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The Internationally Recognized Right to Housing: Implications and (Some) Applications

I. INTRODUCTION: SOCIAL RIGHTS AND POVERTY

There are different ways to fight against poverty. For example, one could simply rely on future economic development, on the effects of charity, or one may expect the problem to be solved solely on governmental initiatives. It is true that sustainable economic development is a precondition to significantly diminish poverty, but it does not lead to this outcome automatically. Charity does not help if there are too many free riders who think that others have contributed and there is no need for their sacrifice. And governments could come and go having very different social preferences.

The guarantee of the state's commitments to fight against poverty could flow from constitutionally and/or internationally secured social rights. It can be argued that this way freely elected governments may be *overcommitted*, losing a significant part of their economic policy freedom, since many of those rights act like *trumpets* giving the impression that in a debate over the resources only the right holders may be right.¹ But these approaches definitely overestimate the consequences of the legal recognition of social rights.

Constitutional and/or international legal regulations provides limited protection because social rights are rarely subjective rights, and in many respects they do not represent more than legally secured state goals. The states have lost much more of their economic policy freedom by globalization than by the maintenance of the institutional base of social rights because they enjoy a relatively wide freedom to decide on the level of services arising from those rights. As far as *the trumpet argument* is concerned, rights having relative protection can hardly be real *trumpets*. Their *relative argumentative power* could help those who belong to

¹ The «trumpet» interpretation comes from Ronald Dworkin: *Taking Rights Seriously*, Duckworth, London, 1977, p. 11. It has been developed by Martti Koskenniemi: «The Effects of Rights on Political Culture», in Philip Alston (ed.): *The EU and Human Rights*, Oxford University Press, Oxford, 1999, pp. 113-116.

the weaker side of the society, especially those who do not have real conflict capabilities –those not having a voice in social debate, those who cannot choose–, like handicapped people or the inhabitants of slums and the homeless people.

On practical grounds, it could be underlined what the people really need is education, a job, a flat, and health services, not the legal guarantee of those.² But unfortunately the people who do not have those things need guarantees not to be left alone. One could argue that universal suffrage resolves this problem, but in an affluent society having a satisfied majority more interested in tax cuts than in social policies, those political forces which favor those in the bottom of the social pyramid through state spending, rarely have a chance.

Social rights can provide entitlements for social services for those who are not able to buy them on the market. The right to social security can provide a safety net for social rights. If the social services are provided in the context a social security system, it means that the law creates a risk community based on two things. The first is a duty to pay fees, the amount of which reflect your level of income; the second are entitlements for those who have paid the fee and are in need to receive services. It is not by chance that according to the approach taken by the European Committee of Social Rights –the Council of Europe body having the duty to supervise the implementation of the European Social Charter– the social security system should not only be adequate to the needs of the vulnerable groups in society, but it should secure basic subsistence to all members of the society.³

Someone could benefit from the social security services according to the rules of the system. It can happen that the person does not pay the fee for the required period or he or she falls out from the system because of other different reasons. Those persons cannot be left in the dark without any care. Under the right to social and health care services, they are entitled to minimal provisions. Obviously there have been people who have had other options than to rely on this right:

«There are men who fall helplessly into the workhouse because they are good for nothing; but there are also men who are there because they are strong minded enough to disregard the social convention (obviously not a disinterested one on the part of the ratepayer) which bids a man live by heavy and badly paid drudgery when he has the alternative of walking into the workhouse, announcing himself as a destitute person, and legally compelling the Guardians to feed, clothe, and house him better than he could feed, clothe, and house himself without great exertion.»⁴

² This argument comes from a US diplomat quoted by Philip Alston: «U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy», *American Journal of International Law* Vol. 84, No. 2 (1990) p. 375.

³ As it has been quoted by Martin Scheinin in «The Right to Social Security», in Asbjorn Eide, Catarina Krause & Allan Rosas (eds.): *Economic, Social and Cultural Rights. A Textbook*. (2nd ed.), Martinus Nijhoff, Dordrecht, 2001, pp. 212-213.

