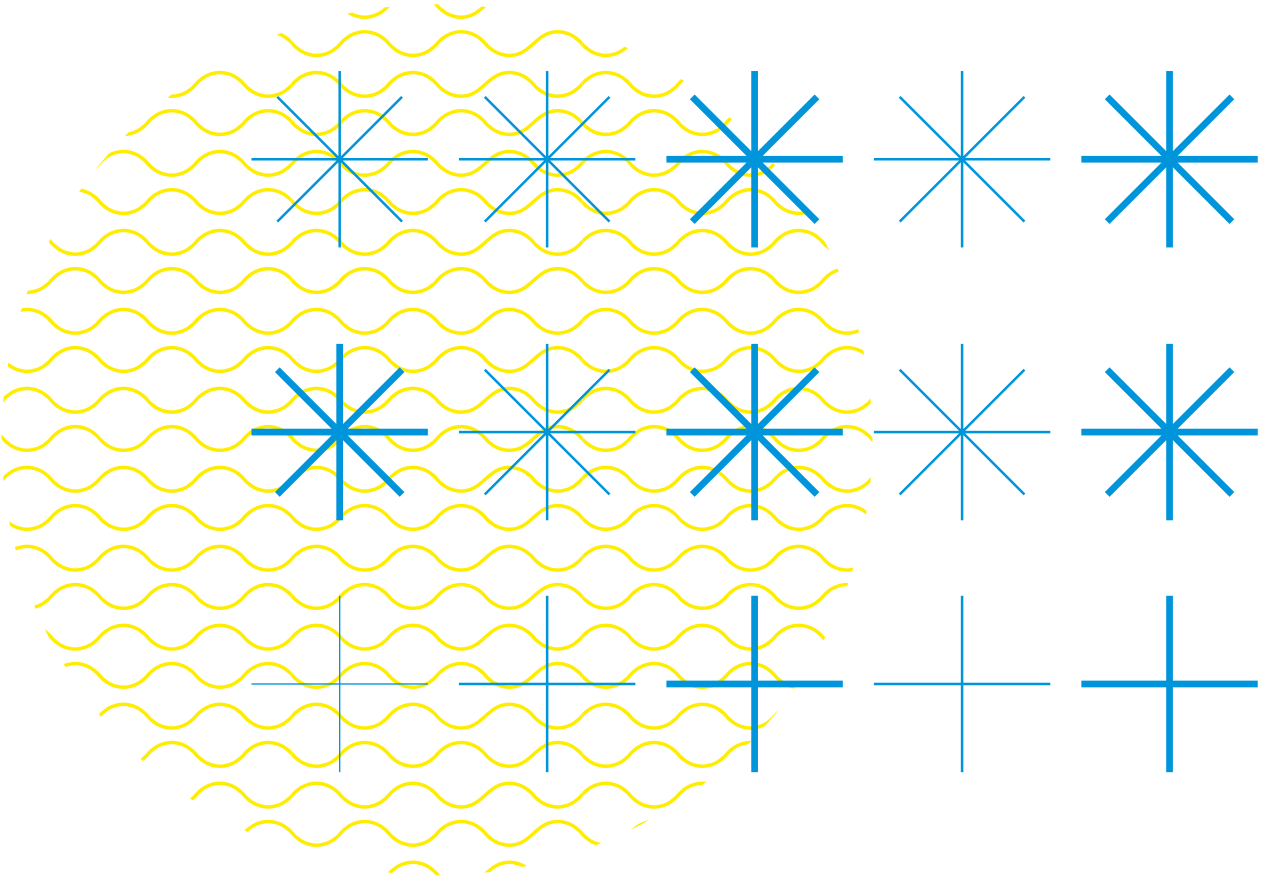
The European and International Contribution to the Right to Housing

Standards, Litigation and Advocacy



FEANTSA

HOUSING RIGHTS WATCH

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The European and International Contribution to the Right to Housing: Standards, Litigation and Advocacy

under the direction of
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Summary

Acronyms

AAAQ	Availability, Accessibility, Acceptability, Quality
BGB	Bürgerliches Gesetzbuch (German Civil Code)
CCH	Construction and Housing Code
CDC	French Fund for Deposits and Consignments
EC	European Commission
CJEU	Court of Justice of the European Union
CNRS	French National Centre for Scientific Research
COP	Conference of the Parties
DREES	French Department of Research, Studies, Evaluation and Statistics
ECHR	European Convention of Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EPC	Energy Performance Certificate
ERDF	European Regional Development Funds
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EUR	Euro
FEANTSA	European Federation of National Organisations Working with the Homeless
FIDH	International Federation of Human Rights Leagues
GDP	Gross Domestic Product
GDR	German Democratic Republic
GI-ESCR	Global Initiative for Economic, Social and Cultural Rights
HLM	Social housing organisation in France
HRC	UN Human Rights Council
ICESCR	International Covenant on Economic Social and Cultural Rights
INGOs	International non-governmental organizations
IPCC	Intergovernmental Panel on Climate Change
NGO	Non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
RFDA	French Journal of Administrative Law
SGEI	Service of General Economic Interest
TFEU	Treaty on the Functioning of the European Union
TPI	Court of First Instance
UK	United Kingdom
UN	The United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNECE	United Nations Economic Commission for Europe
UNFCCC	United Nations Framework Convention on Climate Change
USA	United States of America
WiStrG	Wirtschaftsstrafgesetz (Economic Crimes Act)

Introduction

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Housing Challenges in Europe

While EU Member States implement a range of regulatory, funding and provision measures to address housing need and homelessness, these are today insufficient to meet the need for affordable, accessible and secure housing for all. Almost 10% of the EU-27 population spend 40% or more of their net income on housing, and almost 20% live in overcrowded dwellings. The poorest spend almost half their incomes on housing, and 20% are unable to keep their homes adequately warm.[1] Homelessness across the Union is estimated at 700,000 people, an increase of 70% in the past 10 years. It is well established that homelessness, evictions and poor housing represent a threat to human dignity, create a sense of shame and social exclusion, and act as a barrier to equal opportunity in Europe.

Many European cities face the trinity of financialisation, touristification and residualisation of social housing in their housing systems, where the poor and vulnerable are squeezed out of the rental market. Progressive political and public responses are often wrong-footed by globalized financial corporations who invest in housing and development land, with high returns, while online platforms dominate the rented sector.

Yet, all EU Member States have adopted housing rights obligations, within their constitutions, laws, policies, budgets and international human rights obligations. All have adopted the *Universal Declaration of Human Rights* (UDHR)(1948) which recognises the right to housing as part of the right to an adequate standard of living. All have adopted the UN International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966), the Council of Europe, European Social Charter (ESC)(1961) and Revised Charter (RESC) (1996).[2] All States have adopted the European Convention on Human Rights (ECHR)(1950),[3] and all EU Member States have adopted the EU Charter of Fundamental Rights as part of Treaty law. In addition, a range of "*soft law*" measures have been adopted, including the European Pillar of Social Rights.[4]

1. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_housing.

2. Kenna, P. (2022) Right to Housing, *Elgar Encyclopaedia of Human Rights* (Cheltenham, Edward Elgar).

3. Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm.

4. SWD(2017) 201 final. https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en

When we examine the application of these housing rights a complex and variegated pattern emerges. Litigation exposes the fault lines between what is legislated and what can be expected. Standards can appear with great clarity in legal texts, but deflate rapidly when challenged as legally enforceable norms. Equally, individual advocacy, so favoured by liberal housing rights advocates can have little impact beyond the individual cases. Although the liberal human rights model can ameliorate the worst excesses of policy failure and discrimination, a more comprehensive approach to rights realization, embracing questions of resource allocation in society, is being developed by the European Committee on Social Rights.

All these predicaments are expressed in this publication as it grapples with the conflict, contradictions, poor enforcement, and complexities of applying housing rights to different parts and different national forms of housing systems, in Europe today.

Housing Rights

The ICESCR, States obliges its European ratifying States to recognize, respect, and fulfil the right to housing, meet "*minimum core obligations*", ensure non-discrimination, enact legislative measures and develop appropriate policies by committing the maximum available resources towards a progressive realisation of this right. *UN General Comment No. 4 on the Right to Adequate Housing* (1991) clarified that such rights to housing, at a minimum, include legal security of tenure, available services, materials and infrastructure, be affordable, habitable and accessible, be in a suitable location and be constructed and sited in a way which is culturally adequate. *UN General Comment No. 7 on Forced Evictions* (1997) states that evictions should not result in individuals being rendered homeless.

The (R)ESC sets out a range of housing rights in Article 15 (disabled persons); Article 16 (sufficient housing for families); Article 19 (migrant workers); Article 23 (elderly persons); Article 30 (as part of the right to protection against poverty and social exclusion); and Article 31 (on the right to housing). The ESC monitoring body, the European Committee of Social Rights (ECSR), has defined the concept of "*adequate housing*" as requiring a legal framework ensuring an adequate standard (safe, healthy and of adequate size); legal and procedural safeguards in case of eviction; policy and action to prevent homelessness; provision of adequate emergency accommodation for all homeless persons; provision of affordable housing through social housing of adequate quality and quantity or other means.[5] Although not imposing on States an obligation of "*results*", nevertheless the ESC and RESC rights recognised must take a practical and effective, rather than theoretical, form.[6] When one of the rights in question is exceptionally complex and expensive to implement, States must take steps to achieve the objectives of the ESC within a reasonable time, undertaking measurable progress and making maximum use of available resources.

The Council of Europe's ECHR (1950) which addresses elements of housing rights in an oblique way, has become significant for housing rights advocates, especially in its jurisprudence on its definition of and respect for home. Article 8 of the ECHR (which is replicated in Article 7 of the EU

5. ECSR Committee of Social Rights, *Digest of the Case Law*. https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80

6. *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*, Complaint No. 39/2006. Available at: https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH-2bYG/content/no-39-2006-european-federation-of-national-organisations-working-with-the-homeless-feantsa-v-france?inheritRedirect=false.

Charter of Fundamental Rights) has been interpreted as prohibiting any eviction from a "*home*" without a proportionality assessment.[7] The right to respect for '*home*' "*concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community*".[8]

The Treaties of the European Union sets out fundamental rights for Europeans, and integrate these rights into EU law. These Treaties include the Charter of Fundamental Rights (Charter),[9] with Article 7 on the right to respect for home and family life, Article 33 on the rights of households to enjoy legal, economic and social protection – including access to adequate housing, and Article 36 on the obligation on the EU to recognise and respect Member States arrangements for access to Services of General Economic Interest, which includes social and affordable housing. While the Charter does not create stand-alone individually enforceable housing rights, it does create binding obligations on EU institutions, acting within their competences and mandates, and on Member States when implementing EU law, to "*respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*"[10] Significantly, Article 7 of the Charter on right to respect for home falls within those Charter rights described in Title II as Freedoms, whereas Articles 33, 34 and 36 are set out within Title IV as Solidarity measures – sometimes referred to as principles.[11] Thus, the right to respect for home forms a fundamental right in the EU Treaties.

Perhaps, the best known Article of the Charter in housing terms is Article 34(3),[12] which potentially creates a normative standard of a "*decent existence*" for Europeans and requires that States provide social and housing assistance to all those who lack sufficient resources. While Article 34(3) can only be invoked in the context of EU social inclusion policies, based on Article 153 TFEU, it is however becoming an interpretative tool for assessing Member States application of related EU law, especially where EU law and national measures overlap.[13]

While not justiciable, the European Pillar of Social Rights (EPSR)[14] provides at Principle 19 that access to social housing or housing assistance of good quality shall be provided for those in need, while adequate shelter shall be provided to homeless people. The EPSR now informs EU policy, including the European Semester, with a Social Scoreboard ranking Member States performance

7. McCann v UK *Application no. 18984/91, [1995] available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57943%22]}.*

8. *Yordanova and Others v Bulgaria* Application No. 25446/06, Judgment, 24 September 2012.

9. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01.
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

10. UE Charter of Fundamental Rights, article 51.

11. The *Explanations* of article 34§3 state that "*The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union*".
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29

12. "*In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.*"

13. See Case 571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES)* [2012]. See Kenna, P. (2020) *Briefing Paper 3. Integrating EU Charter Housing Rights into EU Economic Governance*. Available at: http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Briefing-Paper-3-Integrating-EU-Charter-Housing-Rights-into-EU-Economic-Governance-and-Financial-Supervision--.pdf.

14. SWD(2017) 201 final.
https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

in a number of areas including housing,[15] but there is much work to be done to make this relevant for housing rights.

The European institutions, Member State governments and civil society have committed also to the European Platform on Combatting Homelessness, with a target for ending homelessness by 2030. Within this platform, the FEANTSA/Housing Rights Watch promotes rights to housing, access to decent emergency accommodation, equal treatment, right to a postal address, right to sanitary facilities, emergency services, voting, data protection, privacy and right to carry out practices necessary to survival (within the law) of homeless people,[16] among which the most vulnerable groups (migrants, women, LGBTQI+ people, people with disabilities) are the most affected.[17]

However, Olivier De Schutter has highlighted the weak status of social rights in the European Union's constitutional framework. The EU Charter contains significant gaps in comparison to the Council of Europe's ESC. In areas such as the right to social assistance as a means of combating social exclusion or the right to housing, the EU Charter guarantees no directly enforceable entitlements.[18] While this limited approach may be explained by the fact that these areas are primarily regulated by Member States, the EU could in fact take a greater lead in guaranteeing social rights.

> "*(…) Guaranteeing a right does not necessarily equate to having the power to take measures to implement it. It may imply, more modestly but at the same time importantly, that the European Union commits to not restricting the ability of Member States, within their own sphere of competence, to adopt measures that are aimed at the realization of the right in question*".[19]

Climate Change

It is time to recognise that the right to adequate housing must include an additional element – namely sustainability.[20] Addressing climate change is now becoming a key part of housing policy in Europe, recognised as impacting on the enjoyment of the right to adequate housing. The European Green Deal involves the introduction of harmonising regulations governing climate law, to enshrine the 2050 climate-neutrality objective into EU law.[21]

15. https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/#socialdimensions. The EPSR Action Plan (2021) https://ec.europa.eu/eurostat/web/european-pillar-of-social-rights/indicators/social-scoreboard-indicators.

16. https://www.housingrightswatch.org/billofrights#bill. See also FEANTSA/Fondation Abbe Pierre (2020) *Fifth Overview of Housing Exclusion in Europe*. https://www.feantsa.org/en/news/2020/07/23/fifth-overview-of-housing-exclusion-in-europe-2020?bcParent=26

17. See FEANTSA: *Homelessness on the European agenda: European Parliament and the European Commission discuss homelessness and Housing First during first European Parliament plenary session of the year.*

18. UN Doc. A/HRC/47/36/Add.1. *Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter - Visit to the European Union*. Para 20.
https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/110/87/PDF/G2111087.pdf?OpenElement

19. *Ibid*, para 21.

20. See UN Doc. A/HRC/52/28, Towards a just transformation: climate crisis and the right to housing. Report of the UN Special Rapporteur on adequate housing as a component to the right to an adequate standard of living and on the right to non-discrimination in this context, Balakrishnan Rajagopal.
https://www.ohchr.org/en/documents/thematic-reports/ahrc5228-towards-just-transformation-climate-crisis-and-right-housing

21. A European Climate Pact to engage citizens and all parts of society in climate action; a 2030 Climate Target Plan to further reduce net greenhouse gas emissions by at least 55% by 2030 and an EU Strategy on Climate Adaption to make Europe a climate-resilient society by 2050, fully adapted to the unavoidable impacts of climate change. European Green Deal (2021), https://ec.europa.eu/clima/eu-action/european-green-deal_en

Since 75% of housing in the EU is not energy efficient and 85% of these homes will still be in use in 2050, major renovation of housing is required to meet the targets. The implementation of the Green Deal, through the Renovation Wave Initiative[22] (which aims for 35 million buildings to be renovated by 2030), the Commission Recommendation on Energy Poverty,[23] the future revision of the Energy Efficiency Directive[24] and the steer and guidance for local action by EU Energy Poverty Observatory[25], will contribute to alleviate energy poverty and increase the quality of housing, in particular for medium and low-income households. Some 30% of European households are tenants, and their inclusion in future European and national housing policy development will be important.[26]

Significantly, the European Parliament in January 2021, adopted the Report on "*access to decent and affordable housing for all*", with Kim Sparrentak MEP, as Rapporteur.[27] The Report called for adequate, energy-efficient and healthy housing for all Europeans, end homelessness by 2030, no discrimination, an integrated approach to social, public and affordable housing at EU level, security of tenure and inclusive housing markets, and major investment in social, public, affordable and energy-efficient housing.[28] The European Parliament has also called for a European impetus to end homelessness across the EU by 2030.[29]

Connecting all these housing rights arrangements together is a work in progress, and it is the sharing of information and analysis which enables advocates to develop common and higher standards of housing rights. Equally, housing rights advocates can offer insights to human rights advocates (especially in relation to other socio-economic rights).

However, the liberal legal human housing rights model is somewhat fettered by the legal treatment of housing both as a property right (with all that entails for lending, markets, security, and ideology) and housing as a home (decommodified and available to all those in need). Many liberal civil/human rights approaches are entrenched in property rights arguments. This duality becomes visible in debates about the justiciability of housing rights at national level (since many courts constitutional first obligations are to preserve property rights). This approach is not so prevalent in political, social or other disciplinary treatment of housing rights.[30] Changing the

22. COM(2020) 662 final of 17 September 2020.

23. Commission Recommendation (EU) 2020/1563 of 14 October 2020.

24. Directive 2012/27/EU of 25 October 2012.

25. https://www.energypoverty.eu.

26. https://ec.europa.eu/eurostat/cache/digpub/housing/bloc-1a.html?lang=en; See My Rights as a Tenant in Europe: https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/ZERP/TENLAW/My_Rights_as_Tenant_in_Europe.pdf

27. European Parliament (2021) Report on access to decent and affordable housing for all (2019/2187(INI) P9_TA(2021)0020 (January 2021) available at: https://www.europarl.europa.eu/doceo/document/A-9-2020-0247_EN.html

28. https://www.europarl.europa.eu/doceo/document/A-9-2020-0247_EN.html

29. European Parliament resolution 2020/2802(RSP) of 24 November 2020 on tackling homelessness rates in the EU. https://www.europarl.europa.eu/doceo/document/TA-9-2020-0314_EN.html

30. For instance Piketty, T. in *Capital and Ideology* (Harvard University Press (2020) suggests that this overwhelming constitutional respect for property rights (especially corporate property rights) will have to be amended, and it would be a "*good idea to constitutionally enshrine an explicit principle of fiscal justice based on progressive taxation so that it will be impossible for the rich to pay proportionally less in taxes than the poor (and possible for them to pay more if legislators so decide*" (p.996). He suggests that court interventions in this area of socio-economic rights has historically been regressive, citing the US Supreme Court striking down of the New Deal social and fiscal legislation.

conception of housing as property and as an asset class,[31] prevalent among policymakers and mainstream media in Europe, is challenging for human rights and other lawyers.

The development of a housing rights approach can also demonstrate the valuable role of courts in vindicating non-majoritarian rights, and in challenging the other branches of the State to address iniquities which politics does not always effectively reach. Equally, at EU level, the impact of Commission funding for European NGOs and support for Member States action on homelessness, such as through the open method of coordination has been equally, if not more, significant than many human/housing rights approaches to date.[32] In the context of the development of New Public Management (NPM) and other "*governance*" models of public service provision, changing the role and operational models of the State, some human rights models around duty bearers and rights holders are becoming dated. NPM redirects the primary focus of the State/public sector away from traditional public administration models towards goals of cost-effectiveness, efficiency and customer satisfaction – drawing directly from the "*private sector*". It seeks to view citizens as customers, and relegates rights to elements of non-binding actions plans and strategies.[33]

European Contribution to the Right to Housing: Standards, Litigation and Advocacy

All of this provided the context for the Conference on *The European Contribution to the Right to Housing Standards, Litigation and Advocacy Conference*, in May 2022, organised by Abbé Pierre Foundation and FEANTSA.[34] It marked the end of the COVID lockdown period, and enabled a contemporary examination of the "*state of the art*" on housing rights in Europe. The expert speakers (and now writers) at this event addressed key topics such as the right to housing, EU law, social and environmental rights, strategic litigation, climate change, rent control, housing standards, social housing, energy poverty and regulation.

Of course, FEANTSA has been central to the development of housing rights in Europe, and the FEANTSA Expert Group on Housing Rights was established in 2005, with impetus from Marc Uhry and colleagues at Abbé Pierre Foundation. FEANTSA supported a number of Collective Complaints to the ECSR, which clarified the obligations of States under the ESC.[35] Indeed, the Expert Group book on *Housing Rights and Human Rights* (2005)[36] pointed out that States were increasingly disengaging from direct interventions in housing systems and that the responsibilities of States to housing poor people would depend more and more on exercising housing rights. While recognis-

31. Gabor, D. & Kohl, S. (2022) "My Home is an Asset Class" – The financialisation of housing in Europe, The Greens/EFA of the European Parliament. https://www.greens-efa.eu/en/article/document/my-home-is-an-asset-class

32. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:open_method_coordination

33. Hood, C. "A Public Management for All Seasons", *Public Administration* Vol. 69 Spring 1991 (3-19). http://newdoc.nccu.edu.tw/teasyllabus/110041265941/hood%20npm%201991.pdf. See also Mazzucato, M. & Collington, R. (2023) *The Big Con – How the Consulting Industry Weakens our Businesses, Infantilizes our Governments and Warps our Economies*. (Penguin)

34. All the presentations from the Conference are available at: https://www.housingrightswatch.org/news/european-contribution-right-housing-standards-litigation-and-advocacy

35. *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*, Complaint No. 39/2006. Available at: https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH-2bYG/content/no-39-2006-european-federation-of-national-organisations-working-with-the-homeless-feantsa-v-france?inheritRedirect=false.

