitional justice mechanisms were developed initially to deal with violations of civil and political rights.²⁹⁶ Today, transitional justice can be conceived as a unifying framework for understanding the contours of redress politics, which can in turn strengthen practical responses to past injustices and their contemporary effects.²⁹⁷

Throughout the years, scholars and international institutions have acknowledged the fact that violations of civil and political rights are intrinsically linked to violations of economic, social, and cultural rights (including housing rights).²⁹⁸ In 2014, the UN Office of the High Commissioner for Human Rights explored in depth the ways in which transitional justice processes have addressed violations of economic, social, and cultural rights.²⁹⁹ This report focused on countries in transition and addressed the potential, challenges, and limitations of applying transitional justice on economic, social, and cultural rights and provided recommendations for stakeholders.³⁰⁰ One of the important insights of this report is that transitional justice mechanisms are “necessary and could have a lasting impact on a society—for example, through the official recognition of past violations and by empowering victims. Their contribution to social change may be modest but is important.”³⁰¹

294. *Id.* at 85.

295. Jung, *supra* note 99, at 219.

296. Amanda Cahill-Ripley, *Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights*, 32 NETH. Q. HUM. RTS. 183, 184 (2014).

297. Henry, *supra* note 151, at 199.

298. In 2006, the United Nations High Commissioner for Human Rights sought to expand the application of transitional justice to cover economic, social and cultural rights violations. Rep. of the High Comm’r, ¶¶ 3, 59–65, U.N. Doc. A/HRC/12/18 (Aug. 6, 2009). Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 INT’L J.L. & POL’Y 1, 8 (2007).

299. OFFICE OF THE HIGH COMM’R ON HUMAN RIGHTS, U.N. Doc. HR/PUB/13/5 (2014) [hereinafter UN REPORT].

300. *Id.* at 1.

301. *Id.* at 6.

One of the features of transitional justice is to ensure that marginalized groups play an effective role in the pursuit of a just society. Thus, applying transitional justice mechanisms would help increase the compulsion states feel to redress these conditions, and at the same time would provide local actors with a legitimate platform to lobby for solutions to their grievances.³⁰² Such an approach would not only contribute to ending ongoing violations of economic, social, and cultural rights, but would also lay the foundations for forward-looking reforms, strategies, and agendas.³⁰³

However, little attention has been paid to addressing the wide range of past social injustices and housing rights violations through transitional justice measures *within* democratic ethnic land regimes, especially those that did not go through a major “transition.”³⁰⁴ Nontransition states, including settler democracies, trigger different challenges than states in transition regarding the mechanisms that should be applied to social rights violations. The following Part addresses this issue, focusing on housing rights violations.

VI. INCORPORATING TRANSITIONAL JUSTICE MECHANISMS IN HOUSING POLICY

Transitional justice mechanisms that developed throughout the years include: criminal prosecutions of the actors responsible for human rights violations; reparations programs that distribute a mix of material and symbolic benefits to victims (such as compensation and apologies); restitution programs that seek to return housing, land, and property; and truth-telling commissions that investigate, report, and officially acknowledge periods and patterns of past violations.³⁰⁵ Transitional justice mechanisms also include justice-sensitive security sector reforms that seek to transform the military, police, and judiciary responsible for past violations by building institutional accountability, legitimacy, integrity, and the empowerment of citizens.³⁰⁶

Applying transitional justice mechanisms to violations of housing rights have been apparent during or after conflicts and transitions with regard to displacements. In these periods of time, people have been forced out of their homes and communities and have suffered

302. Gross II, *supra* note 242, at 50–52.

303. According to Teitel, “Law is caught between the past and the future, between backward and forward looking. What is deemed just is contingent and informed by prior injustice.” TEITEL, *supra* note 19, at 6.

304. International Center for Transitional Justice, *Transitional Justice and Displacement Challenges and Recommendations*, BROOKINGS-LSE PROJECT ON INTERNAL DISPLACEMENT 1 (2012) [hereinafter ICTJ Report].