⁴ George Bernard Shaw: *Man and Superman*, Act III (1903). Available on-line at <http://www.bartleby.com/157/3.html>

The answer to such behavior is the conditionality of the minimal provisions. The minimal provisions are financed by the social security budget or the state budget. But even if the social security budget covers the expenses the money comes from the state budget, from the state revenue. To satisfy certain basic human needs –like education, housing or the above mentioned minimal social and health services– does not go without public spending, or if you wish without «compelled charity» through taxation.⁵ The expenses are significant and the market solves the problems at best partly. Freedom and welfare services in mass societies finally depend on readiness of the people to pay taxes.⁶ Governmental programs involving legislation and high expenditures are needed and such programs should have firm grounds. Beside other things like moral or religious beliefs, or social citizenship, the theory of basic human needs, the legal concept of social right can serve this goal.

2. THE PROBLEM OF HOUSING

The scale of the housing problem is amazing. According to the data provided by the UN Centre on Human Settlements (HABITAT) in 2006 an estimated billion people did not have adequate housing, and another hundred million did not even have a home.⁷ It is well known that the ongoing economic crisis has started in the house market and its one of the most painful consequences is that many people are loosing their homes. It comes from the fact that in the developed world an increasing number of people are forced to rely on the housing market, where high interest *sub-prime* lending and repossessions for non-payment can easily result in homelessness. Many fall in the affordability trap because they overestimated their future income, not expecting unemployment, pursuing their dreams about their own house and not being able to cope with increasing rents or mortgage payments. Segregated minorities and people with disabilities suffer from discrimination most in the housing market. Although evictions are generally legally regulated, in many cases arbitrary evictions are taking place.⁸

⁵ The compelled charity argument comes from Jeremy Waldron: *Liberal Rights. Collected Papers 1981-1991*, Cambridge University Press, London, 1993, pp. 225-250.

⁶ The costs of rights argument originally comes Stephen Holmes and Cass R. Sunstein: *The Costs of Rights: Why Liberty Depends on Taxes*. They are quoted in Henry Steiner, Philip Alston: *International Human Rights in Context. Law, Politics, Morals*. (2nd ed.) Oxford University Press, Oxford, 2000, pp. 260-261 but the arguments are confined to civil and political rights.

⁷ UN Centre for Human Settlements (HABITAT): *Basic Facts on Urbanization* (available on-line http://www.unhabitat.org/downloads/docs/3777_54054_HS-568.pdf).

⁸ *Housing Rights: The Duty to Ensure Housing for All*, Commissioner for Human Rights, Council of Europe, Strasbourg, 25 April 2008, pp 3-5.

3. THE RIGHT TO HOUSING IN INTERNATIONAL LAW: BEYOND INSPIRATIONS AND ASPIRATIONS

Supreme responsibility for the implementation of human rights is vested in the constitutional system of the states. The states should cope, thus, with a highly contradictory position: being the greatest violator and guarantor of human rights at the same time. International law –with certain exceptions in the field of civil and political rights– provides only guidelines for national legislation. If massive state spending or macro-economic decisions are at stake, as it is the case with the implementation of social rights, it cannot be done differently.

International legal norms regulating social rights generally set *goals*, clarify the *content* (especially the minimum content of a given social right), underline the *aspirations* and the expectations of the international community, work as source of *inspiration* and provide *legitimacy* for human rights NGOs.

Article 25 (1) of the Universal Declaration of Human Rights (1948) and Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (1966) recognize the right to housing as a part of the right to an adequate standard of living, declaring the right of everyone to «an adequate standard of living for himself and his family, including *inter alia* housing».

The texts simply enunciate this right, consequently only via interpretation can its content be clarified. The authentic interpretation has been made by the UN Committee on Economic, Social and Cultural Rights in its *General Comment No. 4 on the Right to Adequate Housing*.