36. Available at: https://aran.library.nuigalway.ie/bitstream/handle/10379/1762/Housing%20rights%20and%20human%20rights.pdf?sequence=1&isAllowed=y.

ing that the most effective housing rights strategy is one which makes use of all available tools, including political organisation and advocacy, the ultimate (albeit minimal) protection often now relies on asserting legal rights in courts.

This publication is set out in five sections. Part I begins by addressing a central question in any European consideration of housing rights – does the EU have any obligations in relation to housing generally and housing rights, in particular. The EU Charter of Fundamental Rights will play a central function as it entrenches all the rights expressed in the other instruments adopted by Member States, such as the ECHR and (R)ESC, as well as rights and principles resulting from the common constitutional traditions of EU Member States, and all the international instruments they have adopted, into binding EU law. But the question of EU competences – exclusive, shared or supportive of Member States is critical. As Judge Rossi points out in chapter 1, the CJEU can only apply the Charter where there is an EU law nexus, as set out in the Treaties.[37] Of course, some Charter rights are based on the ECHR, and in chapter 2 Professor Albuquerque suggests that judges of the European Court of Human Rights have become more cautious in defining a socio-economic right in recent years. This theme of defining housing rights by human rights adjudication bodies is developed by Professor Palmisano (former President of the ECSR at the Council of Europe), where he emphasises the advantages of a "*collective complaints*" system, and the comprehensive nature in which State obligations are defined in addressing socio-economic rights by the ECSR. Bearing in mind that Article 34(3) of the EU Charter is informed by the jurisprudence on Articles 30 and 31 of the RESC these observations are likely to be of benefit to those advancing EU wide standards under Article 34(3).

Part II focusses on the lessons for housing rights advocacy that can be learned from strategic litigation on climate change. The connection between housing rights and the climate crisis is becoming increasingly apparent, with the recognition of the damage to the environment caused by housing. The way we build, heat, cool, and seal land with housing and infrastructure contributes to 37% of carbon dioxide emissions alone.[38] A just and human rights compliant transformation is necessary to ensure that current and future generations have access to adequate housing. Sustainability implies that States should not realize the right to adequate housing in ways that would undermine collective survival. Instead, it requires reducing housing's own carbon footprint, and ensuring housing's resilience against climate events.[39]

In this context, as Delphine Misonne and Marine Yzquierdo suggest, climate action lawsuits by taken civil society groups as a tool of mass mobilisation can also contribute to social change. This is because law and litigation can be a means of whistle-blowing, of defending, of criticising, and of fighting for the recognition of rights. The dynamic legal, political and social synergy which characterises climate change litigation can also provide inspiration for housing rights advocates. This theme is developed by Nicolas Bernard and Koldo Casla, who provide a valuable analysis of the differences and similarities between strategic human rights litigation on the climate crisis and

37. Articles 2, 3, 4 & 6 TFEU. https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html

38. See UN Doc. A/HRC/52/28, Towards a just transformation: climate crisis and the right to housing. Report of the UN Special Rapporteur on adequate housing as a component to the right to an adequate standard of living and on the right to non-discrimination in this context, Balakrishnan Rajagopal.
https://www.ohchr.org/en/documents/thematic-reports/ahrc5228-towards-just-transformation-climate-crisis-and-right-housing

39. UN Doc. A/HRC/52/28, p. 18.

on housing rights, respectively. Climate and housing related issues impact most negatively on the same type of people – the poorest members of society. While they advocate in largely different fora, there is common cause between housing rights advocates and climate change advocates. Indeed the model for "*progressive realization*" of especially difficult rights, as set out in *FEANTSA v France* (2007), offers potentially valuable jurisprudence on rights-based approaches to climate change resource issues.

Part III provides a focus on how the principle of proportionality, as it relates to evictions from home, is being developed in Europe. Here, Padraic Kenna and Maria José Aldanas trace the genesis of Article 8 ECHR proportionality on housing evictions, its limitations in evictions by private property owners (which is not quite water-tight), and its current emanations in relation to Traveller cases, where increasing deference to the margin of appreciation of States is evident. However, the application of this principle though Article 7 of the EU Charter is expanding the remit of proportionality within EU law. This overcomes the limited protection inherent in the vertical application of ECHR rights, as does the growing jurisprudence on proportionality at the UN Committee on Economic, Social and Cultural Rights.

Part IV addresses questions of housing systemic importance, where Max Althoff provides a detailed examination of rent controls in Germany, widely seen as providing the most equitable models for Europe. Virginie Toussain challenges the dichotomy between EU regulations on State Aid in social housing, with the need to support the provision of social housing for a wide section of the population, so as to ensure the right to housing. She critiques the narrow EU approach to housing investment, and presents the European Pillar of Social Rights as one potential means of creating coherence in EU approaches to housing policy. But it is worth noting that while the social provisions in the EU Charter could impact in this area – Olivier De Schutter has pointed out that "*at present, scant attention is being paid to the social provisions of the Charter in the tools developed in the new economic governance architecture of the Union. This is a major gap, and it breeds suspicion and hostility towards attempts to improve economic coordination in the Union. Vague references to 'social fairness' are not a substitute for an approach based on social rights.*"[40]

This dichotomy between the human rights and liberal market ideals and the reality of housing systems is again highlighted by Noria Derdek and Marc Uhry. They point out to the extensive network of legal protections, systematic and curative policies intended to guarantee – on paper and at great expense, minimum housing standards. But when the housing system is, in fact, largely controlled by private financial interests, the role and action of the State (and courts) in monitoring how public policies are, or are not, meeting housing rights standards becomes critical for housing rights protection. The chapter clarifies the nature of State regulation of financial corporate entities to ensure an alignment of public policy and housing rights.

Part V examines the key questions of energy poverty in housing. Marlies Hesselman links the EU Electricity Directive with the EU Charter and EPSR as well as international housing rights, particularly the concepts of adequacy, affordability and habitability. This poses the question as to whether full enjoyment of housing rights necessitates recognition of a right to energy, which is essential for a dignified life today. Louise Sunderland examines a number of mandatory energy standards for homes in France, England and Wales, Scotland and Flanders, Belgium. She focusses

40. De Schutter, O. (2016) "The Implementation of the Charter of Fundamental Rights in the EU institutional framework", European Parliament's Policy Department for Citizens" Rights and Constitutional Affairs. Study for the AFCO Committee; p. 26.

on England which was the first of these to introduce and enforce legally-binding minimum energy standards in housing, but with mixed outcomes because of ineffective enforcement arrangments.

This publication captures the key developments on housing rights in Europe in 2023 and will inform policy makers and legislators, housing rights advocates and adjudicators on how this core right can be further developed. Building on this powerful knowledge base, it will provide a significant resource for those housing rights advocates who see the importance of the European arena, where so many decisions are taken which impact on housing at local level.

Chapter I

The obligations of Member States in relation to the right to housing through European case law: Dialogue with judges

Member States' obligations in relation to housing rights - views of the CJEU

Lucia Serena Rossi
Judge of the Court of Justice of the European Union

I. The European Union's competence in the field of housing rights

The Treaties do not clearly establish the European Union's competence relating to the right to housing, as they do not mention such aid.

On the one hand, in the silence of the treaties, one could consider that this matter, being mentioned neither in the exclusive competences (article 3 of the Treaty on the Functioning of the EU, hereafter "TFEU"), nor in the supporting competences of the Union (article 6 TFEU), falls under the shared competence of the Union (article 4 TFEU),[1] and that, consequently, the European institutions could adopt binding acts in this area.

On the other hand, Article 153 TFEU, concerning the social policy of the European Union, states in paragraph (j) that the fight against social exclusion[2] could concern housing assistance. However, this article establishes a mere supporting power, whereby the European Parliament and the Council may only adopt "*measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States*". The adoption of EU directives, which is foreseen for other social policy aspects, is not envisaged in the field of social exclusion. Moreover, according to paragraph 4 of the same article, the provisions adopted by the Union institutions "*shall not affect the right of Member States to define the fundamental principles of their social security systems and shall not significantly affect the financial equilibrium thereof* ".

However, housing assistance is explicitly mentioned in Article 34(3) of the Charter of Fundamental Rights of the European Union (hereafter the "*Charter*") on the fight against social exclusion. Indeed, the third paragraph of this article states: "*In order to counter social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices*".

1. In the area of exclusive EU competence, the EU alone can legislate, which is not the case for housing. In the area of shared competences, the competence lies with the Member State as long as the Union has not legislated. As soon as the Union has intervened, this legislation creates a pre-emption, so that, in the areas concerned in this sense, the Member States can no longer freely legislate. Finally, the third category is that of supporting and coordinating competences.

2. "*1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (...) j) the combating of social exclusion*".

Yet the recognition of a right to housing in Article 34 of the Charter is not unconditional, as this article refers to the laws and practices of the Member States. All provisions of the Charter that refer to national laws and practices cannot impose standards on Member States, unless the national legislation concerned is intended to implement Union law. This was affirmed by the Court in *Association des médiations sociales*, with regard to Article 27 of the Charter, although the reasoning is transposable to other provisions of the Charter:

> "*44. It must also be observed that Article 27 of the Charter, entitled 'Workers' right to information and consultation within the undertaking', provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices.*
>
> *45. It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law*".[3]

And, according to the Praesidium's[4] explanations of Article 34 of the Charter, the Union must respect the framework of its competences, notably based on Article 153 TFEU. These explanations state that:

> "*Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union*".

Despite the Charter's reference to the right to housing under Article 34(3), it still comes back to Article 153 and its weak supporting competence.

Of course, the right to housing may also be covered by other provisions of the Charter: Article 1 on human dignity, Article 4 on the prohibition of inhuman and degrading treatment, and Article 33(1) on the protection of the family (which reflects Article 16 of the Revised European Social Charter).[5]

However, the Charter cannot apply on its own, outside the scope of the Treaty. As the President of the Court has said: "*the Charter is the shadow of European law*" and "*just as the shadow of an object takes on its form, the scope of EU law defines that of the Charter*",[6] i.e. it is inseparable from European Union law. Therefore, everything that falls outside the scope of harmonisation or the general principles of Union law also falls outside the scope of the Charter.

As a conclusion, a specific European competence in the field of housing, seems to be possible only to the extent that the Union supports the action of the Member States. However, such a Union competence would be limited by the degree of protection provided by each Member State through

3. 15 January 2014, Association de médiation sociale, C-176/12, ECLI:EU:C:2014:2.

4. https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=celex%3A32007X1214%2801%29.

5. However, the right to good administration provided for in Article 41 is only applicable to the institutions of the Union. It cannot create new positive obligations for either the Union or its Member States. Admittedly, when a Member State implements a Union directive, it may be considered to have an obligation of good administration, but this obligation cannot form the basis for a development to add content to existing law or to create positive obligations.

6. K. Lenaerts "In Vielfalt geeint – Grundrechte als Basis des europäischen Integrationsprozesses" 42 EuGRZ 353, at 354 (2015): "*... handelt es sich bei der Charta um den Schatten des Unionsrechts. So wie ein Gegenstand die Konturen seines Schattens formt, bestimmt auch das Unionsrecht die 'Konturen' der Charta*".

its legislation or administrative practices and, in any event, it remains for the Member States to establish whether Union legislation to that effect could be developed.

That being said, nothing prevents the Union institutions from inserting provisions relating to the right to housing in acts relating to other areas where the Union has shared competence and therefore also a power to harmonise national legislations. In such a case, the protection of this right could be ensured in an indirect, but certainly more effective way.

II. Examples of indirect protection. The three categories of beneficiaries of the right to housing under EU law and the case law of the Court of Justice.

Under EU law, three different categories of beneficiaries of the right to housing can be envisaged: 1) EU citizens, 2) third-country nationals who are long-term residents in the EU and 3) applicants for international protection.

1) As regards the right to housing of EU citizens, the general principles of EU law apply, in particular the principle of non-discrimination on the basis of nationality and Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Therefore, the right to housing is addressed as any other right of Union citizens who move and reside in the territory of the Member States. If a Member State grants favourable conditions for housing to its own citizens, it will have to ensure the same benefits to nationals of other Member States who have resided on its territory for five years.

2) In contrast, for third-country nationals who are not citizens of a Member State, the European Union provides for specific rules: Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents and Directive 2013/33 of 26 June 2013 laying down standards for the reception of persons seeking international protection.

Article 11 of the former Directive regulates the provision of assistance and social protection and the first paragraph (f) of Article 11 specifically mentions access to housing. In particular, paragraph 4 of this Article provides that Member States may limit the principle of equal treatment to essential benefits.

The latter Directive contains important clarifications, notably in recitals 22, on taking into account the best interests of the child, and 35, on ensuring human dignity. Its Article 2(g) defines the material conditions of reception, which include accommodation and other elements considered essential. Article 18 specifies more clearly the obligations of Member States with regard to accommodation.

Regarding third-country nationals who are long-term residents, it is worth mentioning first of all the *Kamberaj*[7], which concerned an Albanian citizen living in Italy, in the region of Trentino-Alto Adige. In this region, the coefficient for the distribution of social housing funds was different for EU and non-EU citizens. The Court used Article 34 of the Charter for the first time to interpret Union law, holding that it precludes national legislation such as that at issue as discriminatory. The Court then left it to the national court to determine whether housing is an essential service within the meaning of Article 11(4) of Directive 2003/109.

7. Judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233.

The case of *Kamberaj* laid down key principles, affirming the relevance of Article 34 of the Charter, but it also left some doubts as to the actual scope of Article 11(4), as regards the possibility for Member States to provide that housing is not, under certain conditions, an essential service.

More recently, the decision *Land Oberösterreich v KV* [8] clarified the *Kamberaj* Judgment. The case concerned legislation which made it a condition of housing benefit that the applicant prove basic knowledge of the German language. A Turkish family, long-term residents in Austria, had been refused €300 in housing benefit. The question was whether this assistance was really essential, as the family was already receiving financial assistance for other purposes than housing. According to the Court:

> "*39. Furthermore, when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109, the Member States must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34 thereof. According to Article 34 of the Charter, the European Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. It follows that, in so far as a benefit fulfils the purpose set out in that article of the Charter, it cannot be regarded, under EU law, as not forming part of the 'core benefits' within the meaning of Article 11(4) of Directive 2003/109 (judgment of 24 April 2012, Kamberaj, C-571/10, EU:C:2012:233, paragraphs 80 and 92)*".

The Court added:

> "*42. It is apparent from the information provided by the referring court that, as the Advocate General noted in point 59 of his Opinion, housing assistance contributes to guaranteeing that those persons can lead a decent existence by enabling them to find adequate housing without spending too large a proportion of their income on housing to the detriment, possibly, of the satisfaction of other basic needs. Housing assistance thus appears to be a benefit that contributes to combating social exclusion and poverty, it being intended to ensure a decent existence for all those who lack sufficient resources, as referred to in Article 34(3) of the Charter. If that is the case, the grant thereof to third-country nationals who are long-term residents is therefore also necessary in order to achieve the integration objective pursued by Directive 2003/109. Consequently, housing assistance appears to be such as to constitute a 'core benefit' within the meaning of Article 11(4) of that directive*".

3) Concerning applicants for international protection, they are most often accommodated in structures that cannot be considered as actual housing, since they are accommodation centres where they stay temporarily and/or in conditions that are borderline acceptable.

The *Jawo* judgment [9] had already outlined what constitutes a situation of extreme material deprivation, in order to assess whether state assistance is not sufficient. This judgment refers to human dignity and precarious living conditions, stating, in essence, that everything can be granted or denied in terms of material reception conditions, except what falls below the minimum standard of dignity.

8. 10 June 2021, *Land Oberösterreich (Aide au logement)*, C-94/20, EU:C:2021:477.

9. 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218.

In the *Haqbin* judgment,[10] the Court approached this matter from a new angle, combining Article 24 of Directive 2013/33 on the possibility for Member States to limit or withdraw the benefit of material reception conditions with Articles 1 and 24 of the Charter. An unaccompanied minor was expelled from an accommodation centre in Belgium because of his behaviour, and was simply given a list of other centres where he could find accommodation. He was left to fend for himself and spent some nights with friends. The Court mainly used the protection of the child in the Charter to emphasise that this practice is not compatible with EU law and that Member States have a duty and responsibility to ensure a dignified standard of living for the child at all times, without interruption, including when they delegate this accommodation task. It is therefore not sufficient for the national authorities to limit themselves to giving the child a list of possible accommodation:

> "*50. On the contrary, first, the obligation to ensure a dignified standard of living, provided for in Article 20(5) of Directive 2013/33, requires Member States, by the very fact that the verb 'ensure' is used therein, to guarantee such a standard of living continuously and without interruption. Secondly, it is for the authorities of the Member States to ensure, under their supervision and under their own responsibility, the provision of material reception conditions guaranteeing such a standard of living, including when they have recourse, where appropriate, to private natural or legal persons in order to carry out, under their authority, that obligation*".

The Court therefore recognises that the Directive allows Member States to adopt sanctions for serious breaches of the rules imposed in accommodation centres, especially in cases of particularly violent behaviour. However, in this case, the sanction imposed on a vulnerable person such as an unaccompanied minor was disproportionate.

In the case of *FMS and Others*,[11] Afghan and Iranian citizens seeking international protection were confined in a transit zone between Hungary and Serbia, surrounded by barbed wire. They were sheltered in metal containers of about 13 m². They were not allowed to move within Hungary, and the only exit was to Serbia, which refused to take them in. The Court considered that this type of accommodation constitutes de facto retention, due to the lack of freedom of movement, and undermines the essential content of the material conditions of reception:

> "*254. It follows that an applicant for international protection who does not have the means of subsistence must be given either a financial allowance enabling him or her to be housed or housing in kind in one of the places referred to in Article 18 of that directive, which cannot be confused with the detention centres referred to in Article 10 of that directive. Accordingly, the grant to an applicant for international protection without the means of subsistence of housing in kind, within the meaning of Article 18, cannot have the effect of depriving that applicant of his or her freedom of movement, subject to penalties that may be imposed on him pursuant to Article 20 of that directive (see, to that effect, judgment of 12 November 2019, Haqbin, C-233/18, EU:C:2019:956, paragraph 52)*".

> "*255. Accordingly, and without there being any need to consider whether the detention of an applicant for international protection, on the ground that he or she is unable to provide for his or her needs, is a ground of detention independent of his or her status as an applicant for*

10. 12 November 2019, *Haqbin*, C-233/18, EU:C:2019:956.

11. 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367.

international protection, it is sufficient to observe that such a ground, in any event, undermines the essential content of the material reception conditions that must be provided to that applicant during the examination of his or her application for international protection and therefore does not comply with either the principles or the objective of Directive 2013/33."

Conclusions

As we have seen, while the right to housing does not exist as such in the EU Treaties, Article 34 of the Charter of Fundamental Rights refers to social assistance, including housing. However, the application of this article depends on the laws and practices of the Member States and cannot go beyond them.

Therefore, the Court of Justice must follow the legislator. Unlike the Strasbourg Court, which has a very different competence and can rule on any conduct of the Member States, the Court of Justice can only rule on conduct of the Member States that falls within the scope of Union law, by implementing a directive or regulation. The Court can thus rule on and apply the Charter. Outside this situation, it has no jurisdiction, because the Union has no competence in EU law.

However, indirect protection of the right to housing can also arise from Union acts that regulate other matters. Indeed, in addition to the examples mentioned in relation to the movement of citizens, migrants and refugees, other aspects of EU law indirectly relate to housing, and these are highly harmonised and technical, such as security, regulation of the mortgage market, certain elements of consumer protection, state aid rules, environmental issues, electricity and climate.

For all these aspects, the Charter can be applied and the Court has full jurisdiction.

State obligations in relation to housing rights - views of the ECHR

Interview with Paulo Pinto de Albuquerque
Judge of the European Court of Human Rights from 2011 to 2020

Although the right to housing is regularly formulated or clearly underlying the questions that applicants put to the ECHR, we have the feeling that the Court does not answer them or does not answer them in a clear and systematic way. Why this reluctance?

The European Convention on Human Rights concerns civil and political rights; the right to housing falls into the category of social rights.

While several cases brought before the European Court of Human Rights (hereinafter the "*ECHR*" or the "*Court*") provided a perfect opportunity to clearly formulate the right to housing through Article 8 and even Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "*European Convention on Human Rights*" or the "*Convention*"), the Court's decisions reflect a reluctance of the judges to adopt a simple and clear position. To engage in this direction exposes the Court to severe criticisms, those of being too proactive, too militant, even having its own social agenda. These criticisms have been leveled at the Court on several occasions and it is, of course, sensitive to them.