305. David Little, *A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies*, 13 ETHICS & INT’L AFF. 65, 66 (1999).

306. Jung, *supra* note 99, at 217.

additional human rights abuses.³⁰⁷ These mechanisms have involved the participation of a wide range of actors, such as the UN's Human Settlement Program and other international institutions.³⁰⁸

Indigenous and marginalized groups within settler democracies have suffered, and in some cases are still suffering, from continuous and structural violations.³⁰⁹ This Part presents initial guidelines for the compatible mechanisms that should be applied by settler democracies seeking to provide remedies for systematic housing rights violations committed against their indigenous groups. These guidelines are based on three assumptions.

The first is that realization and actualization of the housing rights of indigenous and marginalized groups should touch upon the roots of the systematic violation and discrimination in housing. The second is that these violations are distinguished from violations committed during transitional regimes, as they occur under the auspices of a liberal and egalitarian legal and political regime. As such, they require a deep analysis of their roots, and as long as the roots of social rights violations are not identified and uncovered, they will continue to occur.³¹⁰ The third is that housing rights, as opposed to political rights (the freedom of speech, the right to vote, *etc.*) are tangible rights that include physical and perceptible objects, such as homes, community centers, and social facilities. These objects are an integral part of the living environments of communities and individuals and are part of the right to adequate housing.³¹¹ Therefore, remedies should account for this aspect of right violation.

Based on these assumptions, the mechanisms used should not be aimed at prosecuting offenders, *inter alia*, because there is no certainty that there are concrete prosecution bases to be found. Moreover, other mechanisms, such as truth commissions³¹² and apologies,³¹³ are important mechanisms that can be applied, but they cannot provide a satisfactory solution. The "Truth commissions" mechanism that investigates the horrors of the past, and the "Apologies" mechanism that redeems historic wrongs, are merely symbolic acts. Through these sorts of mechanisms officials of various sorts communicate, on behalf of wrongdoers, with the victims themselves.³¹⁴ Thus, they may provide

307. ICTJ Report, *supra* note 304, at 3.

308. *Id.*

309. *See supra* Part IV.

310. *See* Teitel, *supra* note 23.

311. *See supra* Part II.

312. *See* Teitel, *supra* note 23, at 78–80.

313. *Id.* at 85–86.

314. MICHAEL R. MARRUS, OFFICIAL APOLOGIES AND THE QUEST FOR HISTORICAL JUSTICE 11 (Munk Centre for International Studies at Trinity College, Univ. of Toronto 2006).

a sense of responsibility towards the harmed group, but they do not provide an actual remedy.³¹⁵

Therefore, the remedies required should be based on a form of restorative justice, which is designed to repair harm and restore actual and practical housing rights by creating deep and thorough change in the spatial policy and legal system of the country.³¹⁶ These mechanisms can motivate change in housing conditions and lives and provide the most direct and meaningful way of receiving justice. They are outlined in the following subparts.

A. Institutional Reform

Institutional reforms are aimed at reforming state structures and institutions that facilitate or promote human rights violations.³¹⁷ They seek to prevent the recurrence of human rights violations through the transformation of safety, security, and justice institutions as well as governance systems, but, more importantly, they also track the root causes of conflict and repression in order to prevent further violations.³¹⁸

Institutional reform is a key element of transitional justice, as it has the potential to trigger structural change and prevent human rights violations from recurring.³¹⁹ It is also forward looking, as institutional reforms benefit all of society and all groups, not only victims.³²⁰ However, it is one of the most under-researched and unexplored areas of transitional justice.³²¹ To date, most efforts have focused on vetting, security sector reform, and legislative reform.³²² For example, the institutional reform implemented in South Africa was intended to assist black individuals in being appointed into relatively high positions in the police and the army, but despite these efforts, they did not really fit in the army, mainly because of lack of education and basic skills.³²³

Institutional reform can include many measures, such as becoming party to international human rights treaties and ensuring the protection and promotion of human rights through international

315. *Id.*

316. Malcolm Langford, *The Justifiability of Social Rights: From Practice to Theory*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* (Malcolm Langford ed., 2008).

317. Brian Grodsky, *Transitional Justice and Political Goods*, in *POST-COMMUNIST TRANSNATIONAL JUSTICE: LESSONS FROM TWENTY-FIVE YEARS OF EXPERIENCE* 7, 10–12 (Lavinia Stan et al. eds., Cambridge Univ. Press 2015); *see also* UN REPORT, *supra* note 299, at 44.