«In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "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 account of 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. Secondly, the reference in Article 11 (1) must be read as referring not just to housing but to adequate housing.»⁹

The *General Comment No. 4* clarifies the core elements of the right. Those are legal security of tenure, availability of services, materials and infrastructure, affordable housing, habitable housing, accessible housing, housing in a suitable location, housing constructed and sited in a way which is culturally adequate.

The most important statements of this *Comment* are the followings:

⁹ General Comment No. 4 (1991) on the Right to Adequate Housing, Para 7.

- All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction and harassment.
- States should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing financing that adequately reflect housing needs.
- Tenants should be protected by appropriate means against unreasonable rent levels or rent increases.
- The implementation of the right requires the adoption of a national housing strategy with effective monitoring relying on whatever mix of public and private sector measures considered appropriate.
- The Committee emphasizes the importance of legal procedural guarantees against planned eviction, discrimination in the allocation and in availability of access to housing and unhealthy conditions.¹⁰

Consequently, the state is not under the duty to guarantee an individual justiciable right to housing, but to provide legal security in housing, to pursue an active and adequate housing policy, and to protect against unreasonable high rents.

The intervention into the market could easily lead to a frozen market. The regulation aiming a ceiling in rents can be an incentive to the investors to select other economic areas for their investments and the deregulation can end in a boom in the construction of houses.¹¹ The solution is not only the fine tuning of the rent level, –giving a help to the tenants but not alienating the investors– but to give tax incentives to those who invest in the housing market.

The *prevention* of homelessness led to the *General Comment No. 7 on The Rights to Adequate Housing – forced eviction*. This Comment prohibits forced evictions resulting in homelessness and in vulnerability to the violation of other human rights.

«The term “forced evictions” [...] is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.»¹²

The forced evictions are frequently associated with violence, international armed conflicts, internal strife and communal or ethnic violence. Other instances of forced eviction are carried out in connection with conflict over land rights, development and infrastructure projects, such as the constructions, urban renewal, the clearing of land for agricultural purposes, unbridled speculation in

¹⁰ General Comment No. 4 (1991) on the Right to Adequate Housing, paras 8-14.

¹¹ Cass. R. Sunstein: *Free Markets and Social Justice*, Oxford University Press, New York, 1997, p. 283.

¹² General Comment No. 7 on (1997) the Rights to Adequate Housing – forced eviction. Para 3.

land. Even if the evictions are justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it must be ensured that they are carried out in a manner compatible with a law which respects the Covenant and all the legal recourses and remedies should be available to those affected.¹³

According to Article 31 of the Revised European Charter of Social Rights (1996):

«With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- 1.– to promote access to housing of an adequate standard;
- 2.– to prevent and reduce homelessness with a view to its gradual elimination;
- 3.– to make the price of housing accessible to those without adequate resources.»

What kind of behavior of the governments is amount to violation of Article 31?

The European Committee of Social Rights in its *Conclusions* (on state reports) has clarified the notions which are essential to understand the content of the obligations, such as adequate housing, homeless persons, forced eviction and housing affordability. It has also established what action States are required to address in order to ensure the effectiveness of the right to housing, like the control of adequacy, construction policy, social housing, housing benefits, judicial remedies, emergency housing for homeless people, etc.¹⁴

In a collective complaint case –the *FEANTSA* (European Federation of National Organizations Working with the Homeless) v. *France* case–,¹⁵ the European Committee of Social Rights came to the conclusion that the following governmental behaviors violate Article 31:

«The insufficient progress as regards the eradication of substandard housing and lack of proper amenities of a large number of households constitute a violation of Article 31§1 of the Revised Charter;

the unsatisfactory implementation of the legislation on the prevention of evictions and the lack of measures to provide rehousing solutions for evicted families constitute a violation of Article 31§2 of the Revised Charter ;

the measures currently in place to reduce the number of homeless are insufficient, both in quantitative and qualitative terms, and constitute a violation of Article 31§2 of the Revised Charter;

the insufficient supply of social housing accessible to low-income groups constitutes a violation of Article 31§3 of the Revised Charter;

the malfunctioning of the social housing allocation system, and the related remedies, constitute a violation of Article 31§3 of the Revised Charter;

¹³ General Comment No. 7 on (1997) the Rights to Adequate Housing – forced eviction. Paras 4-15.