However, the Court has ventured to do so on several occasions, starting with the case *Airey v Ireland* (ECHR, 9 October 1979, n°6289/73), which is still a landmark case for human rights activists. In this judgment, the Court recognised the right to legal aid under Article 6. Indeed, this was the first ever decision in which the Court stated that the Convention should be read in a way that favours social rights:

> "*26. (...) The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions (above-mentioned Marckx judgment, p. 19, para. 41) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (see paragraph 24 above). Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention*".

A woman, who could not afford a lawyer, needed legal aid to access justice and ensure the effectiveness of her right to a fair trial. Thus, the rights in the European Convention on Human Rights sometimes create an obligation for states, which may be of a financial nature. This inclusion of

economic and social rights within the scope of the Convention was the major contribution of this important judgment.

The case of *Demir and Baykara v Turkey* (ECHR, 12 November 2008, n°34503/97) is a good example of the current legacy of the *Airey* case. In this other landmark judgment, the Court used the European Social Charter to flesh out the Convention, despite the position of the respondent State. Since Turkey was not bound by the European Social Charter, the State refused to allow the Court to refer to the Charter when interpreting the European Convention on Human Rights.

> "*54. As to the first objection, the Government contended that the Court, by means of an interpretation of the Convention, could not create for Contracting States new obligations that were not provided for in the Convention. In particular, considering that the Chamber had attached great importance to the European Social Charter (Articles 5 and 6 of which had not been ratified by Turkey) and to the case-law of its supervisory organ, they requested the Grand Chamber to declare the application inadmissible as being incompatible ratione materiae with the Convention, in view of the impossibility of relying against the Government on international instruments that Turkey had not ratified*".

The Court then simply ruled that the Charter embodies a European consensus on trade union rights and the right to collective bargaining. Virtually all European countries recognise them, which is why the European Convention on Human Rights should be read in the light of these rights:

> "*85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.*
>
> *86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, mutatis mutandis, Marckx, cited above, § 41)*".

These examples are key witnesses to the social reading of the Convention.

The Court's use of the notion of European consensus is puzzling. Can it serve the right to housing?

The concept of "*European consensus*" is very uncertain. In several cases, the Court considers it to be a major criterion for decision, while in other it does not take it into account. For example, in *RMT v the United Kingdom* (ECHR, 8 April 2014, n°31045/10), the Court considers that there is a

European consensus on sympathy strikes, they are recognised everywhere, (except in the UK). Despite this consensus, it does not sanction them[1]. It finds no violation of Article 11.

The Court's method is not always consistent and this may indeed affect its credibility. The "*European consensus*" criterion that was used by the Court in *Demir and Baykara* and in many other judgments, in order to impose on the minority the solution of the majority, when the latter is progressive, is not always valid, and even less so in the case of social and housing rights.

And the Court does not seem ready to undertake an assessment of the situation in Europe, at least in statistical terms, to address the difficulties posed by the issue of the right to housing, its existence and effectiveness.

What can housing rights advocates hope from the ECtHR in the next few years?

The Court should not neglect the legacy of its past decisions as a driver for a progressive reading of the Convention, towards the inclusion of social and economic rights within its scope.

The Court acknowledges that housing must be protected. For example, in Article 8 of the Convention, the right to privacy has been interpreted broadly so as to include the right to have one's home protected from pollution by surrounding industrial facilities, noise pollution, arbitrary evictions, etc. This can be considered as the most advanced approach of the Court to the protection of the home. But when it comes to homeless people, those who need housing in order to live decently, the Court has still not addressed their situation in an appropriate manner, based on the principles of improved living conditions and greater social justice.

The current context in Europe is not favourable. International law and justice are increasingly challenged. International courts, in particular, have difficulties in enforcing their judgments. This is also true for the ECHR, as we have seen in the past, and even more so today. In this unfavourable and difficult environment for the Council of Europe, and in particular for the ECHR, we should not expect any bold statements from the latter on the right to housing.

But it is also an opportunity to see whether the Court will be as strong as it was in the 1970s and 1980s.

1. "*98. (…) The Court's review is bounded by the facts submitted for examination in the case. This being so, the Court considers that the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight for determining whether the operation of the statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to the national authorities under Article 11 of the Convention.*"

State obligations in relation to housing rights - views of the ECSR

Giuseppe Palmisano
Former President and current General Rapporteur
of the European Committee of Social Rights

On reading the FEANTSA Report, "*Housing-related binding obligations on States*", it can be noted that a large majority of the European case law creating positive obligations comes from the decisions and conclusions adopted by the European Committee of Social Rights (hereinafter "*ECSR*" or "*Committee*"), the watchdog body of the European Social Charter. This is hardly surprising: the revised European Social Charter, adopted in 1996, is the only European normative instrument that guarantees the right to housing as a human right, as a fundamental social right, in Article 31.[1]

No mention is made of the right to housing either in the European Convention on Human Rights (hereafter the "*Convention*") - which concerns civil and political rights, as well as fundamental freedoms - or in the Charter of Fundamental Rights of the European Union - which timidly refers to the right to housing assistance in the third paragraph of its Article 34, in connection with the social assistance often necessary to ensure a dignified existence for those without sufficient resources. This partly explains why the case law of the ECSR, in relation to the right to housing, hardly refers to the decisions or judgements of other European courts.

Certainly, the Committee shows great sensitivity to the case law of the European Court of Human Rights. This holds true for the use of the concept of "*discrimination*" applied to the right to housing; for the consideration of the vulnerability of the "*Roma*" group, in law and in fact, and the preservation of cultural diversity; for the respect of procedural safeguards in relation to forced evictions. In general, the Committee stresses that its interpretation of Article 31 must be consistent with the Court's interpretation of the relevant provisions of the Convention applicable to the subject under consideration. This was the approach taken, for example, in the decision on the merits of complaint No. 53/2008, *FEANTSA v Slovenia*, (8 September 2009), which considered certain restrictions on the rights of private property owners to be legitimate.

> "*34. In this respect, it is clear from several Court judgments that not all interference by a state in the relationship between landlord and tenant can be regarded as contrary to the Convention. For example, in the case Mellacher and Others v Austria, the Court held that the amendments made to Austrian legislation on housing, which provided for a number*

1. *"Article 31 – The right to housing*
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."

> *of restrictions on the rights of private landlords with regard to existing leases (rents had been strictly controlled and it had been prohibited to terminate existing leases) did not, contrary to what the applicants maintained, amount to a de facto expropriation but amounted merely to a control of the use of the property with a view to finding a solution to the housing problems of a significant number of citizens, in the public interest, the interference being proportionate in terms of the balance to be struck between the public aim pursued and the interests of the owners concerned.*
>
> *35. Likewise, in the case of Thörs v Iceland, the Court, when assessing on the right of pre-emption conferred on tenants by existing Icelandic law, at a purchase price that was, moreover, regulated by statute, dismissed the owner's application as being manifestly ill-founded*".

With regard to the content and scope of states' housing obligations, the ECSR refers more usefully to international UN jurisprudence and, in particular, to the decisions of the UN Committee on Economic, Social and Cultural Rights relating to the right to housing as an element of the right to an adequate standard of living under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). For example, regarding the notion and elements of "*adequate or suitable housing*", see the decision on the merits of claim No. 33/2006, *International Movement ATD Fourth World v France* (5 December 2007) or, more recently, claim No. 110/2014, *International Federation of Human Rights Leagues (FIDH) v Ireland* (12 May 2017). The latter reads:

> *"118. The Committee has repeatedly held that the right to housing for families encompasses housing of an adequate standard and access to essential services (see §106 above). In this respect the Committee takes into account General Comment No. 4 of the UN Committee of Economic, Social, and Cultural Rights Committee which provides that 'Adequate housing must be habitable, 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, and disease vectors. The physical safety of occupants must be guaranteed as well' and that 'An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services'."*

But what are the obligations of European States in relation to housing under the Revised Social Charter system?

First of all, it is necessary to specify that the right to housing, as protected by Article 31 of the Revised Social Charter, is not yet unanimously ratified at European level. Seven States remain party to the 1961 Social Charter (unrevised) which does not contain this article.[2] Moreover, of the thirty-five States parties to the Revised Social Charter, which is subject to an "*à la carte*" ratification mechanism for its provisions, most of them have not yet accepted the three paragraphs of Article 31: hardly a dozen States are bound by this article.[3] This does not mean that other states do

2. Croatia, Czech Republic, Denmark, Iceland, Luxembourg, Poland, United Kingdom.

3. Finland, France, Greece, Italy, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden and Turkey (who accepted all three paragraphs of Art. 31), Andorra and Ukraine (who accepted two paragraphs of this article), and Latvia and Lithuania (who accepted only the first paragraph of the article).

not have obligations in relation to the right to housing, as these can be derived from other articles, as will be seen below.

Secondly, Article 31 does not guarantee the right to housing as an individual subjective right of each person to enjoy a dwelling of an adequate standard for oneself or one's family. The Revised Social Charter does not impose an obligation of results in relation to housing, or an obligation of immediate implementation (like the right to vote in relation to political rights, or the right to emergency medical assistance in the field of social rights).

Rather, the Social Charter places obligations on States to take positive measures to achieve the legal, economic, administrative, practical and operational conditions necessary to ensure that people have effective access to, and can live in, housing of an adequate standard, and that they are not illegitimately deprived of this opportunity. In most cases, these are "*progressive realisation*" obligations: States are committed to act to progressively realise the conditions necessary for the effective enjoyment of the right to housing. This is clear from the text of Article 31. Indeed, according to this article, States Parties undertake, inter alia, "*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*".

This is not to say that States can afford to neglect the right to housing and not to take seriously the legal obligations arising from the Social Charter. On the contrary, they are obliged to strive, with continuity, to put in place all the necessary conditions and adopt all the necessary measures to make the right to housing effective. The Social Charter requires each State party to make progress towards this goal, "*within a reasonable timeframe, through measurable progress, using the best resources available*". Failure to make progress means failing to comply with the Social Charter and violating the obligation to ensure the effective implementation of the right to housing.

It is precisely in this sense that the ECSR has interpreted and applied the provisions of the Social Charter relating to the right to housing and has been able - thanks to the Charter's supervisory procedures - to clarify and develop the content of State obligations in relation to housing. This refers, of course, to the procedure for evaluating State reports, but most of all to the collective complaints procedure. The latter - accepted so far by sixteen states - gives the international and national social partners, as well as international non-governmental organisations (INGOs) with consultative status with the Council of Europe, the possibility to address the Committee directly to decide on possible violations of the Social Charter in the countries concerned.

This is a quasi-judicial procedure, characterised by the principle of adversarial proceedings between the complainant organisation and the state concerned, essentially in writing, during which several forms of voluntary intervention are possible. Unlike cases brought before the European Court of Human Rights, it is not open to individual applications. Its purpose is to obtain a legal assessment of matters of "*collective importance*". When the Committee finds a violation of the Charter, the States concerned are obliged to follow up its decision by submitting to it and to the Committee of Ministers of the Council of Europe the measures taken to remedy the situation.

A dozen of decisions adopted by the ECSR over the last twenty years have been specifically related to the right to housing, thanks to the activism and the crucial role played by some INGOs which have submitted to the Committee well-detailed complaints concerning the situation of several

European States: FEANTSA, of course, but also the International Movement ATD Fourth World, the Centre on Housing Rights and Evictions (COHRE), the International Federation of Human Rights Leagues (FIDH), the European Roma Rights Centre (ERRC) and the Conference of European Churches.

Here are some examples of the possible content of positive obligations of European States in relation to housing rights.

The Committee first underlined[4] that this right must take a practical and effective, rather than purely theoretical, form:

> "*54. This means that, for the situation to be compatible with the treaty, states party must:*
>
> *a. adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;*
>
> *b. maintain meaningful statistics on needs, resources and results;*
>
> *c. undertake regular reviews of the impact of the strategies adopted;*
>
> *d. establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;*
>
> *e. pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.*"[5]

This general approach to the operational content of the State's housing obligations has been endorsed and clarified by the Committee on several occasions. However, there is a need to agree on the legal value of the different points made. In its decision *International Federation of Human Rights Leagues (FIDH) v Ireland* (12 May 2017), the Committee stated in this respect that:

> "*... failure to comply with each and all of the above requirements does not per se necessarily amount to a violation of the right to family housing. Nor does the fulfilment of more or all requirement necessarily exclude that in a given situation the State obligation to ensure the right to family housing is not properly satisfied. The Committee will rather consider each situation on its merits and specificity, on a case by case analysis, taking into account all the factors relevant to the circumstances of the case. (§ 110)*"

This decision is very interesting, in my view, for several reasons. Firstly, the FIDH alleged that Ireland was failing to respect the right to housing of families, primarily on the grounds that some social housing was inadequate and that various aspects of the programmes for the rehabilitation of the social housing stock were not in conformity with the obligations set out in the Revised Social Charter. The case concerned the content of State obligations to provide an adequate standard of housing.

In order to answer, the Committee first clarified the meaning of "*adequate housing*" with "*essential services (such as heating and electricity). Adequate housing refers not only to a dwelling, which*

4. For the first time on 5 December 2007, in the decision on the merits of complaint no. 33/2006, *International Movement ATD Fourth World v France*. The complaint concerned the lack of affordable housing in France and the way in which social housing was allocated to the poorest people, and the eviction procedure for unauthorised occupants, which led to homelessness because, among other things, no authority was responsible for finding a prior solution for where the evicted families could live.

5. European Committee of Social Rights, Complaint No. 39/2006, Decision on the Merits of 5 December 2007, para. 53-54.

must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence" (§ 106).

The Committee therefore considered that *"sewage invasions, contaminated water, dampness, persistent mould etc. go to the core of adequate housing, raising serious concerns from the perspective of both habitability and access to services"* (§ 119).

The Committee also noted that:

> "*...no complete statistics on the condition of local authority housing have been collected since 2002 by the Irish authorities and that in Ireland no national timetable exists for the refurbishment of local authority housing stock. It also takes into consideration the fact that a significant number of regeneration programmes adopted by the Government for local authority estates in the last decade have not been completed with the effect that a number of local authority tenants remain living in substandard housing conditions. (§ 120).*"

And held in conclusion, that *"the Government has failed to take sufficient and timely measures to ensure the right to housing of an adequate standard for not an insignificant number of families living in local authority housing and therefore holds that there is a violation of Article 16 of the Charter in this respect"* (§ 121), hence, a violation of the Revised Social Charter.

This decision is also interesting in that it shows that the protection of the right to adequate housing under the Revised Social Charter system extends beyond Article 31. The complaint concerned a violation of Article 16 (the right of the family to social, legal and economic protection). The Government raised a preliminary objection that the claim, which related to matters which in substance fell within Article 31, which had not been accepted by Ireland, should be held inadmissible. The ECSR rejected this objection, noting that Article 16 required the promotion of the protection of the family through the provision of adequate housing.

> "*25. (...) The fact that the right to housing is stipulated under Article 31 of the Charter, does not preclude a consideration of relevant housing issues arising under Article 16 which addresses housing in the context of securing the right of families to social, legal and economic protection (European Roma Rights Center (ERRC) v Bulgaria, Complaint No. 31/2005, Decision on admissibility 10 December 2005, §9, European Roma and Travellers Forum (ERTF) v The Czech Republic, Complaint No. 104/2014, decision on the merits of 27 May 2016, §§67-68.)*"

> "*107. (...) Article 16 partially overlaps with Article 31 of the Charter, in the sense that the notion of adequate housing and forced eviction are identical under Articles 16 and 31 (see Centre on Housing Rights and Evictions (COHRE) v Italy, Complaint No. 58/2009, decision on the merits of 25 June 2010, (§158).)*"

Thus, States parties that have not recognised Article 31, but have accepted Article 16, are also bound to provide housing of an adequate standard to families.

Another aspect where ECSR decisions have highlighted the character and content of the State's positive obligations in relation to the right to housing is the prevention and alleviation of homelessness.

Although deprivation of housing for non-payment of rent or illegal occupation is considered legitimate, and although states have a wide margin of appreciation to take measures in relation to urban planning, the obligation to prevent and alleviate homelessness requires them to take measures to prevent those threatened with eviction from becoming homeless.

This means that in the event of eviction, public authorities shall endeavour to seek alternative solutions in advance, give reasonable notice of the date of eviction and carry out the eviction in conditions that respect the dignity of the persons, as the ECSR has affirmed in a series of decisions concerning the violation of the housing rights of Roma individuals or families.[6] This also means that where the public interest or law enforcement justifies eviction, public authorities must ensure that the persons concerned are provided with alternative housing or financial assistance to find accommodation. Otherwise, the obligation to alleviate homelessness would not be satisfied, which was very clearly upheld by the Committee in a decision concerning evictions for non-payment of rent or unlawful occupation in France (Complaint No. 39/2006, *FEANTSA v France*, 5 December 2007, §§ 85-91).

The ECSR considers that the right not to be homeless and the right to adequate housing, protected by Article 31 §2, as well as by Article 16 in relation to the protection of the family, are so fundamental and inherent to the respect for human life and dignity, that States parties are exceptionally obliged to guarantee it to persons who do not fall within the personal scope of the Charter. This includes "*foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.*"[7] However, several decisions have found violations of the right to adequate shelter and accommodation of unaccompanied foreign minors and foreign nationals who are illegally present in the territory of the respondent State.[8]

Finally, the ECSR has also held on the positive obligations to make Article 31 §3 effective, i.e. to make the cost of housing accessible to those without sufficient resources. I am referring in particular to the decisions of the International *Movement ATD Fourth World v France* of 5 December 2007 and *FEANTSA v Slovenia* of 8 September 2009, which show, inter alia, that States are obliged to promote the construction of social housing intended primarily for the most disadvantaged, to reduce the excessively long delays in the granting of social housing, and to provide housing subsidies for people on low incomes and disadvantaged categories of the population.

To conclude, these examples illustrate the direction in which the right to housing must be realised, under the Revised European Social Charter, which requires the respect and implementation of positive obligations by States and public authorities. They show the usefulness of a European normative system - such as the Social Charter - and its quasi-judicial monitoring procedure - such as that of collective complaints - in addressing and resolving the serious problems that

6. *European Roma Rights Centre (ERRC) v Greece*, Complaint No. 15/2003; *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No. 31/2005; *European Roma Rights Centre (ERRC) v France.* Claim No. 51/2008; *Centre on Housing Rights and Evictions (COHRE) v Italy*. Complaint No. 58/2009.

7. Scope of the Revised European Social Charter in terms of persons protected. Appendix to the Revised European Social Charter 1996. Available at: https://www.refworld.org/pdfid/3ae6b3678.pdf.

8. *Defence for Children International v The Netherlands*, Complaint No. 47/2008, decision on the merits of 20 October 2009; *Conference of European Churches (CEC) v The Netherlands*, Complaint No. 90/2013, decision on the merits of 1 July 2014; *International Commission of Jurists (ICJ) and European Council on Refugees and Exiles (ECRE) v Greece*, Complaint No. 173/2018, decision on the merits of 26 January 2021.

afflict the enjoyment of the right to housing in European countries. However, I would insist that the results are only beneficial and substantial if - and to the extent that - organised and committed civil society is able to make these tools available to it work effectively, calling the European States to account for their responsibilities in the field of housing. We can also hope that, in the near future, the European Pillar of Social Rights (EPSR), whose Principle 19 deals with housing and homelessness, will advance the content of EU secondary legislation on housing rights.

Chapter II

Implementing positive obligations: the responsibility of public authorities

Three recent and resounding European cases – *Urgenda v The Netherlands, "Affaire du Siècle" ("Case of the Century") v France* and *Klimaatzaak v Belgium* – have led to the recognition of the responsibility of public authorities by the courts for inaction on climate change. In Europe and throughout the world, such cases concerning air pollution and environmental protection are multiplying.

States are being "*taken at their word*": i.e., they are being enjoined (under penalty) to fulfil the precise and quantified obligations to which they have agreed at the European and international level, or that their legislative and/or executive powers have decided to adopt at the national level. Environmental organizations have seized existing legal tools, firmly and astutely. They are relentlessly campaigning for a continuous legislative renewal, which is programmatic and pragmatic, and as "*opposable*" (to the public authorities) as possible, while setting clear and long-term trajectories in environmental matters. They initiate all possible judicial actions, supported by communities and individuals, conceiving "*litigation*" not as a "*last card to be played*", but as a motor for change, for activating public policies and for making private actors more responsible, and as the logical and immediate position to adopt in case of failure and damage, without waiting for the deleterious effects of delay.

This legal - but also political and social - synergy, which has been extremely dynamic for several years, is one of the central elements of a strategy that is producing its fruits - positive obligations - and that undeniably serves global environmental claims.

All this inevitably raises questions for housing rights advocates, since the dissimilarities between areas of law do not rule out their convergences. And this is all the more true since there is now a growing consensus that the right to housing and the environmental cause are closely linked. The comparison is stimulating because it makes us aware of the potential of the right to housing, which the following two chapters identify by delving into the question of its content and its present and future scope, in several fields.

From this perspective, the creation by courts of positive obligations for public authorities that guarantee fundamental rights, and their possible control before the courts, are of considerable importance.

However, the legislative translation of positive obligations should not be underestimated. A primary positive obligation is to legislate in order to organize access to the right to adequate housing and to provide the necessary protections to guarantee it. It is still necessary to ask how to legislate usefully and with an impact, so that the right to housing takes on a "*concrete and effective form, not a theoretical one*" in each of its dimensions and for all persons (what objectives? to be met by what deadlines? involving what obligations, what actors and what responsibilities?).