318. UN REPORT, *supra* note 299, at 44.

319. Grodsky, *supra* note 317, at 44.

320. *Id.* at 44.

321. *Id.* at 45.

322. *Id.*

323. *Id.*

supervision UN committees.³²⁴ It also includes the application of administrative reforms or the creation of new legal frameworks, like adopting constitutional amendments and legal enactments.³²⁵ Another form is building trust between all citizens and their public institutions, such as background examination of staff members for the removal of corrupt officials, structural reform and the reorganization of institutions to promote the integrity and legitimacy of these, and creating public oversight bodies within the state institutions.³²⁶ Institutional reforms also include disarmament, demobilization, and reintegration of ex-combatants in civil society.³²⁷ Institutional housing reforms within settler democracies are essential mechanisms and raise political and public challenges. According to this Article's assumption, they can be accomplished through the following four stages. First, a declaration from the administration that there were structured special policies that resulted in systematic rights violations. Second, a commitment from the administration for a change in the state's spatial policy. Third, an investigation and analysis of regulatory tools that promoted the discriminatory land regime and resulted in systematic privilege to one group over another must be done. This step is especially important and challenging, because housing regulations within liberal settler democracies are, in most cases, worded in a neutral manner and are not up front regarding discriminatory regulations.

Fourth, adequate housing rights protections, as manifested in international law, must be incorporated in the domestic legal system in a way that suits the conditions of each country and the unique roots of housing rights violations. Such a move would provide legal standing when rights are violated and would force the government to advance equitable housing schemes, such as promoting better planning initiatives and legalizing the "unlawful" construction of residential buildings. Furthermore, it would also provide courts with tools to review the historical background of past injustices and violations of housing rights, which may allow it to rule differently.

An example of such a welcome measure is the American NAHASDA Act mentioned above. This is a legislative reform intended to address the need for affordable housing for low-income people on tribal lands in the Native American reservations.³²⁸ The Act is divided into seven sections and includes the following regulations: block grants

324. Basil Fernando, *Editorial: Institutional Reforms as an Integral Part of a Comprehensive Approach to Transitional Justice*, 8 INT'L J. TRANSITIONAL JUST. 187, 188 (2014).

325. *Id.*

326. *Id.*

327. Hansen II, *supra* note 286, at 32.

328. Kenison, *supra* note 196, at 253–54.

and grant requirements;³²⁹ affordable housing activities;³³⁰ allocation of grant amount;³³¹ compliance, audits, and reports;³³² and federal guarantees for financing of tribal housing activities.³³³ These actions are intended to align with the objectives of assisting and promoting affordable housing on tribal land, offering tribal members better access to private mortgage markets, matching developments to surrounding areas, and promoting private capital markets in Indian Country.³³⁴ In this sense, such an enactment anchors transitional justice mechanisms that address housing rights violations through a wide historical context.

B. Reparations and Restitution Programs

Applying the mechanism of “reparation programs” as a remedy for housing rights violations includes mainly financial compensation to the victims.³³⁵ “Restitution programs” seek to return housing, land, and property transferred to state ownership under unlawful enactments to their owner.³³⁶ Justice mechanisms (tribunals) or national administrative reparations programs that address the root causes of conflict or repression can order these programs.³³⁷ In the context of displacement, there have been only a few examples of reparations programs providing benefits directly for housing rights violations.³³⁸ In Guatemala and Peru, for instance, reparations programs address displacement as a crime that merits restitution, and in Colombia, the administrative reparations program, established in 2011, anticipates providing redress for forced displacement as such.³³⁹

Lisa Laplante provides a comprehensive theory of “Just Repair” of reparations for redressing atrocities through developing a wide notion of financial compensation.³⁴⁰ She suggests an approach for governments that face challenges while they attempt to repair the harm suffered by hundreds, and sometimes thousands, of victims of

329. NAHASDA, *supra* note 201, at Title I.

330. *Id.* at Title II.

331. *Id.* at Title III.

332. *Id.* at Title IV.