¹⁴ See Council of Europe: *Conclusions of the Committee on Social Rights* available online at www.coe.int.

¹⁵ Decision on the Merit, 5 December 2007.

the deficient implementation of legislation on stopping places for Travelers constitutes a violation of Article 31§3 of the Revised Charter in conjunction with Article E.»

Consequently the defense of the French Government –emphasizing that this provision only requires States to «take measures», not to achieve «results», and that the numerous laws, policies and plans on housing adopted by the authorities simply prove that France respects this provision– was not accepted. The European Committee of Social Rights has not only insisted in the proper implementation of the existing legislation but it has also required for «sufficient progress» in different fields of housing. It clearly means that under the revised European Social Charter of Social Rights the implementation of the right to housing expects certain result as a part of an active and adequate housing policy.

This decision shows that International law can go further than inspirations and aspirations. The real problem is the domestic implementation, as the Commissioner of Human Rights (Council of Europe) points out:

«While supporting housing rights at international level, many States fail to address these rights obligations within national legislation, administration systems, monitoring and policies. Some have difficulties in defining and enforcing a minimum standard of housing rights protection, or in securing the resources for effective State action. Indeed, where they exist, many programmatic approaches preclude any remedies for violations, while some rights approaches ignore the role of housing markets.»¹⁶

4. THE JUSTICIABLE ASPECTS OF RIGHT TO HOUSING IN INTERNATIONAL LAW

Although the above mentioned collective complaint procedure may also be seen as a kind of procedure of international justiciability, its real form is the protection via civil and political rights in individual cases in front of international human rights courts or bodies.

The European Court of Human Right in the *James and others* case¹⁷ analyses certain aspects of the connection between the right to property and housing and comes to the conclusion that in modern societies housing is a primary social need and it cannot be left to the market completely. Consequently, it is legally justified if legislation in serving greater social justice intervenes into private contracts. According to *Connors*¹⁸ and *Prokopovich*¹⁹ forced eviction may amount to a violation of right to privacy, family life and home such as displacements and destructions of home and also to a violation of right to property (*Aakdivar and*

¹⁶ *Housing Rights...*, *cit.*, p. 4.

¹⁷ Judgement, February 28, 1986, paras. 47, 63.

¹⁸ Judgement, May 27, 2004, paras. 85-95.

¹⁹ Judgement, November 8, 2004, paras. 35-45.

others)²⁰. In *Marzari*²¹ the Court, considering the violation of right to privacy, family life and home, stated:

«Although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual.»

On occasion of and extreme destruction of homes –for example, in a case (*Yöyler*) in which authorities have set fire on the houses of relatives of terrorist suspects– the Court has held the violation of the right to housing and the practice of an inhuman and degrading treatment.²²

In cases of forced eviction, displacements and destruction of homes the Inter-American Courts of Human Rights has come to same conclusion: violations of right to freedom from interference with private life, family, and home (*Ituango Massacres*)²³ of freedom of residences and right to property (*Moiwana Community*).²⁴

Consequently, indirect protection of rights related to right to housing could go very far if the protection of civil and political rights is well established. Moreover the case law of the indirect protection clearly reveals those related rights which are easily justiciable for everyone.

5. DOMESTIC LEGISLATION

Although many countries still lack proper domestic legislation, there are certain cases in which domestic legislation goes beyond international expectations and tries to provide not only for an adequate housing policy with financial resources and incentives, but to a progressively justiciable right to housing to everyone. The Homelessness Act of Scotland adopted in 2003 is a good example. The ambitious legislation obliges local authorities to secure adequate accommodation by 2012 for all persons who become homeless, as part of a legally binding obligation to provide housing for all. The questions of intentional homelessness and local connection which limited eligibility in the past will be removed.

The new law on the enforceable right to housing adopted in France in 2007 (known as the «DALO Act») provides a gradually introduced procedural right to turn to administrative tribunal if the right to housing has been violated. The measures foreseen in the new Act entered into force on 1 December 2008 for

²⁰ Judgement, September 16 1996, para. 88.