Interview with Delphine Misonne and Marine Yzquierdo

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Marine Yzquierdo
Lawyer, Member of the association Notre Affaire à Tous (France)

Why are environmental organisations so committed to litigation?

MY: Faced with political inaction on climate change, litigation can force States and companies to reduce their greenhouse gas emissions while also bringing about political change. States, as regulators and negotiators in international trade deals, have become active participants in the fight for climate justice, with all the responsibilities that this implies.

Rather than seeking financial compensation, the goal of such lawsuits is to strengthen the existing law or change its interpretation. Since jurisprudence is a source of law, it allows for positive law to be developed, which evolves alongside changes in society itself. These lawsuits thus contribute to changing the regulatory framework by pushing public authorities to adopt more ambitious laws and regulations to reduce greenhouse gases.

As such, the judge becomes an active participant in the process. Didier-Roland Tabuteau, Vice-president of France's administrative Supreme Court (*Conseil d'État*), stated that "*It is the role of the Council of State to make sure that the objectives of the Paris Agreement on climate are respected*".[1] The administrative judge thus becomes the judge "*of how credible government actions are*", and not just how realistic they are; verifying whether the projected path is being followed and whether the actions carried out are sufficient to reach the objectives set.

Furthermore, because lawsuits are also used by civil society as a tool of mass mobilisation, they contribute to social change. This is because law is a means of whistle-blowing, of defending, of criticising, and of fighting for the recognition of our rights. This new social function of law has led to a change in the concept of the separation of powers. Montesquieu's famous words according to which "*judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour*" are not quite true anymore.

DM: The involvement of civil society in litigation is also, in certain cases with a collective scope, the result of legal advances concerning access to justice for associations in environmental matters. In Europe, we benefit from the effects of the 1998 Aarhus Convention, undertaken under the auspices of United Nations Economic Commission for Europe ("*UNECE*"), a pillar of which deals

1. "*C'est le rôle du Conseil d'État de faire respecter les objectifs de l'accord de Paris sur le climat*" ["*It is the Council of State's role to ensure the objectives of the Paris Agreement are respected*"], Le Monde, 18 November 2022.

with the need to open the doors of justice to environmental protection organisations. In Latin America, the Escazú Agreement, which entered into force in 2021, has a similar aspiration. Who else would be the official defender of the environment, including the climate? Having said that, the first civil law cases taken on climate in Europe were mainly about the liability of public authorities with regard to *people*, not with regard to climate *per se.*

Climate cases differ from more traditional environmental cases (which have been numerous for a very long time, but receive much less media attention) in their emphasis on communication. They often have a website, call for fundraising, and are accompanied by festive events, press coverage, and detailed explanations on social networks. Many of them are led by well-known figures, from TV stars to young people involved in the YouthforClimate movement to mayors. Many emphasise the mass effect, involving hundreds of co-applicants. The case is therefore also being played out outside the courtroom.

As Marine noted, it is first and foremost strategic litigation, the particularity of which is that it is strongly rooted in the progress of scientific knowledge. In many cases, it is based on the scientific consensus crystallised in the Intergovernmental Panel on Climate Change ("*IPCC*") reports, on the seriousness of the issue, and on the urgency to act.

The effect of this litigation does not, however, ease all the tensions, nor does it necessarily lead to great leaps forward. However, it does have the merit of taking the climate issue out of diplomatic circles. Climate is not just a matter for the COPs, it is also a matter for citizens who are calling their respective states to account, or who are turning to the protection of supranational courts such as the European Court of Human Rights in Strasbourg.

How can fundamental rights be used? Have new principles and new positive obligations also been recognised?

DM: The link to fundamental rights was made, in the first judgement obtained in Europe (*Urgenda* 2015),[2] by recourse to the fundamental elements of civil law on State liability. It is through the notions of tort and duty of care – concepts that have been present in well-known texts for centuries – that the first injunction issued by a judge against a government emerged in the field of climate. It was on this basis that the judge ordered a government to reduce greenhouse gas emissions by a certain amount and by a certain date. So everything was there in the codes, it was just a matter of seeing it and seizing it. The Urgenda case demonstrated the State's failure to respect of its international commitments on human rights, including articles 2 ECHR (the right to life) and 8 ECHR (the right to respect for one's home), even though the danger to be avoided was foreseeable.

In the case of the European Convention on Human Rights, it is in particular Articles 2 and 8 mentioned above, but also Articles 11 (freedom of expression) and 14 (non-discrimination) that are used, not always successfully, before national courts. Indeed, the record is mixed. Some cases also involve human rights enshrined in national constitutions. Paradoxically, however, few cases are linked to the right to protection of a healthy environment, which is still imperfectly enshrined at several levels today (but for which much is expected since the universal recognition of the right to

2. *Urgenda Foundation v State of the Netherlands*, Hague District Court, 24 June 2015, C/09/456689/HA ZA 13-1396, ECLI:NL:RBDHA:2015:7145.

a clean, healthy and sustainable environment as a human right in July 2022 by the United Nations General Assembly).[3]

In terms of principles, certain climate cases revive the potential of the principle of preventing damage caused beyond the jurisdiction ("*no-harm*"),[4] reexamine the contours of social and climate justice in the light of the principle of common but differentiated responsibility,[5] strengthen the contours of the duty of vigilance of companies and begin to address the issue of the violation of human rights in the event of the insufficiency of adequate adaptation policies. Among other things, these cases also discuss the relationship between the concept of ecological damage and the degradation of the functions performed by the atmosphere, as well as demands for the affirmation of the right to a stable climate in law.

MY: There is a leveraging of fundamental human rights in several major climate cases. Some academics talk about a "*shift in rights*" regarding this new generation of litigation that invokes human rights. In the Urgenda case, which I will detail further below, as Delphine Misonne stated, the 2019 decision by the Dutch Supreme Court highlights the link between climate change and protection of human rights.

When studying climate litigation, we can observe three clear tendencies: (i) a hybridisation of rights regimes, in which human rights support the right to healthy climate (as in the *Urgenda* case in the Netherlands[6] and the *Klimaatzaak* case in Belgium)[7]; (ii) a creation of new legal obligations based on case-law, for States and companies, based on human rights (for example, in the French case *Affaire du siècle*, the complainants asked the judge to recognise a general principle of the right to live in a sustainable climatic system); (iii) an evolution in human rights to anticipate future climate-related violations (such as in decision of the German constitutional court dated 24 March 2021 regarding German climate law).[8]

The judge thus finds himself/herself in the delicate, yet essential, position, of reviving human rights texts, written in an entirely different context which, according to Christel Cournil,[9] calls for a renewed reading of human rights through an approach that is collective, generational, and based on solidarity; all of this in the midst of an unprecedented global crisis.

It should however be noted that the human rights argument can be limiting in certain ways. Firstly, some consider this approach to be individualistic, whereas the need is for collective action when it comes to climate urgency. There is a doctrinal debate on this point, as the goal of human

3. https://digitallibrary.un.org/record/3983329?ln=en.

4. "*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*" (Rio Declaration on Environment and Development, 1992, principle 2).

5. Founding principle of the 1992 Framework Convention on Climate Change (UNFCCC), according to which all the Parties are concerned by climate change, but pursuant to their asymmetric commitments; some are more in need of development than others. At the time, due to their historic responsibility and their financial capacities, only States listed in Annex I (developed countries) had to be at the forefront of tackling climate change.

6. *Urgenda Foundation v State of the Netherlands*, Hague District Court, 24 June 2015, C/09/456689/HA ZA 13-1396, ECLI:NL:RBDHA:2015:7145.

7. https://www.klimaatzaak.eu/en.

8. https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html;jsessionid=EE77D0CFD261AFA03AD532B660DE34FF.2_cid344.

9. *Les droits de l'Homme au service de l'urgence climatique?* [Are human rights serving the urgency of climate change?] Christel Cournil and Camila Peruso, JEDH 2022/2, p. 101-102.

rights is to protect the individual's interests, rather than collective interests. Furthermore, there are timescale limitations as climate issues are often future-oriented and concern not just current generations, but future ones also.

Thus, to a certain extent, the climate issue goes beyond the boundaries of human rights. That is why some academics, like Catherine Le Bris,[10] suggest the recognition of new fundamental rights, namely the rights of humanity, and in particular the right of humanity to a healthy environment. These rights of humanity are collective and intergenerational, aiming to protect the environment, maintain peace, and our common natural ressources.

The Council of Europe is currently working on adopting an agreement on the right to a healthy environment. Indeed, The Council of Europe's Parliamentary Assembly adopted a resolution in 2021 in which States declared themselves "*resolved to define the right to a healthy environment as an autonomous human right*". As the right to a healthy environment has already been recognised by the UN as part of human rights, the challenge now is to define, before the courts, the outline of a real, subjective right to a healthy environment. Climate litigation can contribute to this, provided that the victims of climate change are involved in these cases. The outline of this subjective right to a healthy environment has not been developed yet.

Which European and international cases have proved most effective in their recourse to the courts, and have they paved the way for later cases?

MY: As detailed in *Les grandes affaires climatiques* [The Major Climate Court Cases][11] edited by Christel Cournil, the movement for climate justice at global level dates back to the mid-2000s in the United States, where climate litigation has been particularly well developed, notably in resistance to President Bush's attitude when he refused to ratify the Kyoto protocol.

In Europe, it started in 2015 with the well-known Urgenda case in the Netherlands. This was an action initiated by the NGO Urgenda and 886 Dutch citizens against the Netherlands Government, aiming to raise the country's ambitions to fight climate change. In 2019, the Dutch Supreme Court confirmed the judgement on appeal which had compelled the Dutch State to reduce its greenhouse gas emissions by 25% by 2020. Following this Supreme Court decision, the Dutch government launched a EUR 3 billion action plan in April 2020 that included curtailing maximum speed limits on roads, closing coal-fired power plants, reducing cattle and pig herds, and greening cities. This action led to a remarkably effective legal outcome that no other environmental activism actions, either associative or political, had been able to achieve until then.

There are other cases such as one in Belgium (2015, Klimaatzaak, still ongoing[12]) and one in Germany (2021, regarding German climate law). In the latter, the German constitutional court judged that German climate law was not aligned with fundamental rights, basing its decision in part on article 20a of the German Constitution which provides for the protection of the natural foundations of life and animals for future generations.[13]

10. *Droits de l'homme et droits de l'humanité au service de la crise climatique* [Human rights and rights of humanity in tackling the climate crisis], Catherine Le Bris, JEDH 2022/2, p. 137-153.

11. Cournil, Christel, Les Grandes Affaires Climatiques [The Major Climate Court Cases], 2020.

12. https://www.klimaatzaak.eu/en.

13. Constitutional court of Karlsruhe, decision of 24 March 2021 published 29 April 2021.

In France, it is still in its early stages but there have been noteworthy victories with *Grande Synthe*[14] and the *Affaire du siècle.*[15]

Outside of Europe, two other victories deserve a mention. In Pakistan in 2015, a farmer initiated legal proceedings because government policy on adapting to climate change was inadequate, thus threatening the claimant's right to life, to health, and to food security. The judge engaged in judicial activism by using the claimant's arguments to require that the State set up a commission on climate change in order to rethink and rewrite climate regulations at regional and national level.

In Colombia, in 2018, the NGO DeJusticia along with 25 young people filed a special constitutional claim called "*tutela*" used to enforce fundamental rights, following the government's failure to reduce deforestation of the Colombian Amazon.[16] The Supreme Court ruled in their favour and ordered the State to present an action plan to reduce deforestation and to present an intergenerational pact for the life of the Colombian Amazon.

DM: There are many cases now in Europe, not all of which deal with human rights. As legislation on the governance of the climate issue multiplies, the content of lawsuits changes. They no longer only deal with ambition or lack thereof, but they also question how well certain measures are being interpreted, and their effects. Thus, they focus on the legality of some implementation measures, on the relevance of the content of plans, and even on the binding force of carbon budgets. The litigation extends to administrative jurisdictions. There are also criminal proceedings, which will continue to increase in number with recent civil disobedience actions and new protest types, such as those that have been carried out in museums.

The decisions that set the most solid groundwork are clearly those of the Supreme Courts. There have already been about ten of these decisions in Europe. Several cases are currently pending before the European Court of Human Rights and promise at least a landmark ruling, as they have been entrusted to the Grand Chamber.

Legislating or taking legal action, there is no predefined route to take as both make sense: is moving swiftly from one to the other a guarantee of constant progress for fundamental social rights?

DM: Yes, in a way, with the caveat that the judge cannot solve everything. He/she will thus signal from the outset the limits of his/her powers, by in some cases stating to the lawmaker: "*It is up to you, not me, to change that.*" The most striking cases are those in which the judge considers that he/she can issue injunctions to a government (*Urgenda*), or even a legislator (*Neubauer*), and where this attitude is validated by the highest courts.

In Europe, the Paris Agreement has encouraged the adoption of new legislation on climate governance. The European Union adopted a "*European Climate law*" in 2021, which mainly sets common targets for the member states. Once the legislator has exercised its discretion in this way, it becomes more difficult, if not impossible, to question its choices in terms of ambition through the courts.

14. Council of State, 19 November 2020, n°427301.

15. Paris administrative court, 14 October 2021, n° 1904967-1904968-1904972-1904976.

16. Supreme Court, *Future Generations v Ministry of the Environment and Others*, 5 April 2018.

MY: There is no predefined route, but the decisions issued as a result of strategic litigation announce the promise of legal revolutions by forging key concepts such as the State's duty to protect with a duty of care. These concepts are linked to fundamental rights contained in constitutions and with the human rights enshrined in the European Convention on Human Rights.

With regard to fundamental social rights, although there is no reference to the right to adequate housing in the European Convention on Human Rights, elements of this right can be inferred from other fundamental rights such as the right to respect for private and family life and the right to a healthy environment. This, after all, is the same reasoning that was adopted for the right to a healthy environment – before it was recognised by the UN and later by the Council of Europe – which was inferred from the jurisprudence of the European Court of Human Rights.

The specific link between climate change and housing was demonstrated by the Foundation Abbé Pierre in their brief as part of their voluntary third-party intervention in the *Affaire du siècle*. However, this intervention was rejected by the court as the Foundation's claims were different from those of the four other claiming associations to the extent that the Foundation had not requested for reparation for environmental damage.

What lessons and limits have you identified through this brave journey?

DM: This litigation has the immense merit of putting the human element back at the centre of the debate and of making it clear to states, but also to companies (and soon to universities, banks, insurers, etc.) that the climate danger is a matter of responsibility, of obligations to achieve results and of human rights. The climate is not an issue reserved only for the great international cenacles. It is about people's lives. It is about protecting the habitability of territories and, more specifically, reacting to the loss of habitable areas. The link between climate, housing, and living environments becomes obvious. It is courageous but also necessary. One of those invited as an actor to the table, the judge, who is independent from the other elements of the state, governed by law, and who must be listened to. But, beyond the rhetoric, it happens that some judgements denouncing breaches and shortcomings are not followed up. This is not, however, the case with climate judgements alone.

MY: From a legal perspective, these legal actions facilitate innovation by creating new jurisprudential obligations or by strengthening existing laws. Furthermore, they encourage structural change because they also have political repercussions. What is important is not just the court's decision but also the citizen's mobilisation that emerges around the case as well as the effects it has at political level. However, we need to ensure that the court decisions are fully respected and implemented. The recent judgment requiring the French State to pay two record penalties of EUR 10 million for air pollution demonstrates that the measures taken by the State – in this case to improve air quality – are insufficient. Furthermore, these legal proceedings take place over a long period of time, which is at odds with the climate urgency and the need to drastically reduce greenhouse gas emissions. In the Urgenda case, the legal action started in 2012 and the Supreme Court issued its decision in 2019. In the *Affaire du siècle* case, the preliminary claim was made in December 2018 and the administrative court issued its decision on 14 October 2021. The slow wheels of justice – a result of a chronic lack of resources – is detrimental to litigants, climate, and biodiversity. But yet, such litigation is a valuable means of highlighting and advancing action on climate change.

Lessons from strategic human rights litigation: From climate change to adequate housing

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Introduction

In recent years, there has been a multiplication of cases against government authorities for their inaction in combating global warming. The rising number of judicial cases has been accompanied by a growing academic interest in the use of courts as an advocacy tool to protect the environment. The turning point in the academic engagement with this issue was the first *Urgenda* case,[1] from 2015, when a first instance court in The Hague ruled that The Netherlands ought to cut greenhouse emissions by at least 25 percent by 2020, as agreed upon in international fora. Since then, the academic articles, books and special issues on climate change litigation have grown exponentially.[2]

There has also been a human rights-turn in climate change litigation. According to data from the Sabin Centre for Climate Change Law at Columbia Law School, by May 2021, 112 of the 1,841 cases compiled in their database relied wholly or partly on human rights law. While most of the 1,841 cases concerned North America, human rights-based climate change litigation was spread evenly among regions around the world. Most of these examples of human rights-based climate change litigation were filed after the Paris Agreement of 2015, including *Urgenda*: litigants relied both on substantive obligations – such as the adoption of adequate climate change legislation and impact assessments – and procedural human rights obligations – for example, access to information and access to justice.[3] The trend suggests that countries in the global south with a strong case-law on economic and social rights (like South Africa, Colombia and Pakistan) may, in the coming years, become a fertile ground for strategic litigation on climate change from a human rights perspective.[4]

1. Final ruling by the Dutch Supreme Court dates from 20 December 2019.

2. Setzer, J., Vanhala, L. (2019) Climate change litigation: A review of research on courts and litigants in climate governance. *WIREs Clim Change*, 10:e580.

3. Savaresi, A., Setzer, J. (2022) Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers. *Journal of Human Rights and the Environment*, 13(1), 7-34.

4. Guruparan, Kumaravadivel, Moynihan, H. (2021) *Climate change and human rights-based strategic litigation*. Chatham House.

However, academic literature thus far has focused excessively on the global north, with 76 percent of articles published in English language between 2015 and 2019 examining cases from North America (Setzer & Vanhala, 2019). Given the wide regional distribution of human rights-informed strategic litigation on climate change, lessons should be sought not only from better known cases in Europe and North America, but also from Africa, Latin America[5] and Australia[6], as well as from lesser known and "*invisible*" cases in all regions that may contribute to the evolution of jurisprudence incrementally.[7]

The objective of this chapter is less ambitious than that. The chapter intends to reflect on the meaning of climate change for strategic human rights litigation, understood as litigation that pursues goals or concerns interests that are broader than those of the parties, thereby reaching beyond the victims or applicants involved in a certain case.[8] It uses climate change litigation as a source of inspiration for the judicial enforceability and implementation of another fundamental human right, the right to adequate housing. Indeed, we believe it is also essential to learn from strategic litigation horizontally, meaning, between different rights.

The right to adequate housing is contained in several international human rights treaties, including particularly Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by more than 170 countries.[9] One key element of the adequacy of the right to housing is habitability, a situation threatened by climate change in many countries today, particularly in the context of flooding. In July 2022, the United Nations General Assembly formally declared access to a clean and healthy environment as a human right.[10] Both the right to a healthy environment and the right to adequate housing have experienced steady progress in their recognition as constitutional rights. In 2016, environmental rights were included in 68 percent of constitutions and were judicially enforceable in 42 percent of them, while housing rights were included in 42 percent of national constitutions.[11]

This paper begins with an analysis of the differences between climate change and housing. It then explores the commonalities and areas of convergence between strategic litigation in relation to both rights, and ends with concluding remarks about the replicability of housing standards for the environment, the need to pay attention to material inequalities, and the empowering effect of the affirmation of identities through court cases.

5. Bouwer, K. (2022) The influence of human rights on climate litigation in Africa. *Journal of Human Rights and the Environment*, 13(1), 157-177.

6. Auz, J. (2022). Human rights-based climate litigation: a Latin American cartography. *Journal of Human Rights and the Environment,* 13(1), 114-136.

7. Bouwer, K. (2018) The Unsexy Future of Climate Change Litigation. *Journal of Environmental Law*, 30(3), 483–506.

8. Duffy, H. (2018) *Strategic Human Rights Litigation: Understanding and Maximising Impact*. Hart, p. 3.

9. https://indicators.ohchr.org/.

10. UN General Assembly, Resolution 76/300, The human right to a clean, healthy and sustainable environment (28 July 2022).

11. Rosevear, E., Hirschl, R., Jung, C. (2019) Justiciable and Aspirational Economic and Social Rights in National Constitutions, in The Future of Economic and Social Rights (ed. Katharine Young, CUP), p. 40.

Differences

Legal proceedings or lawsuits before domestic courts in relation to the right to housing are often brought against private parties – which own the bulk of real estate – and not against the state or companies.[12] In contrast, plaintiffs in climate litigation – both nationally and internationally – sue public authorities accused of not doing enough to prevent global warming, or large polluting private enterprises, or even a sui generis international organization like the European Union[13].[14] Companies are also private actors, but it is individuals who are most often targeted by housing rights disputes. It is also true that the latter mostly concern very concrete and daily issues (leases, evictions, etc.), whereas climate disputes involve fundamental rights and general principles. Many disputes concerning housing rights fall within the scope of private law, whereas climate-related disputes tend to fall within the scope of public law. These distinctions may explain the public tropism of climate litigation. However, it is instructive to observe that plaintiffs in a housing case rarely consider placing the case on the ground of human rights and invoking state responsibility, preferring to pragmatically direct their action against a private landlord on the basis of a specific positive law, rather than against a public authority or a company, and on the basis of broader, and less certain, legal principles. The reason for this might be that housing problems are felt more acutely by the population than the more abstract and distant issue of climate change; they therefore call for precise responses as quickly as possible, whereas climate change litigation is a long-term process and seeks less to respond to immediate problems than to be a *significant cause*.