333. *Id.* at Title VI, (This simplified the system of providing housing assistance to Native American communities by consolidating the myriad programs previously available to tribal groups into a single grant program known as the Indian Housing Block Grant (IHBG). It also authorized loans and loan guarantee programs to help American Indian tribes finance their development projects.)

334. Kenison, *supra* note 196, at 254–55.

335. Lisa J. Laplante, *Just Repair*, 48 CORNELL INT’L L.J. 513, 523–24 (2015).

336. ICTJ Report, *supra* note 304, at 3.

337. UN REPORT, *supra* note 299, at 38.

338. ICTJ Report, *supra* note 304, at 3.

339. *Id.*

340. This is a plural approach in designing a reparation policy and is based on a wide conception of justice. See Laplante, *supra* note 335, at 513–14.

political violence, repression, and armed conflict.³⁴¹ However, her research is confined to the application of reparation programs on violation of political as well as social violations of rights committed by transitional societies (and not by nontransition states).³⁴²

Based on Laplante's theoretical insight, this Article suggests rethinking the concept of financial compensation to include much more than monetary forms of compensation, but also tangible forms of compensation. For example, she proposes initiating rehabilitation and renewal schemes for existing houses, as well as building new adequate housing that is adjusted to the needs of residents. Such schemes should also include the implementation of housing programs that allocate budgets and resources for building adequate educational and cultural institutions, health services, sewage systems, and water supplies.³⁴³ These programs would enable indigenous groups to actually deal with the housing shortages and crowded and poor living conditions.³⁴⁴ More importantly, such forms of reparations should be diverse depending on the type of structured violation; the political context of the state; the social, economic, and cultural conditions; and the needs of the groups involved.³⁴⁵

C. Participation as Political Constituencies

Indigenous and marginalized groups suffer from underrepresentation among leading policymakers' positions, affecting their livelihoods and housing conditions.³⁴⁶ There are several agreements and international conventions that entitle indigenous people to a positive right *vis-à-vis* the development of lands and resources to which they have a traditional affinity.³⁴⁷ These arrangements intend to protect marginalized groups from development projects that can harm their quality of life and heritage.³⁴⁸ Moreover, as part of its work against the discrimination of indigenous people, the Committee for Eliminating all Forms of Racial Discrimination declared

341. *Id.*

342. *Id.* at Part III.D.

343. UN REPORT, *supra* note 299, at 39.

344. Ruben Carranza, *The Right to Reparations in Situations of Poverty*, INT'L CTR. FOR TRANSITIVE JUST. BRIEFING (2009).

345. Laplante introduced the concept of differentiation in treatment to different victims. Laplante, *supra* note 335, at 568–69; *see also* Larry May, *Reparations, Restitution, and Transitional Justice*, in MORALITY, JUS POST BELLUM, AND INTERNATIONAL LAW 32, 36–43 (Larry May & Andrew Forcehimes eds., 2012). *See generally* INT'L CTR. FOR TRANSITIVE JUSTICE, *Reparations*, <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (last visited Sept. 7, 2019) [<https://perma.cc/JP55-RZ5V>] (archived Aug. 21, 2019).

346. Rainer Baubock, *Cultural Minority Rights for Immigrants*, 30 INT'L MIGRATION REV. 203, 203–50 (1996).

347. G.A. Res. 61/295, ¶ 26 (Oct. 2, 2007).

348. *Id.*

that decisions in relation to indigenous groups should be reached in a manner that is “free, early and with rational consent.”³⁴⁹ Accordingly, indigenous communities must be notified about their rights, including their rights to lands, resources, and to receiving impartial counseling on projects that can affect their living conditions.³⁵⁰

Laplante’s insight presented in the previous subpart is built on the work of Amartya Sen’s conception of “positionality.”³⁵¹ Positionality refers to the fact that “[w]hat we can see is not independent of where we stand in relation to what we are trying to see. And this in turn can influence our beliefs, understanding, and decisions.”³⁵² Accordingly, Laplante argues that victims’ participation in reparation programs will better accommodate their needs.³⁵³