²¹ Judgement, 4 May, 1999. It has been quoted by *Housing Rights...*, *cit.*, pp. 9-10.

²² Judgement, May 10, 2001, paras. 74-76.

²³ Judgement, July 1, 2006 paras. 175-188.

²⁴ Judgement, July 15, 2005 paras. 168-189.

certain categories of persons, and will enter on 1 January 2012 for other categories. From 1 January 2008, a negotiated settlement application to mediation committees are provided for social housing applicants on the waiting list for «excessively long» times (Group 1) and good faith applicants who are unhoused or underhoused (Group 2) and applicants for temporary accommodation (Group 3). From 1 December 2008, those who belong to Group 2 and Group 3 have a court action if a committee decision in their favor is not implemented. From 1 January 2012, Group 1 will have the same right on the same conditions.

In Andalusia (Spain) a new law aims to ensure access to housing for three different priority groups: people with an income that is below the minimum wage, socially disadvantaged people, and young people. Also in Spain, Catalonia's National Pact for Housing aims to ensure that nobody experiences housing exclusion due to economic reasons.

Sophisticated framework legislation for housing, with clearly defined goals and target groups, with good implementation regulation, with timetable and with necessary financial resources and incentives is really a must for the realization of the right to housing. But aiming too high and to provide a justiciable right might lead to disappointments, especially if the financial resources are not guaranteed.

The impact of constitutional or legislative recognition of right to housing and landmark cases like *Grootboom*²⁵ in South-Africa (2000) is maximum *significant but limited*. In South-Africa although still millions live without adequate housing in informal settlements, but the *Grootboom* decision of the South African Constitutional Court has had two positive impacts as regards housing rights. First, it has created a powerful tool for the advocates of specific communities involved in evictions proceedings; and second, it has paved the way to a national program for housing assistance in emergency circumstances.²⁶

I am afraid that is the way how the recognition of an individual social right can help the solution of a social problem.

6. INSTEAD OF CONCLUSIONS

«India has some of the biggest slums in the world. An estimated 60.2 million people live in informal settlements in the country's cities, as much as a quarter of the urban population, according to the 2001 census. The slum population has been rising as more people migrate from India's rural areas to cities in search of jobs and higher incomes. In this week's national budget, Pranab Mukherjee, the finance minister, earmarked Rs40bn (\$820m, £506m, €587m) for spending on housing and the provision of basic services. This included money for a new scheme, the Rajiv Awas Yojana (Rajiv Gandhi housing plan), aimed at making the country "slum-free".

²⁵ 2000 (11) BCLR 1169 (CC).

²⁶ Elisabeth Vickeri: «*Grootboom's* Legacy. Securing the Right to Acces to Adequate Housing in South Africa?», *NYU School of Law Center for Human Rights and Global Justice Working Paper, Economic, Social and Cultural Rights Series No. 5* (2004), pp. 6-7.

The extra spending came alongside an almost 90 per cent increase in financial support for the Jawaharlal Nehru National Urban Renewal Mission, a scheme to improve urban infrastructure.

But Jockin Arputham, president of the National Slum Dwellers Federation in Mumbai, was doubtful. "It's unfortunate to say that our system is not equipped to deliver that [target]," he said. "This kind of political statement that the government delivers is not the best. Some of my slum people told me: 'What a wonderful joke!' If he had said 20 years, I would say it is worth doing." Mr Arputham said the government should concentrate its efforts on one city to create a model of how to untangle disputes over property rights issues and lack of amenities surrounding informal settlement. He challenged the central government to release land it owns to people who have illegally settled on it.»²⁷

The resolution of the property disputes, the transformation of the actual possession of land into right to property in the developing world are the key elements of social development –including housing.²⁸

²⁷ «India drives plans to end slum living», *Financial Times* July 10, 2009.

²⁸ See Hernando De Soto's fascinating book: *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, New York, 2000.