Ending global warming presents unique challenges from the perspective of collective action and causality. The environment is, by definition, a global collective good with extraterritorial effects and shared but diffuse interests. The judicialization of climate change raises "*questions of the shared responsibility of multiple states and of attributing responsibility to individual states*".[15] Identifying the causal link between a certain damage, on the one hand, and state action or inaction, on the other, is extremely difficult. Hence, science becomes essential to provide evidence and to articulate state responsibilities in relation to precaution, due diligence and the principle of doing no harm. As observed by Vanhala (2020), "*in the case of climate change, the way in which climate science interacts with the legal opportunity structure matters.*"[16]

This is why internationally agreed targets are so important in order to evaluate individual states' action to stop global warming. International diplomatic agreements have resulted in scientifi-

12. It is certainly the other way around in international human rights litigation, since only states, and not private actors, can be challenged in front of the UN Committee on Economic, Social and Cultural Rights or the regional human rights courts and committees. In fact, 71 of the 88 cases brought to the attention of the UN Committee on Economic, Social and Cultural Rights in application of the Optional Protocol to ICESCR by 2021 concerned the right to housing, and 70 of those 71 had Spain as the responding state (GI-ESCR, *2021 Yearbook The Committee on Economic, Social and Cultural Rights*, 2022, p. 20).

13. Brosset, E., Trulihé, E. (2020) Les People's Climate Case c. Union européenne (2019). *Les grandes affaires climatiques,* C. Cournil (Ed.), Confluence des droits.

14. In Carvalho and Others v Parliament and Council (T-330/18), individuals from several European countries sought to have three EU acts (Directive 2018/410 and Regulations 2018/842 and 2018/841) annulled before the General Court and then the Court of Justice of the European Union, which they claimed prevented the EU's target of reducing greenhouse gas emissions by at least 40% by 2030 compared to 1990 levels, thereby contradicting the Paris Agreement. However, both courts found the action inadmissible (the General Court on 8 May 2019 and the Court on 21 March 2021), as the applicants had not demonstrated that they were directly and individually concerned by these acts, as required by Article 263(4) of the Treaty on the Functioning of the European Union.

15. Keller, H., Heri, C. (2022) The Future is Now: Climate Cases Before the ECtHR. *Nordic Journal of Human Rights*, 40(1), 153-174, p. 166.

16. Vanhala, L. (2020) *Why ideas and identity matter in climate change litigation*. Open Global Rights.

cally informed benchmarks that set explicit and measurable goals, such as limiting temperature rise by 1.5 degrees compared to pre-industrial levels, or reducing greenhouse gas emissions by a certain percentage by a certain point in time. This sort of unequivalence and clarity of objective, moreover, is what may partly explain some of the fortunes of climate litigation in the courts, for it can become relatively easy for a court to assess a state's actions against such numerical commitments. For example, in a recent case concerning Australia, the UN Human Rights Committee dismissed the idea that the failure to address climate change impact cannot be attributed to one state in particular. The Committee observed that, in light of the large amount of pollution emitted from the country (cause), and its high levels of economic development (ability to act), the alleged actions and omissions fell under the state's jurisdiction for the purposes of its international human rights obligations (effect).[17]

As regards housing, the principle of progressive realization means that states are required to make use of the maximum of available resources to advance progressively towards the full realization of economic, social and cultural rights.[18] Judges could use indicators and benchmarks to track progress against this general principle, and when the right to housing is justiciable judges and courts may assess the extent to which governmental policies are reasonably and proportionately heading towards the full realization of the right.[19]

However, both policies and the targets in relation to housing are less specific than those concerning climate, and this ambiguity makes judicial enforceability more challenging for housing advocates. It is possible to believe, for example, that the housing crisis will be resolved the day that enough social housing is built, just as one can choose a different tack, such as getting rents to come down, fighting against housing unfit for habitation, fighting discrimination in housing, or even facilitating home ownership for the middle class. This multiplicity of possible actions makes identifying a specific failure of the state more difficult,[20] especially given that the state will always try to offset a possible failure to act in one subarea (social housing, for example) by a measure taken in another subarea (like homeownership).

One of the consequences of the mentioned principle of progressive realization is that the state often has an obligation of conduct when it comes to the right to housing, both because the targets cannot always be given as precise figures, and because government authorities are expected to make good on the right to housing somewhat gradually. In contrast, while state's obligation to mitigate climate change is to might generally considered an obligation of conduct,[21] given the urgency of the matter, the commitments made by government bodies in favor of the climate usually take the form of an obligation of result:[22] "*The best time for climate action was yesterday*"[23]. The idea of the fault of the government authorities, which is a cornerstone of climate litigation, is

17. UN Human Rights Committee, Daniel Billy and *al v Australia*, Views of 21 July 2022, UN doc. CCPR/C/135/D/3624/2019, para 7.8.

18. Article 2(1) ICESCR.

19. Boyle, K. (2020) *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication*. Routledge.

20. Unless, of course, the legislator was careful to assign each of these routes a numerical target, which is far from being the case.

21. Mayer, B. (2022) The judicial assessment of states' action on climate change mitigation. *Leiden Journal of International Law*, 35(4), 801-824, p. 803.

22. Torre-Schaub, M., d'Ambrosio, L., Lormeteau, B. (2019) *Les dynamiques du contentieux climatique. Usages et mobilisations du droit pour la cause climatique*, Rapport de recherche, CNRS, p. 70.

23. Torre-Schaub, M. (2022) Le contentieux climatique : du passé vers l'avenir, *RFDA*, p. 75.

more complicated to establish in housing cases. As a result, the very responsibility of the state is difficult to establish, whereas it is frequently at issue in climate litigation.

There is one important conceptual difference between climate change and adequate housing. While the right to housing belongs to individuals under the jurisdiction of the state, in the case of the environment there is a profound division between anthropocentric and ecocentric approaches to the environment, the former focusing on the human's right to a healthy environment, the latter focusing on the rights of nature. Attempts to embrace a healthy environment as a human right have adopted a predominantly anthropocentric perspective. This is observable, for example, in the expansive interpretation of the right to life in UN Human Rights Committee's General Comment No. 36, which talks of "*the right to life with dignity*," which would include a healthy environment.[24] However, international human rights bodies may adopt a more explicitly ecocentric approach in the years to come. In a way, in fact, they have already started doing so.[25] For example, in its advisory opinion on environment and human rights, the Inter-American Court of Human Rights said that "*the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals.*"[26]

Environmental lawyers have been relatively successful in court in recent years. In contrast, calls to take housing disputes out of the courts are becoming more and more pressing. This is so for a number of reasons. The courts are saturated, so justice is slow. Going to court is expensive for the most underprivileged and, what is more important, the outcome is uncertain. Impoverished households are often wary of the justice system, for experience may have taught them that justice is not always on their side. For example, tenants instigate only 7 percent of the renting-related requests put to justices of the peace in Belgium, and fail to show up in 50% of the cases which are brought by landlords.[27] Instead, people are promoting out-of-court mediation schemes in which solutions are developed jointly by the parties themselves rather than being forced on them by a judge. In Brussels, for example, a joint committee on rentals, composed of equal numbers of landlords' and tenants' representatives, was set up in 2021 and tasked with giving opinions, free of charge, on the fairness of rents.[28]

Convergences

When thinking of commonalities between human rights, one must start from the idea that they are and must be interdependent and indivisible. Human rights effectively form a compact, mutually supportive whole. The indivisibility of and interdependence between civil and political rights, on the one hand, and economic, social, and cultural rights, on the other hand, have been solidly affirmed in international human rights law. "*There is no water-tight division separating*" the two categories of rights, as observed by the European Court of Human Rights more than four decades

24. UN Human Rights Committee, General comment No. 36: Article 6 (Right to Life), 3 September 2019, UN doc. CCPR/C/GC/35, para 26 and 62.

25. Knox, J. (2020) Constructing the Human Right to a Healthy Environment. *Annual Review of Law and Social Science*, 16, 79-95, p. 92.

26. Inter-American Court HR, Advisory Opinion 23/17 on Environment and Human Rights (15 November 2017), para. 62.

27. Rassemblement bruxellois pour le droit à l'habitat. (2020) *Justice de paix : bailleurs welcome ! Locataires welcome ? Quand la justice peine à sanctionner l'insalubrité.*

28. Ordinance of 28 October 2021.

ago.[29] This reasoning can be transposed mutatis mutandis to the relationship between socioeconomic and environmental rights.

Regarding the simple obligation of means incumbent upon the state in the area of the right to housing, sometimes lawmakers place a true obligation of result on the state. For example, France's 2007 law making the right to housing justiciable[30] obliges the relevant government bodies as a matter of law to provide applicants with social housing upon pain of being convicted by the courts.[31]

The judicial route remains highly useful in enforcing the right to housing especially when it is a matter of rendering effective a constitutional fundamental right that would otherwise remain theoretical or a nice principle without effect. Judges have indeed sometimes been considered to be the "*guarantor[s] of the right to housing*" with the role of putting meat on the bones of this human right proclaimed in constitutions and international treaties.[32]

A potential shared characteristic between climate and housing is the acuteness of the imminence of the predicted catastrophe, which calls most forcefully for the adoption of immediate regulatory measures. The status quo is no more tenable in the area of housing than in that of the climate crisis, given the rising water levels and steady rise in global temperatures. The current rises in gas and electricity prices, to take just one example, are putting an unprecedented squeeze on household finances, to the point of endangering their continued occupancy. The continuous growth of prices (housing, rents, charges) massively threatens the accessibility and maintenance of decent housing. In the current climate, it will be more peremptory than ever the need to adopt effective measures to protect the security of tenure and ensure evictions are really the last resort.[33] Already problematic in themselves individually, the two phenomena can feed each other: climatic disturbances materially affect housing (deterioration, destruction, floods), and spatial segregation leads to problems of health, education and overexposure to climatic hazards.

If climate issues are known to be intertwined with the right to a healthy environment, the same goes for housing. The European Court of Human Rights has developed a very stimulating strain of environmental case law connected to housing. It has found human right violations in states for having tolerated the presence of a factory engaged in "*dangerous activity*" 30 metres from a dwelling,[34] for the prolonged exposure of a person to industrial emissions having harmful consequences for the quality of life at her home,[35] for the development around residential buildings of an area of activities in which night-time noise was "*undeniable*," so that the perimeter of this

29. European Court of Human Rights, *Airey v Ireland* (application No. 6289/73), Judgment of 9 October 1979, para. 26.

30. Law No. 2007-290 of 5 March 2007 establishing the enforceable right to housing.

31. Bernard, N., Derdek, N. (2016). Le DALO, un droit au logement vraiment "opposable"? *Revue trimestrielle des droits de l'homme*, 107, 713-732.

32. "*Since the judge is the guarantor of the fundamental right to housing and can only award in case of default those claims which he considers to be just and well-founded, the legitimacy of the increase should be reviewed. The legitimacy of the increase [of the rent of a social housing unit] should be checked*" (free translation). Grâce-Hollogne, Justice de paix – civil court. (1st of October 2000). *Revue de jurisprudence de Liège, Mons et Bruxelles*, 2000, 21, p. 900.

33. Casla, K. (2022) Unpredictable and damaging? A human rights case for the proportionality assessment of evictions in the private rental sector. *European Human Rights Law Review*, 2022(3), 253-272.

34. European Court of Human Rights, *Gaiacomelli v Italy* (application No. 59909/00), Judgment of 2 November 2006, para. 96.

35. European Court of Human Rights, *Fadeyeva v Russia* (application No. 55723/00), Judgment of 9 June 2005, para. 88.

area was "*acoustically saturated*,"[36] and for the detrimental effect of the expansion of a cemetery without the establishment of a sanitary protection zone.[37] Moreover, the granting of compensation (such as the authorities' paying the rent of a flat in a protected area for one year) is not always considered sufficient to repair the injury sustained.[38] All these cases draw upon the right to private and family life and respect for the home, contained in Article 8 of the European Convention on Human Rights (ECHR). In other words, it is not possible to enjoy one's home serenely or to have any private or family life in it if one is at risk of being evicted from it at any time (for environmental reasons in particular), if it is subjected to toxic industrial discharges, if it is under constant threat of flooding, and so on.[39] Article 8 ECHR provides a relatively useful legal resort, for neither the right to a healthy environment, the right to housing, or the right to a healthy climate are recognized as such in ECHR. A healthy environment affects the location and habitability of housing, which are essential requirements of the right to adequate housing, as recognized by both the European Committee of Social Rights and the UN Committee on Economic, Social and Cultural Rights.[40]

Climate change is also closely associated with the right to health. Climate phenomena (droughts, water shortages, changes in the fauna and flora, etc.) truly put health, including public health, to the test, to the point of endangering individuals' physical integrity, even their lives. At the same time, the state of a dwelling has decisive influence over its inhabitants' physical and mental health: damp walls can cause asthma, lead pipes carry the risk of lead poisoning, a defective water heater exposes people to carbon monoxide poisoning, extremely cramped conditions can induce a feeling of oppression, a spell out in the streets can lead to the onset (or exacerbation) of neuropsychiatric disorders, and so on.[41]

Both climate and housing are witness of the key role played by activists and national and international organizations. Without the NGOs that are energetically working for the environment, climate litigation would never have been brought, much less won. In the same way, the groups that defend the right to housing play a key role in implementing it, both nationally and internationally, in front of the European Committee of Social Rights and the UN Committee on Economic, Social and Cultural Rights, for example. Associations are given the task of giving concrete expression to the right to housing in domestic law too. Belgian law, for example, has given them the powers to denounce housing that is unfit for habitation, to manage vacant dwellings (even against the landlord's will!), and even to go to court against all landlords of vacant properties (for the purpose of forcing them in one way or the other to put an end to the vacancy).[42]

36. European Court of Human Rights, *Moreno Gómez v Spain* (application No. 4143/02), Judgment of 16 November 2004, para. 58-59.

37. European Court of Human Rights, *Solyanik v Russia* (application No. 47987/15), Judgment of 10 May 2022, para. 51.

38. European Court of Human Rights, *López Ostra v Spain* (application No. 16798/90), Judgment of 9 December 1994.

39. de Fontbressin, P. (2006) De l'effectivité du droit à l'environnement sain à l'effectivité du droit à un logement décent, *Revue trimestrielle des droits de l'homme*, 65, 87-98.

40. European Committee of Social Rights, Complaint No. 110/2014, Decision on the Merits of 12 May 2017; UN Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing, 13 December 1991, UN doc. E/1992/23.

41. Bernard, N. (2010) Le logement et la santé mentale au prisme de la loi [Housing and Mental Health under the Law]. *Les échos du logement*, 114(2), 14-26. Bernard, N. (2017) Entre droit au logement et droit à la santé, des influences multiples et croisées [Between the right to housing and the right to health, multiple and intersecting influences]. *Les échos du logement*, 121, 4-8.

42. Art. 7, §2, Indent 1, 2°, of the Brussels Housing Code.

Climate litigation has been brought by associations that have become emblematic, such as the Urgenda Foundation in the Netherlands, Klimaatzaak association in Belgium, and Notre Affaire à Tous, Fondation pour la Nature et l'Homme, Greenpeace and Oxfam in France, whose grounds for going to court were recognized by the various domestic courts. In a similar vein, concerning housing, a Belgian law adopted in 2018 instituted the possibility of class action suits, traditionally defined as suits lodged by a group set up to defend the ends being sought in the case.[43] Since then, a lawsuit lodged by a moral person (non-governmental organisation/NGO) with a view to protecting human rights or fundamental freedoms is recognized and will be declared admissible in court when a collective interest alone is being sought by the moral person (NGO), amongst other conditions. On 19 January 2022, the chamber of the Brussels French-speaking Court of First Instance that rules on applications for interim relief (*Chambre des référés*) required the state "*to take all necessary measures to put an end to the current impossibility for an indeterminate number of applicants for international protection to present and submit their applications for international protection*," and ordered the Federal Agency for Asylum Seekers "*to give the benefits of material assistance [housing] to all applicants for international protection as of the presentation of their applications, without conditions or deadlines*," on pain of being fined in both cases. The suit was brought not by individuals (the persons requesting international protection, for example), but by several associations, including the Bar Association of Belgium.

Climate and housing issues have become so acute that everyone's contribution, of private individuals and the state alike, is indispensable. This is true when it comes to energy and the environment, where the state must issue general prohibitions and grant financial incentives, but where private individuals must also make very concrete efforts on their side, such as cutting down on flying or renovating their dwellings. This is no less true when it comes to housing, where private landlords must upgrade their housing to meet current standards and avoid discriminating against tenants, at the same time as the public authorities must build more social housing and pass rent control laws, for example.

Last but not least, climate - and housing - related problems affect the same type of public, i.e., the poorest members of society, first and foremost. This is unquestionable when it comes to housing, since the poor live in buildings that are in the worst state, spend what is often more than fifty percent of their income on rent, are the most susceptible to eviction, and so on. The same findings hold true with regard to the climate, since the households that are impacted by the full force of floods, high water, and storms are often those without the means to live elsewhere, that is to say, in places other than those that are notoriously overexposed to the ups and downs of climate, and which for this reason are cheaper. In this same vein, dwellings that are put up hastily and/or built with cheap materials unsurprisingly withstand the aforementioned climate phenomena less well. In any case, this overexposure of precarious populations only reinforces the need to appeal to the state and to engage its responsibility, since it is the state which must take regulatory measures and implement change.

43. Art. 137 of the Law of 21 December 2018 on various provisions relating to justice.

Concluding remarks

In *FEANTSA v France*, the European Committee of Social Rights established that, for the right to adequate housing to be "*practical and effective, rather than purely theoretical*" states must:

> "*a. Adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;*
>
> *b. Maintain meaningful statistics on needs, resources and results;*
>
> *c. Undertake regular reviews of the impact of the strategies adopted;*
>
> *d. Establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;*
>
> *e. Pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.*"[44]

Mutatis mutandis, these standards are equally applicable for the environment and climate change. States must ensure that they make use of the full extent of their available resources to advance progressively towards the full realization of social and environmental rights. Time matters, both for housing and for climate change. Science-informed impact assessments are of the essence, as well as transparency in the collection and use of data and statistics, making sure that people with lived experience of human rights abuses are actively involved in the decisions that affect them.

Indeed, "*[A] progressive socioeconomic agenda for the Anthropocene needs to be concerned as much with economic equity as with decarbonization and a livable Earth system*".[45] This requires going beyond minimum standards of reasonableness and minimum core obligations to make sure that material inequalities are part of the assessment of the situation. This applies both to climate and to adequate housing. As observed by the Inter-American Court of Human Rights, the right to equality has "*a material or substantial dimension that requires the adoption of positive measures of promotion in favor of groups that have historically been discriminated against or marginalized [...]. This means that the right to equality entails the obligation to adopt measures that ensure that the equality is real and effective; [...] States must actively combat situations of exclusion and marginalization*".[46]

Finally, the identities of the champions of environmental rights do matter. As observed by Vanhala (2020), "*the affirmation or denial of identities through court cases and related campaigning activity can have profound impacts on whether litigation is a tool of empowerment or oppression for litigants and grassroots communities.*"[47] Children all over the world are bringing cases to court and holding governments to account for the general failure of one generation to bequeath a habitable home to the next. The better-known case may be the one lodged by children in 33 countries against Portugal at the European Court of Human Rights.[48] However, as of May 2021, the Sabin

44. European Committee of Social Rights, Complaint No. 39/2006, Decision on the Merits of 5 December 2007, para. 53-54.

45. Rodríguez-Garavito, C. (2022) *Climatizing Huma Human Rights: Economic and Social Rights for the Anthropocene*. NYU Law and Economic Research Paper No. 21-20, p. 5.

46. Inter-American Court of Human Rights, *Workers of the Fireworks Factory in Santo Antonio de Jesus and Their Families v Brazil*, Judgment of 15 July 2020, para. 199.

47. Vanhala, L. (2020) *Why ideas and identity matter in climate change litigation*. Open Global Rights.

48. European Court of Human Rights, *Duarte Agostinho and Others v Portugal and 32 other States* (application No. 39371/20), submitted on 7 September 2020.

Centre for Climate Change Law's database of climate litigation had tracked of 32 youth-focused cases in 14 countries.[49] There was also the case brought by 16 young people from 12 different countries against Argentina, Brazil, France, Germany and Turkey in front of the UN Committee on the Rights of the Child.[50] Children all over the world are fighting for their future and pushing the conceptual and practical boundaries of extraterritorial obligations and intergenerational justice.

49. Parker, L., Mestre, J., Jodoin, S., Wewerinke-Singh, M. (2022) When the kids put climate change on trial: youth-focused rights-based climate litigation around the world. *Journal of Human Rights and the Environment*, 13(1), 64-89.

50. UN Committee on the Rights of the Child, *Chiara Sacchi et al v Turkey et al*, Decision of 22 September 2021, UN doc. CRC/C/88/D/108/2019.

Chapter III

Loss of home: what are the requirements of the principle of proportionality?