Based on her argument, this Article asserts that governments should motivate indigenous and marginalized groups to participate as political constituencies, and enable them to make decisions and reach agreements with the settler state on matters affecting their interests, especially with reference to housing crises.³⁵⁴ Promoting such a project requires states’ active involvement and initiative in a two-stage process. The first stage is training and empowerment of individuals from indigenous and marginalized groups that would become qualified professional functionaries.³⁵⁵ The second is the appointment of professionals from the indigenous community as stakeholders in leading positions of policy-making regarding adequate housing.³⁵⁶ The

349. “Free” means that consent should be given in a way that is free of manipulation, force, threat, fear from revenge, corruption, or inequality. “Early” means that the indigenous people should be given enough time to consider their free consent. Their values, traditions, and circumstances should be considered. “Rational consent” means that the plan and its goal should be defined clearly, with consideration to its effect on the specific culture. Hum. Rts. Comm. Res., U.N. Doc. A/HRC/27/30 (2014).

350. This right is based on the International Covenant on Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights, the International Convention on the Eliminations of All Forms of Racial Discriminations, and G.A. 61/295, the United Nation Declaration on the Rights of Indigenous Peoples. International Covenant on Economic, Social and Cultural Rights, *supra* note 5, at art. 16(1); International Covenant on Economic, Social and Cultural Rights, *supra* note 5, at art. 11; International Convention on the Elimination of all Forms of Racial Discrimination, *supra* note 5, at art. 5.

351. Laplante, *supra* note 335, at 539.

352. *Id.*

353. *Id.* at 570.

354. Philips, *supra* note 12, at 84.

355. A similar notion was applied in South Africa to achieve racial transformation in business through the concept of Black Economic Empowerment. Harold D. Herman, *Affirmative Action in Education and Black Economic Empowerment in the Workplace in South Africa since 1994: Policies, Strengths and Limitations*, 15 CURRENT BUS. & ECON. DRIVEN DISCOURSE & EDUC.: PERSP. FROM AROUND THE WORLD 31, 31 (2017).

356. Positive discrimination, affirmative action and measures of redress have been developed during the Civil Rights Campaign in the United States during the 1950s and 1960s. These measures were applied in favor of minorities in a number of countries throughout history. *Id.* at 31. My suggestion is slightly different from the classic notion

involvement of marginalized and oppressed groups in the decision-making process is critical because it promotes a sense of justice, and in cases of past injustice, promotes institutional accountability, legitimacy, integrity, and a sense of empowerment among citizens.³⁵⁷

In sum, these mechanisms can be applied by settler democracies (and states in transition) on various levels, depending on the legal and political context and the type of social-right violation in question.

VII. CONCLUSION

Violations of the housing rights of indigenous groups in settler democracies are embedded in institutionalized discriminatory systems of land allocation, housing, and planning policy. Settler democracies face a major dilemma when they attempt to deal with systematic housing-rights violations with the aim of creating an egalitarian and just land regime. On the one hand, these states are committed to guaranteeing equal rights and applying an egalitarian housing policy for all citizens. On the other hand, the application of color-blind and history-blind policies ignores systematic injustice and may broaden the disparities between groups. As a consequence, it might lead to nonegalitarian outcomes.³⁵⁸ Therefore, acknowledging past injustices is the fundamental cornerstone of addressing present problems and establishing a solid and just future.

Transitional justice continues to expand as it responds to the complexity and nuances of past injustice of social-rights violations within diverse societies, including settler democracies. It has great potential to address the root causes of the housing-rights violations through a structural change of the legal and political system. Based on this assertion, this Article has argued that transitional justice mechanisms are the most compatible tools for addressing systematic housing discrimination and past injuries that are deeply embedded in an institutional, segregative, and ethnocratic land regime. This stance is also applicable to other liberal countries that have undergone transition and aspire to guarantee equal social rights for all its citizens.

of affirmative action as it requires its application with regard to policy making positions concerning marginalized groups issue.

357. IRIS M. YOUNG, *RESPONSIBILITY FOR JUSTICE* 105–07 (Oxford Univ. Press 2011).

358. Gross II, *supra* note 242, at 88 (addressing the consequences of implementing a non-distributive approach of property rights on current un-equal division).