This chapter focuses on Article 8 of the ECHR, which is becoming central to the jurisprudence on the right to respect for home – an integral part of the right to housing. Any interference with this right to respect for home must meet a "*proportionality test*" conducted by an independent and impartial tribunal.

Proportionality reviews are particularly significant in relation to evictions, where the principle requires that a pressing social need for the eviction be satisfied. While this test is only applied in relation to State actions (vertical application of rights) by the ECtHR, as it supervises the application of the ECHR in the countries of the Council of Europe. It is, more and more being applied in EU law and at UN adjudication bodies. Moreover, national courts are increasingly aligning themselves with these approaches, and the onus is often on them to carry it out first. Deciphering the criteria, strengths and limitations of proportionality review in any legal system - international, European and national - is therefore an essential and ongoing task, in order to define the scope of housing rights.

The assessment of proportionality raises important questions of perspective, context and scale. Multiplying the possibilities of legal review, and diversifying the supervisory bodies to which one can turn, are important ways of giving full meaning and content to the right to housing.

Proportionality and Evictions

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This chapter considers the concept and application of the principle of proportionality in relation to evictions from home, arising from Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). It builds on the presentations at the Fondation Abbe Pierre/ FEANTSA *The European Contribution to the Right to Housing Standards, Litigation and Advocacy Conference*, May 2022.[1]

Any interference with the right to respect for private and family life must meet a "*proportionality test*", and there is a growing body of jurisprudence from the European Court of Human Rights (ECtHR) on this point. This chapter outlines this case law, which is limited to cases involving the vertical application of human rights, i.e., between States and a private party.[2] It also considers how the principle is also being applied in a horizontal and more expansive way through EU law and the UN human rights complaints system. It concludes that the limitations of ECHR civil and political rights in this area are becoming evident, while much scope remains within EU law and UN monitoring systems.

ECHR – Article 8

The Council of Europe, established in 1949, promotes housing rights in an oblique way through its ECHR.[3] Article 8 ECHR states:

> "*1. Everyone has the right to respect for (…) his home (…).*

1.* Thanks to Gëzim Zejnullahu, PhD researcher at University of Galway for assistance with this chapter. All the presentations are available at: https://www.housingrightswatch.org/news/european-contribution-right-housing-standards-litigation-and-advocacy.

2. Many States have adopted the ECHR into their legislation or in the case of monist legal systems it is automatically part of national law once ratified. This chapter does not consider the national court decisions relating to Article 8.

3. Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm. It is important to reference the more extensive socio-economic rights set out in the Council of Europe's European Social Charter and Revised Charter of the Council of Europe and its specific right to housing in Article 31, and the almost total failure of the ECtHR to integrate that jurisprudence into its case civil and political rights case law. See Council of Europe, European Treaty Series – No. 35: European Social Charter, Turin, 18 October 1961. (Revised) Council of Europe, Strasbourg 3 May 1996. Available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp. Article 31 is entirely relevant to the consideration of this Council of Europe organ and states: 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 the 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.

> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*"[4]

Article 8 ECHR rights do not grant any right to a home, merely a positive obligation on the State to respect the right to home.[5] This was reiterated in *Faulkner v Ireland*:[6]

> "*98. (...) this provision does not recognise, as such, a right to be provided with a home (see Ghailan and Others v Spain, no. 36366/14, § 53, 23 March 2021, and further references therein), nor does it confer a right to live in a particular location (see Garib v the Netherlands [GC], no. 43494/09, § 141, 6 November 2017, and further references therein), or guarantee the right to have one's housing problems solved by the authorities, as the scope of any positive obligation to house the homeless is limited (see Hudorovič and Others v Slovenia, nos. 24816/14 and 25140/14, § 114, 10 March 2020.*"

Thus, Article 8 rights act negatively, as a protection against arbitrary evictions from dwellings or land.

Of course, the ECtHR also regards "*home*" as more than temporary occupancy of a building or land and requires the existence of sufficient and continuous links with the place occupied, even if such occupancy is illegal,[7] as the case of *Faulkner v Ireland and McDonagh v Ireland* still reminds us:[8]

> "*91. The Court observes that whether or not a particular premises constitutes a 'home'– an autonomous concept under the Convention – and thus attracts the protection of Article 8 § 1 will depend on the existence of sufficient and continuous links with a specific place (see, among others, Winterstein and Others, cited above, § 141)*[9]*. Furthermore, whether a property is to be classified as a 'home' is a question of fact and does not depend on the lawfulness of the occupation under domestic law (see Hirtu and Others v. France, no. 24720/13, § 65, 14 May 2020 and the authorities cited therein) (...)*".

Thus, the ECtHR has recognised the inherent fluidity of the home and the different forms and shapes that it can assume.[10]

4. The relationship between Article 8 ECHR and housing in the jurisprudence of the ECtHR is summarised in the ECtHR Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence. (Updated on 31 August 2022). Available at: https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

5. For an review of all European law and policy related to evictions see Kenna, P. Nasarre-Aznar, S., Sparkes, P. & Schmid, C.U. (2018)(ed.) *Loss of Homes and Evictions across Europe: A Comparative Legal Examination*, Cheltenham, Edward Elgar; Nield, S. "Article 8 respect for Home - A Human Property Right?" 23 King's Law Journal, 2013, 147.

6. *Faulkner v Ireland and McDonagh v Ireland,* Application nos. 30391/18 and 30416/18. Judgment 31 March 2022, para 98.

7. Vojvodić, J. D. "Respect of the Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Recent Case Law of the European Court of Human Rights", Zbornik Radova Pravnog Fakulteta Novi Sad, 2020. Available at: https://scindeks-clanci.ceon.rs/data/pdf/0550-2179/2020/0550-21792004533V.pdf.

8. Application nos. 30391/18 and 30416/18. Judgment 31 March 2022, para 91.

9. *Winterstein and Others v France* , Application no. 27013/07, Judgment, 17 October 2013. See also *Connors v the United Kingdom,* Application no. 66746/01, Judgment, 27 May 2004*; McCann v the United Kingdom,* Application no. 19009/04, Judgment, 13 May 2008.

10. Cittadini, S. (2022) "A right to home or an individual preference? The impact of the definition of home in international and European legislation on cases concerning Roma, Travellers and Gypsies", *Romani Studies* 5, Vol. 32, No. 1 (2022), 85–103. Available at: https://muse.jhu.edu/article/859937/pdf.

The proportionality of any action which interferes with this right to respect for the home has been established as a core element in the protection of Article 8 rights.[11] The questions posed in the "*proportionality test*" arising from Article 8 ECHR were elaborately defined by the ECHR. In *Yordanova and Others v Bulgaria*[12], where the ECtHR reiterated that a national court must examine whether the interference with the "*home*", if it materialises, (i) firstly pursues a legitimate aim, (ii) then, is "*necessary in a democratic society*".

> *"117. An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see, among other authorities, Smith and Grady v the United Kingdom, Nos. 33985/96 and 33986/96, 27 September 1999, §§ 88, ECHR 1999-VI)".*

A margin of appreciation is left to the national authorities to assess whether the interference is proportionate to the legitimate aim pursued. However, this margin of appreciation will vary according to the nature of the ECtHR rights at issue. In the application of wider social and economic policies related to housing, such as planning policies, national authorities enjoy a wide margin of appreciation. However, the margin of appreciation left to the national authorities will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of its key privacy and personal rights. *Yordanova* was very explicit about this dimension of Article 8 ECHR:

> "*118. (ii) (...) Since Article 8 concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community, where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant (see, among many others, Connors, cited above, § 82);*
>
> *(iii) The procedural safeguards available to the individual will be especially material in determining whether the respondent state has remained within its margin of appreciation. In particular, the ECHR must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see Buckley, cited above, pp. 1292-93, § 76, and Chapman, cited above, § 92). The 'necessary in a democratic society' requirement under Article 8 § 2 raises a question of procedure as well of substance (see McCann, § 26);*
>
> *(iv) Since the loss of one's home is a most extreme form of interference with the right under Article 8 to respect for one's home, any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8, notwithstanding that, under domestic law, he has no right of occupation (...). This means,*

11. Kenna, P. "Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights", 2008 *European Human Rights Law Review* 2, 193; Kenna, P. and Gailiute, D. "Growing coordination in housing rights jurisprudence in Europe?", 2013 *European Human Rights Law Review* 6, 606.

12. *Yordanova and Others v Bulgaria* Application No. 25446/06, Judgment, 24 September 2012.

> *among other things, that where relevant arguments concerning the proportionality of the interference have been raised by the applicant in domestic judicial proceedings, the domestic courts should examine them in detail and provide adequate reasons (ibid., §§ 67-69);*
>
> *(v) Where the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the court [ECtHR] may draw the inference that the State's legitimate interest in being able to control its property should come second to the applicant's right to respect for his home*".[13]

National authorities must also take into account the position of vulnerable and disadvantaged persons or groups, which require special consideration to be given to their needs and their different lifestyle, both in any planning framework and in specific cases, and in the proportionality assessment that they must undertake.[14]

When it comes to illegal construction in breach of planning laws, the factors likely to be of prominence when determining the proportionality of the measure are:

> "*64. (...) whether or not the home was established unlawfully, whether or not the persons concerned did so knowingly, the nature and degree of the illegality at issue, the precise nature of the interest sought to be protected by the demolition, whether suitable alternative accommodation is available to the persons affected by the demolition and whether there are less severe ways of dealing with the case; the list is not exhaustive (see Ivanova and Cherkezov, cited above, § 53; Winterstein and Others, cited above, § 148 (ε); and Kaminskas, cited above, §§ 54 and 57)*".[15]

In *Faulkner v Ireland* and *McDonagh v Ireland,*[16] involving the eviction of Travellers from an unauthorised site, it would appear that the evictions there were undertaken to facilitate a contractor who was threatening to sue the Local Authority, and the safety risks only arose as a result of the new road construction.[17] The decision relied on the broad "*margin of appreciation*" which pertains in the sphere of social and economic policy, and also mentioned the issue of safety.[18] The ECtHR held that there was no breach of the limited intrusion restrictions into the "*personal sphere*" of the holder of Article 8 rights, in relation to the individual claimant "*identity, self-*

13. *Ibid,* para 118.

14. *Ibid.*, para 129. However, in *Hirtu and Others v. France*, (Appication no 24720/13, 14 May 2020), while the clearance of a Gypsy encampment clearly had repercussions on the private and family life of those evicted, who belonged to an underprivileged social group, in fact the proportionality of the interference was assessed for the first time by an Administrative Court 18 months after the eviction – See presentation by Senada Sali, Legal Director, European Roma Rights Centre at Fondation Abbe Pierre/FEANTSA *The European Contribution to the Right to Housing Standards, Litigation and Advocacy Conference*, May 2022. Available at: https://www.housingrightswatch.org/sites/default/files/Presentation_ERRC_forced_evictions_SS.pptx_.pdf.

15. *Ghalian v Spain* (Application no 36366/4. Judgment 23 March 2021).

16. (Application nos. 30391/18 and 30416/18. Judgment 31 March 2022).

17. *See Faulkner v Ireland,* para 14 : *"The Council appointed a contractor on 23 June 2017. After works commenced in September 2017, the contractor encountered difficulties due to the occupation of the Coonagh site. The contractor's safety inspection stated that large vehicles using the road were passing close to caravans with young children in their vicinity, preventing the vehicles from safely accessing and leaving the construction site, and creating a significant risk to the public and to the occupants of the site. On 2 October 2017, the contractor notified the Council that works must cease until the site's occupants were removed, submitted a contractual claim for 531,381 euros (EUR) arising from this delay and continued to charge the Council a further EUR 10,000 for every day vehicles were unable to access the construction site."*

18. *Faulkner v Ireland,* para 109. *"In addition, the Council's intervention had also been dictated by considerations of public safety, both for the children and adults living on the Coonagh site and the construction workers seeking to carry out their tasks without harming either".*

determination, physical and moral integrity, maintenance of relationships with others and to a persons' settled and secure place in the community".[19] The principle of the positive obligation imposed on the Contracting States by virtue of Article 8, to facilitate the way of life of the Roma and Travellers, did not prevent the eviction, and the fact that the applicants had been rehoused (although not in Traveller-specific accommodation) was found to be significant. Thus, while proportionality in relation to evictions requires a clear proportionality assessment, this does not guarantee alternative Traveller-specific accommodation, or full protection against eviction.

Limitations of Article 8 – no "horizontal" application between private parties

The horizontal effect of Article 8 ECHR, i.e. whether it applies to evictions from private rented housing or as a result of mortgage repossessions, is problematic.[20] In *Vrzic v Croatia*[21] the ECtHR held that in all previous Article 8 cases involving eviction, the applicants were living in state-owned or socially owned accommodation flats, and an important aspect of finding a violation was the fact that there was no other private interest at stake. The ECtHR held that there was no violation of Article 8, despite the absence of a proportionality assessment. Indeed, the ECtHR found that in this specific case the forced sale of the house had to be considered "*necessary in a democratic society*" in view of the risks deliberately taken by the plaintiffs in borrowing a substantial amount of money for their business, and using their home as collateral. "*By not objecting to the enforcement order, which specifically concerned the sale of their house, the applicants tacitly agreed to its sale in the enforcement proceedings*".[22] However, this did not mean that the ECtHR would never examine the procedures in cases involving private parties:

> "*101. The Court is mindful of the fact that the present case concerns proceedings between private parties, namely the applicants and their creditors on the one hand and the applicants and the purchaser of their house on the other hand. However, even in cases involving private litigation, the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law (see Anheuser-Busch Inc. v Portugal [GC], no. 73049/01, § 83, ECHR 2007-I; J.A. Pye, cited above, § 57; and Zagrebačka banka d.d. v Croatia, no. 39544/05, §§ 250 and 251, 12 December 2013)*".

In *F.J.M. v the United Kingdom* (2018)[23] the ECtHR held "*prior verification of the proportionality of a landlord's repossession of his property and the eviction of the tenant could not be required in the*

19. *Faulkner v Ireland* and *McDonagh v Ireland*, Application nos. 30391/18 and 30416/18, Judgment 31 March 2022, para 95 (ii).

20. Orthodox human rights discourse often refers to "non-state actors" in this context, which, of course, in housing terms encompasses all private and corporate ownership of housing and land – in other words the very largest part and in some cases almost all. The horizontal application of right means that they could be enforced in the relations between private parties (ie. non State).

21. ECtHR Application No. 43777/13 Judgment 12 July 2016.

22. *Ibid*, Para 70: "*When the enforcement order for the sale of their house was issued, the applicants did not challenge that order by means of an appeal, as provided for under section 11 of the Enforcement Act.*"

23. *F.J.M. v The United Kingdom,* Application no. 6202/16, Judgment 6 November 2018, paras 41-46.

context of a tenancy involving private persons".[24] However, in the case of *Jansons v Latvia* (2022)[25] the ECtHR held that where the applicant had been "*arbitrarily evicted without a lawful eviction order*" from a private apartment by a private company and thus "*without his right to reside in the apartment – or the absence thereof - having been first determined by the domestic courts*" there was a violation of Article 8. The procedural safeguards provided under domestic law had failed to prevent this arbitrary interference with Article 8 rights, and thus, it would now appear that even in cases involving purely private parties a possession order is still required before a lawful eviction can take place.[26]

Proportionality in the EU Charter of Fundamental Rights (EUCFR)

The EUCFR is part of EU Treaty law and binding on Member States when they implement EU law, and it also obliges the EU institutions and bodies to respect the rights, observe the principles and promote the application of the Charter within their respective competences and mandates.[27] A number of provisions of the EUCFR were directly inspired by the European Convention on Human Rights. Many directly reflect ECHR rights, thus, it can be expected that the CJEU would take into account the Council of Europe interpretations of these rights.[28] Indeed, the *Explanations Relating to the Charter of Fundamental Rights* (The Explanations), state "*The rights guaranteed in Article 7 [of the EUCFR] correspond to those guaranteed by Article 8 of the ECHR*".[29]

However, while the EUCFR does not grant stand-alone rights, it must be applied in the interpretation of EU law (primary and secondary), and thus, in situations where EU applies the EUCFR also applies. There are examples of this interpretative role of the EUCFR in housing-related cases, such as *Kamberaj*,[30] *Sanchez Morcillo* (I)(2014),[31] and *Kusionova*[32]. Indeed, in *Kusionova* the Court of Justice of the EU ("*CJEU*") specifically invoked Article 7 EUCFR to establish whether a term relating to extrajudicial enforcement of the security for a debt on immovable property in a consumer

24. For an examination of the implications of this case see Casla, K. "*Unpredictable and damaging? A human rights case for the proportionality assessment of evictions in the private rental sector*" (2022) (3) *European Human Rights Law Review* 253-272.

25. App no 1434/14 (ECtHR, 8 September 2022).

26. App no 1434/14 (ECtHR, 8 September 2022). "*In that respect, the present case should also be distinguished from the cases of Vrzić v Croatia (no. 43777/13, 12 July 2016) and F.J.M. v the United Kingdom ((dec.), no. 76202/16, 6 November 2018), where the Court analysed court-ordered evictions and clarified that the Convention did not require that tenants be entitled to seek a proportionality assessment where possession was being sought by private-sector property owners. In contrast, the present case concerns the applicant's complaint that he was evicted without the lawfulness of this interference having been determined, and in a situation where, moreover, the requirement of a prior judicial review was expressly laid out in domestic law (see paragraph 32 above)*" (para 88).

27. *Charter of Fundamental Rights of the European Union*, OJ 2010/C 83/02. Article 51.

28. See De Schutter, O. (2016) *The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights – Study for the AFCO Committee European Parliament*, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf, p. 40.

29. *Explanations relating to the Charter of Fundamental Rights* (OJ 2007/C 303/02). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF. However, the Charter also states that in relation to the Explanations: *"Although they do not as such have the status of law, they [the Explanations] are a valuable tool of interpretation intended to clarify the provisions of the Charter."*.

30. Case 571/10 Grand Chamber, 24 April 2012. Using Article 34(3). See also Case C-94/20, *Land Oberösterreich v KV*, Judgment 10 June 2021.

31. Case C-169/14, *Morcillo and Abril García* v *Banco Bilbao*, EU:C:2014:2099. Using Article 47. See J. van Duin, "Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures Under Directive 93/13/EEC", (2017) *Amsterdam Law School Research Paper* 37; 11. Available at SSRN: https://ssrn.com/abstract=3034205 or http://dx.doi.org/10.2139/ssrn.3034205.

32. Case C-34/13, *Monika Kušionová* v *SMART Capital, a.s.*, EU:C:2014:2189.

lending contract was unfair.[33] Significantly, the CJEU held that "*Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13*",[34] setting out the clear link with Article 8 ECHR in this case:

> "*63. The loss of a family home is not only such as to seriously undermine consumer rights (the judgment in Aziz, EU:C:2013:164, paragraph 61), but it also places the family of the consumer concerned in a particularly vulnerable position (see, to that effect, the Order of the President of the Court in Sánchez Morcillo and Abril García, EU:C:2014:1388, paragraph 11).*
>
> *64. In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in McCann v United Kingdom, application No. 19009/04, paragraph 50, ECHR 2008, and Rousk v Sweden, application No. 27183/04, paragraph 137).*
>
> *65. Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13.*
>
> *66. With regard in particular to the consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the Court has already emphasised the importance for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13 (see, to that effect, the judgment in Aziz, EU:C:2013:164, paragraph 59)*".

The CJEU did not really elaborate on the complexity of the ECHR jurisprudence beyond reciting the iconic passage in detail, leaving it for the national court to carry out this assessment.[35] However, it is clear that the interpretation of EU secondary legislation has become the "*nexus*" between national procedural law, consumer law and the EUCFR.[36] Indeed, the Opinion of advocate général Laila Medina in *SP, CI v Všeobecná úverová banka, a.s.*[37] reiterated these links in the CJEU juris-

33. Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21 April 1993.

34. See Case C-34/13 paras 63-65. See also Domurath, I., & Mak, C. (2020). "*Private Law and Housing Justice in Europe*". MLR, 83(6), 1188-1220.

35. Simon-Moreno, H. & Kenna, P. (2019) "*Towards a new EU regulatory law on residential mortgage lending*", Journal of Property, Planning and Environmental Law, 11(1) 51-66: Kenna, P. & Simon-Moreno, H. (2019) "*Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights*", European Law Journal, 25 (6) 608-622: https://doi-org.proxy-ub.rug.nl/10.1111/eulj.12348; Rutgers, J. "*The right to housing (article 7 of the Charter) and unfair terms in general conditions*", in H. Collins (ed.)(2017) European Contract Law and the Charter of Fundamental Rights (Cambridge, Intersentia), 132.

36. See Kenna, P. "Introduction" in Kenna, P., Nasarre-Aznar, S., Sparkes, P. & Schmid, C.U. (ed.)(2018) *Loss of Homes and Evictions across Europe A Comparative Legal and Policy Examination* (Edward Elgar Publishing, Cheltenham), p. 41. See also Beka, A. (2018) *The Active Role of Courts in Consumer Litigation - Applying EU Law of National Court's Own Motion* (Cambridge, Intersentia).

37. Case C-598/21 *SP, CI v Všeobecná úverová banka, a.s* Opinion of AG Medina 12 January 2023. https://curia.europa.eu/juris/document/document.jsf?text=&d ocid=269163&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&-cid=13006.

prudence, and emphasised that Article 7 of the EUCFR falls within the Title II part of the EUCFR entitled "*Freedoms*", and not under the "*Solidarity*" provisions, containing Article 34(3) on the right to social and housing assistance which can only be applied in the context of EU social inclusion policies.[38] This is an important distinction, which recognises the importance of the right to respect for "*home*" within the corpus of EU law.

One outcome of CJEU legal developments relating to Article 7 EUCFR is that ECHR Article 8 rights can now be applied horizontally - via the EUCFR - to relations between private contracting parties.[39] This marks a major enhancement in the protection of borrowers against mortgage lenders.[40] The horizontal application of fundamental rights under the EUCFR (i.e. between private parties) can also be extended to the duty of national legislators to pass legislation in a Charter-compliant way, and, to subsequent judicial interpretations.[41] The EUCFR overcomes many of the limitations of other human rights instruments, such as the ECHR, which are interpreted as granting only vertical sets of rights, *i.e.* private parties against State action.

Proportionality under the UNCESCR

In 2013, the UN Committee on Economic, Social and Cultural and Cultural Rights ("*UNCESCR Committee*" or the "*Committee*") adopted an Optional Protocol[42], enabling individual complaints to be made to the Committee on violations of the International Covenant on Economic, Social and Cultural Rights ("*ICESCR*"). This facilitated the Committee to further elucidate and develop the scope of ICESCR housing rights under Article 11. Many individual complaints related to evictions, with Spanish cases taking a major role.[43] Moving beyond the confines of Article 8 ECHR jurisprudence on "*proportionality*" the Committee has broadened the application of the principle to a wider set of circumstances, as well as clarifying the obligations of the State overall, in the process.[44]

The first "*Communication*" issued by the Committee was in relation to *Ben Djazia and al. v Spain*[45] where the applicant was being evicted from an apartment at the end of a tenancy.[46] The eviction had been lawful, but the applicant and his with two children were now homeless. For the Spanish authorities, the role of the State was limited to that of mediator in a dispute between private

38. The *Explanations* state that "*The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union*".

39. Enforceability of Charter rights between private entities has been approved in such cases as C414/16, *Egenberger*, EU:C:2018:257, para. 76); Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Bauer and Willmeroth v Broßonn*, ECLI:EU:C:2018:871.

40. Collins, H. "The Challenges Presented by the Fundamental Rights to Private Law", in Barker, K., Fairweather, K. and Grantham, R. (eds.), *Private Law in the 21st Century* (Bloomsbury, 2017), 215.

41. Cherednychenko, O. "Fundamental Rights, European Private Law, and Financial Services", in Micklitz, H. ed.), *Constitutionalization of European Private Law*, XXII/2 (Oxford University Press, 2014), 203-204.

42. UN Doc A/63/435. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: 2008. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4

43. Sánchez, B. The UN Committee on Economic, Social and Cultural Rights Decision in *López- Albán v Spain*: The Need for a Proportionality Assessment in Eviction Procedures" (2020) 10 *Lex Social* 371. Due credit for presenting many of these cases must go to Javier Rubio, Centro de Asesoria y Estudios Sociales. S. Coop, Madrid.

44. Grohmann, N. "*Tracing the Development of the Proportionality Analysis in Relation to Forced Evictions under the ICESCR*" *Human Rights Law Review*, 2022, 22, 1-24.

45. (5/2015), E/C.12/61/D/5/2015.

46. All the Communications under the Optional Protocol to the ICESCR are available online at https://www.gi-escr.org/cescr-jurisprudence.

parties (similar to the approach taken by the ECtHR in *Vrziv v Croatia*[47] and *F.J.M. v UK*)[48]. In this context, however, the Committee held that the State party had an obligation to guarantee that any eviction does not violate Article 11 (1) ICESCR.[49] The State was obliged to protect ICESCR rights from both direct and indirect interference. The Committee unequivocally stated that "*the scope of the provisions of the Covenant extends to relations between individuals*".[50] The Committee focused on the failure to provide alternative accommodation and held that in cases of eviction, this *lacuna* could amount to a violation of Article 11 unless the State took all appropriate measures to the maximum of its available resources.[51]

In *López Albán v Spain*[52] the applicant was the mother of six children and had leased an apartment from a person with no legal title to it. The actual owner (bank) sought possession, which was granted by a local court, and the family were evicted. The Committee considered such forced evictions from dwellings where the occupant did not have a legal right to occupy, and held that "*evictions are prima facie incompatible with the Covenant [ICESCR] and can only be justified in the most exceptional circumstances*".[53] The duty on a State party to the ICESCR to ensure that that alternative accommodation is available applies regardless of who is causing the eviction – even a private entity. The Committee noted that the national court "*did not conduct an analysis of the proportionality of the legitimate objective of the eviction to its consequences for the persons evicted*"[54]. Thus, the State party had violated Article 11 ICESCR. However, the Committee held that the requirement to carry out a proportionality assessment also flowed from Article 4 ICESCR as well as Article 11.[55]

The case of *Rosario Gómez Limón Pardo v Spain*[56] concerned an elderly woman who was evicted from an apartment that she had rented for most of her life. She was not entitled to social housing and claimed that she was not offered appropriate alternative accommodation by the State. This meant that she was forced to move into temporary accommodation where she lacked any security of tenure. In the clearest exposition of the requirements of the proportionality analysis from the perspective of the ICESCR the Committee held that:

> "*9.4. When an eviction might result in a person's being deprived of access to adequate housing and exposed to a risk of destitution or some other violation of his or her Covenant rights, an obligation to analyse the proportionality of the measure arises. This obligation flows from the interpretation of the State party's obligations under article 2 (1) of the Covenant, read in conjunction with article 11, and in accordance with the requirements of article 4. (…) Firstly,*

47. ECtHR Application no. 43777/13 Judgment 12 July 2016.

48. ECtHR Application no. 6202/16, Judgment 6 November 2018.

49. *Ben Djazia et al. v Spai*n, Para 14.1.

50. *Ibid*., Para 14.2.

51. *Ibid*., Para 16.6.

52. (37/2018), E/C.12/66/D/37/2018.

53. *López Albán v Spain, p*ara 8.2. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/66/D/37/2018&Lang=en

54. *López Albán v Spain*, para 11.5.

55. Article 4 ICESCR states: The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

56. (52/2018), E/C.12/67/D/52/2018. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?Lang=en&symbolno=E%2FC.12%2F67%2FD%2F52%2F2018

> *the limitation must be determined by law. Secondly, it must promote the general welfare in a democratic society. Thirdly, it must be suited to the legitimate purpose cited. Fourthly, the limitation must be necessary, in the sense that if there is more than one measure that could reasonably be expected to serve the purpose of the limitation, the least restrictive measure must be chosen. Lastly, the benefits of the limitation in promoting the general welfare must outweigh the impacts on the enjoyment of the right being limited. The more serious the impact on the author's Covenant rights, the greater the scrutiny that must be given to the grounds invoked for such a limitation. This analysis of the proportionality of the measure must be carried out by a judicial or other impartial and independent authority with the power to order the cessation of the violation and to provide an effective remedy. This authority must analyse whether the eviction is compatible with the Covenant, including with regard to the elements of the proportionality test required by article 4 of the Covenant as described above.*[57]
>
> *9.5. (...) A State will be committing a violation of the right to adequate housing if it stipulates that a person whose rental contract is terminated must be evicted immediately, without regard to the circumstances in which the eviction order would be carried out.*"[58]

Thus, the requirement of proportionality in the context of forced eviction has now emerged as an established procedural safeguard in UNCESCR monitoring of the right to housing under Article 11 ICESCR – even in cases of private rented housing law. In its Concluding Observations to Latvia in 2021, the UNCESCR noted its concern about a new draft Law on Residential Tenancy, which "*weakens the rights of the tenants considerably, and that landlords will be allowed to bring actions before domestic courts requesting the eviction of tenants on a no-contest basis*".[59] The UNCESCR recommended that the courts apply a proportionality analysis in their decisions on eviction of tenants, in cooperation with the social services offices concerned, so that tenants who fail to pay the rent under difficult circumstances will not become homeless.[60]

Thus, the UNCESCR might present itself as a strategic choice for complainants from Europe in countries which have ratified the Optional Protocol, leaving aside the normative difference between a judgment rendered in Strasbourg and the views adopted in Geneva.[61]

57. *Rosario Gómez Limón Pardo v Spain*, para 9.4.

58. *Ibid*., para 9.5.

59. UN Doc. E/C.12/LVA/CO/2. UNCESCR, Concluding observations regarding Latvia 30 March 2021. Para 36. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/075/46/PDF/G2107546.pdf?OpenElement

60. *Ibid*, para 37.

61. *Ibid*., at 23. Council of Europe States which have ratified the Optional Protocol on Economic, Social and Cultural Rights at October 2022 are: Armenia, Belgium, Bosnia and Herzegovina, Finland, France, Italy, Luxembourg, Montenegro, Portugal, San Marino, Slovakia and Spain.

Conclusions

The contentious role of the ECtHR in defining human rights, and its increasing deference to States "*margin of appreciation*" especially on rights which involve any socio-economic issues, are becoming evident, despite the powerful rationale set out in *Airey*.[62]

While any interference with the "*right to respect for one's home*" under Article 8 ECHR must satisfy a proportionality test, this only applies in a "*vertical*" way within the ECHR jurisprudence in relations between the applicant and the State (largely public/state land and housing). It reflects the traditional liberal concept of civil and political rights as barriers to interference with liberty and property by the State – reflecting classical liberal political development against feudal systems. Although Article 8 cases have established important precedents in relation to evictions from State from public land and buildings , the great majority of evictions take place today – not from State land, but as a result of the termination of private housing relationship, tenancies or contracts – even mortgage defaults. The ECtHR, in one significant case, *Vrzic v Croatia*[63], has pointed out that even in cases involving purely private (non-State) parties, the State is under an obligation to ensure the necessary procedural guarantees which enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law.

However, the horizontal application of the right to respect for home (ie. between private parties, landlords, lenders, tenants/borrowers, squatters on private land) is being better advanced in EU law and in the UN human rights monitoring systems. This is leading to a more expansive and modern approach, which addresses the contemporary place of consumer law and human rights law, as well as established modern State obligations in housing. There is much room for the ECtHR to move beyond its current deference to the "*margin of appreciations*" of States, and further to define the scope of positive obligations in order to protect the socio-economic rights of the vulnerable and socially disadvantaged people.[64] The jurisprudence of the UN and EU on proportionality offers much inspiration for development.

62. *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979). For instance, see *Hudorovič and Others v Slovenia* App nos 24816/14 & 25140/14 (ECtHR, 10 March 2020), at para 158. *"Reiterating, firstly, that the applicants received social benefits which could have been used towards improving their living conditions, secondly, that the States are accorded a wide margin of appreciation in housing matters, and thirdly, that the applicants have not convincingly demonstrated that the State's alleged failure to provide them with access to safe drinking water resulted in adverse consequences for health and human dignity, effectively eroding their core rights under Article 8 (see paragraphs 115-16 above), the Court finds that the measures adopted by the State in order to ensure access to safe drinking water and sanitation for the applicants took account of the applicants' vulnerable position and satisfied the requirements of Article 8 of the Convention."* See also dissenting judgments by Egidijus Kūris and Darian Pavli, *judges.*

63. ECtHR Application No. 43777/13 Judgment 12 July 2016.

64. Palmer, E. "*Beyond Arbitrary Interference: The Right to a Home? Developing Socio-Economic Duties in the European Convention on Human Rights.*" NILQ, vol. 61, no. 3, Autumn 2010, 225-244, at 244.

Chapter IV

Controlling property markets against price and rights abuses

This chapter is based on two postulates. On the one hand, regulating real estate markets and strictly limiting the margin of action of private actors in the general interest is a requirement for the full respect of positive obligations intended to make the right to adequate housing effective. On the other hand, such public interventionism is not, as a matter of principle, contradictory to the law and general principles of the EU, especially where it is in line with fundamental social rights.

The European Union is not entirely and solely responsible either for the reconsideration of the services of general interest and protective legislation for inhabitants, or for the financialization of housing and the land on which it is built. The Member States that direct national and European policies have their share of responsibility in the deregulation of the housing sector, through the decisions they take - or refrain from taking - on their own initiative, without direction from the European Commission. The discussion concerning the actual room for manoeuvre and the powers of States to maintain or return to interventionist policies in housing is carried out here through a comparative approach, a imed at deconstructing common beliefs regarding the public regulation of European private rental markets.

It is on the ideological level that the drivers of such divisions in policy are based, and movements in regulation/liberalisation mirror these ideological/political approaches. It is only when the social consequences of these policies reach such a degree of gravity that they can no longer be ignored (without risk to public order), that there is political agreement to grant a minimal level of substantive provision, which can sometimes be defined in terms of the right to housing.

Legal measures that protect human rights suffer from the instability of politics, the vagaries of the economy and the weakness of economic and social rights, which limit real progress towards a sustainable balance. The diversity of objectives pursued by a multiplicity of actors with very different characteristics and priorities, whether public or private, collective or individual, makes it difficult to maintain a sense of commonality and general interest. Human rights do not generally in Europe direct legislators, political programmes, or the amount of funding in the field of housing. They only influence them, and produce adjustments, the purpose of which is often only the amelioration of desperate situations of deprivation.

A different approach to rights is taken by many entities and associations who view the right to housing in the sense of article 11 of the ICESCR, to be achieved through positive obligations to ensure access to adequate housing for all (continually evaluated) and achieving this through the ordering of the housing sector. Rather than a focus on any acceptable level of deprivation of adequate housing further emphasis should be placed on recognition of existing national and international provision, and how it can benefit everyone. All past and future decisions can be examined in the light of this objective, with no regression or dilution.

Discharge and rent control in Germany

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Residential tenancy law in Gemany (*Wohnraummietrecht*) plays an important role, as tenants make up the majority of the population. Germany is second in Europe in this regard, just after Switzerland. Some 54% of people in Germany live in rented flats, and in big cities this number is even higher. For instance, in Berlin, 84% of the population are tenants.

The level of rented housing (*Mietbelastungsquote*) is constantly increasing. During the "*economic miracle*" (*Wirtschaftswunder*), in the 1950s and 1960s, Germans spent on average some 10% of their income on housing. In the 1980s, this figure increased to 20%. Today, it has reached an average of 30%, after a continuous increase since the global financial crisis of 2008. The property market has become an important financial investment, at the expense of housing access and affordability.

At the same time, the traditionally important public housing sector (*gemeinwohlorientierter Wohnungssektor*) in Germany has shrunk. Tax incentives encouraging social housing were abolished in the late 1980s, and large stocks of municipal housing were sold to the private sector. The number of social housing units, which was still as high as 4 million in the late 1980s in West Germany, has fallen to about 1 million nationwide today.

Germany has not had such a free housing market for more than a century, and yet – or precisely because of this – rents are rising and tenancy law no longer offers tenants a sufficient level of protection.

Historical Overview

From the 1920s onwards, Germany strongly regulated rents and provided a high level of protection against the termination of tenancies by landlords. While tenant protection remained in the "*DNA*" of the GDR until reunification, West Germany experimented with the liberalisation of tenancies and rents in the 1960s. However, due to the rapid rise in rents, the first social-liberal coalition administration in West Germany created the German social tenancy model in 1971, which is still in force today, albeit with some modifications.

In principle, parties can freely conclude a tenancy agreement, in compliance with the law, and this agreement cannot be terminated by the landlord as long as the tenant complies with their obligations. The "*notice for change of rent*" (Änderungskündigung), by which the tenant is required by

the landlord to agree on a higher rent, in order to comply with rent contract, is prohibited. Fixed-term leases are only possible within narrow limits.[1]

During the course of the lease, landlords can only increase the rent up to the "*local reference rent*" (*ortsübliche Vergleichsmiete*): they can ask for the rent that other landlords already charge for comparable dwellings. But in order to protect tenants, the increase cannot exceed 20% or 15%[2] over a three-year period.

Landlords can also modernise their dwellings and modify their equipment, and then pass on the cost of these improvements to the tenants (currently 8% per year without time limit), who cannot object to these improvements.[3] For a long time, this was one of the main ways to evict tenants, but since 2019, the distribution of these modernisation costs is limited to three or two euros per square meter and per month (depending on the initial rent) for a period of six years.[4]

In the last ten years, the legislator tried to come to terms with the development of local housing markets in which housing supply on reasonable terms is especially endangered. To achieve this goal, Germany has placed rent controls (*Mietpreisbremse*) on the re-letting[5] of dwellings in areas

1. § 575 of the Bürgerliches Gesetzbuch (BGB, German Civil Code): *"Temporary tenancy agreement*
(1) A tenancy agreement may be entered into for a fixed period if the landlord, after the expiry of the tenancy period
1. intends to use the premises as a dwelling for himself, members of his family or members of his household,
2. wants to remove the premises in a permissible manner or to alter or repair them in such a substantial way that the measures would be considerably impeded by a continuation of the tenancy, or
3. wishes to let the premises to a person obliged to provide services
and he informs the tenant in writing of the reason for the time limit at the time of conclusion of the contract. Otherwise, the tenancy shall be deemed to have been concluded for an indefinite period."

2. The federal law says 20% but gives the federal states the opportunity to change this to 15% if the sufficient supply of the population with rental housing on reasonable terms in a municipality or part of a municipality is particularly endangered.

3. § 555b of the BGB: *"Modernisation measures: Modernisation measures are structural changes:*
1. through which final energy is sustainably saved in relation to the rented property (energy modernisation),
2. through which non-renewable primary energy is sustainably saved or the climate is sustainably protected, unless an energy modernisation according to number 1 has already been carried out,
3. through which water consumption is sustainably reduced,
4. which sustainably increase the utility value of the rented property,
4a. by which the rented property is connected for the first time by means of optical fibre to a public network with very high capacity within the meaning of Section 3 No. 33 of the Telecommunications Act,
5. through which the general living conditions are permanently improved,
6. which are carried out due to circumstances for which the landlord is not responsible and which are not maintenance measures pursuant to § 555a, or
7. new living space is created."

4. § 559 of BGB: "*Increase in rent after modernisation measures*
(1) If the landlord has carried out modernisation measures within the meaning of § 555b (1), (3), (4), (5) or (6), he may increase the annual rent by 8% of the costs incurred for the accommodation. (...)
(2) Costs which would have been necessary for maintenance measures shall not be included in the costs incurred in accordance with paragraph 1; they shall, if necessary, be determined by means of an estimate. (...)
(3a). Where the annual rent is increased in accordance with paragraph 1, the monthly rent may not increase by more than EUR 3 per square metre of floor space over a period of six years, with the exception of increases in accordance with sections 558 or 560. By way of derogation from the first sentence, if the monthly rent before the increase is less than EUR 7 per square metre of living space, it may not be increased by more than EUR 2 per square metre of living space.
(4) An increase in rent shall be excluded if, even taking into account foreseeable future operating costs, it would cause the tenant to suffer hardship which cannot be justified even taking into account the legitimate interests of the landlord. The first sentence shall be disregarded if
1. the rented property has merely been restored to a condition which is generally customary, or
2. the modernisation measure has been carried out due to circumstances for which the lessor is not responsible.
(5) Circumstances that justify a hardship pursuant to subsection (4) first sentence shall only be taken into account if they were notified in good time pursuant to section 555d subsections 3 to 5. The provisions relating to the time limit referred to in the first sentence shall not apply if the actual rent increase exceeds the announced increase by more than 10 per cent.
(6) Any deviating agreement to the detriment of the tenant shall be ineffective."

5. This regulation therefore does not apply to first-time tenants.

under pressure[6]: landlords may not charge rents that exceed the reference rent by more than 10%. For areas where the supply of the population with housing on reasonable terms is particularly endangered, the state government there can enact regulations to protect against terminations in the case of conversions to condominium ownership and to lower the limit for rent increases.

Protection of tenants against dismissal by their landlord

An open-ended lease can be terminated by the tenant with three months' notice and by the landlord with three, six or nine months' notice, depending on the duration of the lease. However, landlords can only give notice if they can show a legitimate interest. Basically, there are two authorised grounds for giving notice to tenants who comply with their contract: "*personal need*" (*Eigenbedarf*) or the prevention of reasonable economic exploitation. Terminations for exploitation are few (although increasing), whereas terminations for personal need are increasing dramatically, especially in urban centres. In this case, landlords can give notice if they need the accommodation for themselves, their family members or members of their household.

The caselaw is very flexible regarding who can benefit from the repossession of the dwelling, and the use that will be made of it, favouring landlords: occasional visits of children living in a foreign city, the moving in of a nephew or an au pair are considered as valid reasons.

Tenants can object to the termination of their contract if it places them in a particularly difficult situation: the recognised reasons for a valid objection are mainly serious illness. Only if the tenant's interest in the accommodation outweighs the landlord's interest can tenants remain in the accommodation, for a limited period of time. The procedures often end in transactions (*Vergleich*): the tenants leave the premises and receive a more or less important financial compensation. Termination for personal reasons is often an excuse for evicting a tenant, but it is rarely possible to prove it.

Termination for non-compliance with the contract is possible without notice for late payment (however, a little more than one month's rent is sufficient), for unauthorised subletting, or for disturbing neighbours.

However, eviction is only possible through execution of a court order. Exceptions are very limited, and are only ordered by the judge following an application for interim measures by the tenant (*einstweiliger Rechtsschutz*). A case usually lasts four to six months. If tenants are ordered to vacate, they are usually given a period of up to one year to find a new accommodation.

6. § 556d of BGB: "*Amount of rent permissible at the start of the lease; power to issue a regulation*
(...) Areas with a tight housing market are defined as areas where the provision of sufficient rental accommodation for the population on reasonable terms in a community or part of a community is particularly threatened. This may be the case, for example, if:
1. rents increase significantly more than the national average,
2. the average rental costs of households are significantly higher than the national average,
3. the resident population is increasing without new housing being built to meet the need, or
4. there are few vacant dwellings while demand is high (...)"

Protection against conversion to joint ownership

In Germany, land and building ownership are not separated. However, it is possible to divide up land and buildings and then market "*portions*" of the property by selling the flats individually, thus creating a "*joint ownership*". This is a lucrative business where the sum of the income generated from the sale of individual flats is many times the original value of the entire building sold.

The occupants are then seriously endangered by the terminations that the new owners issue because of personal need. For this reason, when the building is split up into condominiums, purchasers are prohibited for three years from terminating the leases of tenants who had already been living in the property on grounds of personal needs. In tension areas, this period can rise up to 10 years. In addition, the property must be first offered for sale to the existing tenants.

Protection in rent setting

a. The local reference rent *(Ortsübliche Vergleichsmiete)*

The local reference rent is the core of German legislation. It consists of the rents agreed or contractually modified by contract during the last six years in the municipality or in comparable municipalities for dwellings of comparable type, size, equipment, characteristics, including energy, and location. Rents that have not been increased for more than six years are not taken into account in determining the reference rent. These are generally the lowest rents. Structurally, this system allows for an ongoing increase in rents, as the reference rent is regularly higher than the average rent recorded locally.

The reference rents are listed in an official list of rents, called the "*rent mirror*" (*Mietspiegel*), established by the municipalities. In order to be considered "*qualified*", they must be established according to recognised scientific principles[7]. This has to be recognised by the municipalities, landlords' and tenants' representatives. After much controversy about the quality and therefore the compulsory nature of official rent lists, the legislator has now specified the criteria for drawing up such lists and compels municipalities with more than 100,000 inhabitants to draw up such lists. They are accessible and can be obtained free of charge.

In the absence of a valid official list in a municipality, the local reference rent is determined by surveys, the costs of which are often disproportionate with the rent charged and the results of which are generally unfavourable to tenants.

Landlords can increase the rent every fifteen months within a double limit: the new rent requested must not exceed the local reference rent; the increase is limited to 20% over three years. In tension areas, this limit can be lowered to 15% by the Länder government. The current government coalition plans to lower it to 12%.

From a legal point of view, this is a contract amendment. If tenants refuse the amendment, landlords can go to the district court up to three months after the proposed increase. If the higher rent is approved by the Court the tenant will be obliged to agree to it and the rent rises. If the increase is not so approved the rent stays unchanged.

7. This work is usually carried out by specialised institutions through ad hoc surveys of landlords and tenants, differentiating between legal criteria such as location, equipment and age group.

b. Rent control *(Mietpreisbreme)*

In areas where the housing market is tight, the state government may provide that the rent may not exceed the local reference rent by more than 10%. However, there are many exceptions and restrictions. For example, the rent control does not apply to new dwellings or to first-time tenants after a complete modernisation. But, even if landlords have not comprehensively modernized, they can pass on the cost of the modernisation to the rent. Finally, landlords who were charging excessive rents before the regulation came into force were able to maintain those previous higher rents.

If a rent is too high, tenants can complain to their landlord and, if necessary, have the overvaluation established by the civil courts, demanding reimbursement of the overcharge.

Rent controls were introduced by the Great Coalition in 2015 and have been debated since then, which made their implementation very difficult. Since its confirmation of their validity by the Federal Constitutional Court in 2019[8], legal proceedings concerning rent control are increasing. However, non-compliance with the rent controls does not lead to public sanctions.

c. Excessive rent increases *(Mietpreisüberhöhung)*

Section 5 of the Wirtschaftskriminalgesetz (*WiStrG*) prohibits landlords from setting a rent that exceeds the local reference rent by more than 20 %. Any infringement of this rule can lead to a fine.

Under this provision, which dates back to the 1970s, the public administration could ensure the stability of the general level of rents. This was a simple and inexpensive procedure for tenants. At the same time, tenants could themselves claim back the amount that was charged above the statutory limit by their landlord.

In 2005, the Federal Court of Justice put an end to this practice and considerably narrowed the scope of this provision. According to the current caselaw of the Court, a proof that landlords took advantage of the tenants' distress when concluding the tenancy agreement is now required for Section 5 WiStrG to apply. Since then, this regulation has hardly played any role.

d. The rent ceiling *(Mietendeckel)* **in Berlin**

In Berlin, a city that has been affordable for tenants for decades, rents are rising at a much higher than average rate and are now approaching the levels of Hamburg, Frankfurt and Munich.

In 2019, a rent freeze (*Mietendeckel*) was introduced for five years with a maximum rent allowed on re-letting, based on 2013 rents: rents were capped at 20% above, under penalty of a fine for non-compliance by landlords. All tenants had to be informed by their landlord of this maximum allowed rent, which was much lower than the local reference rent. Rents were sometimes drastically reduced. The issue of rent and the idea that it could be too high was thus fully appreciated by the tenants. As expected, the freeze gave Berliners a break from the stress of daily rent hikes.

The regulation was adopted by the state of Berlin for the whole city. The adoption of this cap, which partly changes federal tenancy law, was considered as legally justified thanks to the legislative competence in the field of housing that was partially transferred to the Länder in 2006,

8. The decision in German: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/07/lk20190718_1bvl000118.html ; Its summary in English: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/07/lk20190718_1bvl000118en.html.

following a reform of the German Constitution. However, in April 2021, the Federal Constitutional Court annulled the Berlin law on the grounds that rent legislation is an exclusive competence of the federal state, leaving no place for regulation at state level. This hopeful project thus failed, despite having the approval of over 70% of Berliners.

Housing subsidies

The level of rents in Germany is very difficult to bear for many people. Those with low incomes can apply for housing subsidies through the unemployment benefit (*Sozialgesetzbuch II*) and social assistance.

However, only reasonable rents are subsidized, i.e. rents for reasonably equipped dwellings in a simple residential area. If the actual rent exceeds the reasonable rent, it is not covered. If the rent increases during the course of the lease beyond the reasonable limit, tenants are asked to look for new accommodation within six months. However, there is hardly any low-cost housing left in the major cities and poor tenants are gradually being excluded.

People with a slightly higher income can claim for a housing allowance (*Wohngeld*). But it is so low and formalised that it cannot compensate for the lack of solvency.

Conclusion

As has been demonstrated above, the German Federal Court of Justice interprets tenancy law often at the expense of tenants. As it is politically difficult to reduce tenants' rights by changing the legislation, because of the high proportion of tenants, the conservative judiciary does it.

In practice, therefore, protections are insufficient, even more so when the market is under pressure, as it is today. They need to be strengthened to better protect low-income people.

The possibilities for the landlord to terminate the lease for personal need and for late payment (and other breaches of contract) should be further restricted. All rents should be included in the determination of the local reference rent, even the oldest and thus the lowest ones. The rent freeze (*Mietenstopp*) should be allowed in particularly stressed areas facing a housing crisis and §5 WiStrG – as originally applied – should be reactivated.

A rent ceiling should be introduced into federal law and not only in the federal states local legislation, with the possibility for the states or municipalities to place it where the tightness of the rental market justifies it. A reform along these lines would be simple. However, so far, local initiatives to this end have all failed in the Federal Council (*Bundesrat*).

At the same time, it is essential to strengthen the public housing sector. This is what the new federal government has announced. We are waiting to see whether and how this will be implemented. The prospect of nationalising large housing firms, as demanded by Berliners in a referendum (on 26 September 2021), is also hopeful.

Social housing in France and European law

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The right to housing is recognised in several European Union Member States as well as in European instruments for human rights, such as the European Social Charter. The EU treaties recognise common values, including human dignity, fighting exclusion, and promoting social cohesion. The Charter of Fundamental Rights of the European Union – article 34§3 – states: *"In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices."* EU law and jurisprudence also recognises the existence of fundamental rights that are absent from the Treaties but recognised in various Member States. The right to housing benefits from this recognition under EU Treaty law.[1]

In France, social housing bodies (hereafter HLM) play an important role in making the right to housing a reality. Article L. 411 of France's Construction and Housing Code (CCH) states that "*building, planning, allocation, and management of rented social housing aims to improve the living conditions of people on low incomes and disadvantaged sections of the population. These activities play a role in the implementation of the right to housing and contribute to the necessary social mix in cities, towns, and neighbourhoods."*

Fulfilling this goal – which national authorities consider to be in the general interest – can sometimes conflict with the fundamental freedoms of community law and the establishment of the common market.

A balance must therefore be found between the diverse objectives of the European Union and the implementation of fundamental rights, such as the right to housing. This is achieved in stages by calling on different concepts (such as Services of General Economic Interest, or "*overriding reasons relating to the public interest*") which can (I) ensure the legal context for French social housing is compatible with community law and (II) support the development of social housing, thus contributing to the effectiveness of the right to housing.

1. Under Article 6 TFEU which states: The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. sources of those provisions. of the Lisbon Treaty. Article 34 (recognises a right to social and housing assistance.

I. The compatibility of French social housing with EU community law

The roles, organisation, and financing of social housing producers (hereafter "*HLM bodies*") are regulated by the French legislature.[2] This legal framework can conflict with some provisions of EU law and, as such, complicate implementation of the right to housing. However, recognising that HLM agencies are responsible for a service of general economic interest (SGEI) makes the required adaptation possible and creating specific provisions ensures compatibility with EU law.

A. Services of general economic interest (SGEI) and HLM bodies

The EU Treaties recognise the role of services of general interest. Their implementation guarantees citizens" legal rights, particularly the right to housing.

Article 14 of the Treaty on the Functioning of the European Union (TFEU) states that, *"without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions."*

Protocol 26 of the TFEU treaty also deals with this issue.[3]

In France, as long ago as 1992, the Council of State recognised that the HLM bodies "*taking into account the mission invested in them in the field of social housing, enter into the scope of the above-mentioned stipulations of article 90[4] of the Treaty of Rome*"[5] in their provision of a service of general interest.

Article L. 411-2 CCH states [in French] that *"the HLM bodies mentioned in the previous paragraphs benefit - in accordance with Commission Decision 2012/21/EU of 20 December 2011, on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest - from tax exemptions and specific state aid for general interest services [...]."*[6]

2. France's Construction and Housing Code, Book IV.

3. Protocol (No. 26) on Services of General Interest: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A12012E%2FPRO%2F26.

4. *"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 7 and Articles 85 to 94 inclusive.*
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

5. Council of State, France, 24 April 1992, 116489.

6. *"[...] defined as:*
- the construction, acquisition, improvement, allocation, management, and sale of rent-controlled housing [...];
- carrying out initiatives enabling people with incomes below the threshold to access home-ownership [...];
- management and acquisition for the purpose of reselling [...] housing units within apartment buildings with significant problems [...]."

This important qualification aligns the regulatory framework of HLM bodies with European fundamental freedoms and principles and enables the creation of a national legal framework – defining the legal forms, competencies, and obligations of public service as well as how it is financed – which could otherwise be incompatible with EU rules on competition and the internal market.

B. An exemption framework that is compatible with EU community law

In the event of a conflict between fulfilling the goals of SGEIs and respecting EU law provisions, the TFEU provides a resolution method in article 106(2):

> *"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."*

1. Competition rules

This provision was used with regard to state aid granted to HLM bodies. Public funding or State Aid which distorts competition is, in principle, forbidden under community law (article 107 TFEU[7]).

On foot of several community case law rulings,[8] a financing framework for certain SGEIs, including social housing, was adopted by the European Commission in 2005,[9] and renewed in 2011,[10] in order to bring legal security to those responsible for this mission, such as HLM bodies.

The exemption framework resulting from Decision 2012/21/EU of 20 December 2011[11] does not give *carte blanche* to States regarding granting public funding to the undertakings concerned, but rather defines – under certain conditions – an *a priori* compatibility of this aid, which is exempted from notification. These conditions include: the existence of a clear mandate defining the obligations of public service; the prior identification of any compensation and overcompensation in this respect; as well as the application of transparency rules.

The French national framework, having been tested a few times, seems respectful of this exemption and thus compatible with EU law.

7. " *1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

8. See the "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest", European Commission, Brussels, 29 April 2013, SWD(2013) 53 final/2, https://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf.

9. European Commission Decision 2005/842/EC of 28 November 2005, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32005D0842

10. Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012D0021.

11. *Ibid.*

Financing social housing in France is regulated and organised[12] through a combination of subsidised bank loans, subsidies, social contributions provided for by law, and tax exemptions, classified as state resources in community law. Without this specific financial organisation, the mission of HLM bodies, which includes implementing the right to housing, could not be achieved.

2. The internal market

This mediation of legal frameworks, to facilitate the EU's shared values and rights, was also sought within the internal market and free movement rules during adoption of the Services Directive,[13] as the organisational forms of HLM bodies could be considered contrary to the freedom of establishment. Due to the "*overriding reason relating to the public interest*", applicable in this case, an exemption framework was created enabling services related to social housing to be excluded from the Directive's text.

The search for legal co-existence between community law and the effectiveness of fundamental rights, such as the right to housing, has been supported at European level by other policies also.

II. European support for social housing to ensure the right to housing

Public financing plays a fundamental role in the effectiveness of the right to affordable, decent, adapted, energy efficient housing, and is a key condition when it comes to social housing.

The European institutions, conscious of this issue, adopted in 2017 the European Pillar of Social Rights, principle 19 of which stipulates that "*Access to social housing or housing assistance of good quality shall be provided for those in need.*"[14] This pillar does not create new rights but obliges European institutions to support all its principles in their own policies and competencies. In 2018, the Task Force report on investing in social infrastructure in Europe, chaired by Romano Prodi and Christian Sautter, noted a shortfall of EUR 57 billion per year for housing.[15]

Thus European economic governance plays an essential role in State's capacity to invest in social housing, while at the same time, the coherence and coordination of European policies is vital to support HLM bodies in their mission.

12. *"Financing social housing. Once the decision to build social housing has been made by the community, the State or by a HLM body, the operation can be financed by different stakeholders depending on the objectives of the housing. (...) Social housing can be financed by: the State (mainly through fiscal aid); local communities (at the level of région, département, agglomération, commune, etc.); the CDC (French Fund for Deposits and Consignments) which grants very long-term loans backed by popular savings schemes such as Livret A. Loans of 30-70 years constitute almost 75% of the financing; Action Logement (a social landlord funded by a 1% levy on employers); landlords themselves with their own funds. Depending on the financing that they have provided (land, subsidies, etc.), the financiers have quotas of reserved apartments, for which they suggest tenant applicants, depending on the applicant's family situation, income, and level of instability. These financiers are called the "grantees" and have a quota. The State also has a quota per prefecture.* "In French at *https://www.ecologie.gouv.fr/logement-social-hlm-definition-categories-financement-attribution-acteurs*

13. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

14. The 20 key principles of the European Pillar of Social Rights: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

15. Directorate-General for Economic and Financial Affairs, Fransen, L., Bufalo, G., Reviglio, E., Boosting investment in social infrastructure in Europe: report of the High-Level Task Force on Investing in Social Infrastructure in Europe, Publications Office, 2018, https://data.europa.eu/doi/10.2765/794497.

A. Economic and political governance of housing: public deficits versus investment

Following the 2009 economic crisis, the establishment of European economic governance,[16] and particularly the European Semester,[17] has had a tangible impact on Member States' capacity to invest in housing policies. Much of the EU institutional analysis is based on a narrow analysis of public spending, ignoring its goals and the social and economic benefits that flow from the effective implementation of rights.

The social housing sector in France, since 2016, has suffered the consequences of this narrow vision of investment. One European Commission Report in 2016 on macroeconomic imbalances stated that:

> "*France spends significantly more on housing than its European peers. (…) More specifically, the 2.3 % of GDP expenditure on housing are split between housing benefits seeking to improve access to housing rental or ownership and targeting housing demand and representing 40 % of public spending for housing (0.9 % of GDP) and subsidies to housing supply and renovation as well as to the social rental sector (1.4 %). (…) Despite higher spending than other European countries the housing market situation in France has not improved significantly since the years 2000. (…) The objective of the housing policy in France to ensure decent housing to all according to their means is only partially achieved. The French housing policy is not progressive as well-off families can benefit both from social transfers for working-age dependent children (students) and tax deductions. Not all the housing benefits are means-tested and this creates a bias in the redistribution role of the housing policy in France. Moreover, the housing supply issue remains unsolved and is aggravated by the definition of the housing policy objectives at the national level, while their implementation is delegated to the lowest administrative level (commune), which grants building permits and takes the decisions to build.*"[18]

In 2017, the European Semester Report for France concluded that:

> " *(…) the criteria for accessing social housing leads to suboptimal outcomes. Turnover of tenants in the social housing sector is low at between 10 and 15 years, compared to around three years in the private rental sector. The financial situation of social housing tenants is not periodically reassessed to verify if the tenants still qualify for such lower-cost housing (Cour des Comptes, 2017f). Since 70 % of the population can claim access to social housing, waiting lists are long (1.7 million people in 2014) and only some particular situations lead to priority treatment of files (Agence Nationale pour l'information sur le logement). As a consequence, housing supply remains locked in the hands of insiders and access is not always granted to those most*

16. "*Economic governance refers to the system of institutions and procedures established to achieve Union objectives in the economic field, namely the coordination of economic policies to promote economic and social progress for the EU and its citizens. The financial, fiscal and economic crises that began in 2008 showed that the EU needed a more effective model of economic governance than the economic and fiscal coordination in force until then. Developments in economic governance, still ongoing, include reinforced coordination and surveillance of both fiscal and macroeconomic policies and the setting-up of a framework for the management of financial crises.*" https://www.europarl.europa.eu/factsheets/en/sheet/87/gouvernance-economique

17. "*The European Semester provides a framework for the coordination of economic policies across the European Union. It enables EU countries to discuss their economic and budgetary plans and to monitor their progress at specific times in the year.*" https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en

18. Country Report France 2016, Including an In-Depth Review on the prevention and correction of macroeconomic imbalances, European Commission staff working document, SWD(2016)79 final, 26 February 2016.

in need."[19]

These EU institutional analyses contributed to the establishment of reforms that led to substantial budget cuts of EUR 1.3 billion per year and have in turn led to a significant drop in the production of social housing in France.[20]

B. European policies supporting social housing: a need for coherence and coordination

The adoption in 2017 of the European Pillar of Social Rights introduced a new factor into EU institutional approaches on housing expenditure at national level, informing Semester Reports in a different way on how housing expenditure could be analysed at EU level.

In 2018, the European Semester report on France stated that the reforms undertaken had led to a fall in housing investment, despite this investment being necessary – particularly with regard to affordable housing – in order to reduce inequalities. The supply of social housing in some regions was considered insufficient, and the Report suggested that "*stronger investment in social housing, especially in areas with high demand, could reduce social distress and foster labour mobility*."[21] The Elan Act[22] had made it easier to privatise HLM housing, however, and the European Commission Report had called in 2019 into question, as it could lead "*to the privatisation of up to 40,000 social housing units per year (compared to the current 8,000 units per year) with potential risks for social housing shortages.*"[23]

The European Commission Semester Report for 2019 noted that "*the French Social protection system performs well in comparison to the rest of the world*", even though problems around the disposable income of specific sections of the population remain (for example, households on less than 60% of median income) with this being largely due to housing costs.[24]

The European Commission in 2019 stated, for all of Europe, that:

> "*developments in the housing market can affect financial stability and thereby require action in some Member States. Housing is often the main asset held by households, and, at the same time, housing-related lending accounts for a large share of total lending in the economy. Moreover, scarcity of adequate and affordable housing is a growing problem in several Member States.*"[25]

Since then, the COVID pandemic, the war in Ukraine and its consequences on energy prices have wreaked havoc on European economic governance and public investment, suspending the Stability and Growth Pact. Investment in housing policy (with the exception of energy efficiency) has

19. 2018 European Semester: Country Report – France, p. 25, https://commission.europa.eu/publications/2018-european-semester-country-reports_en.

20. *Le livre noir de la réforme des APL* [The Black Book of APL (personal housing allowance) Reform], Union sociale de l'Habitat, 2019; Loi Elan, *La modernisation du logement social, Direction générale de l'Aménagement, du Logement et de la Nature* [Elan Law, the modernisation of social housing, Directorate-General for Planning, Housing, and Nature], 2019.

21. 2019 European Semester: Country Report – France, p. 48, https://commission.europa.eu/publications/2019-european-semester-country-reports_en.

22. French Law n°2018-1021 of 23 November 2018 on the evolution of housing, land management, and digital technology.

23. 2019 European Semester: Country Report – France, p. 48.

24. 2019 European Semester: Country Report – France, p. 46.

25. Commission Recommendation, European Semester 2019, COM(2019) 500 final, 6 June 2019, p. 16, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0500

taken a backseat and cutbacks on expenditure are being reintroduced. One European Commission Report in 2022 for France identified housing as a sector in which savings were possible, yet 2.2 million people are on waiting lists for social housing and housing production by HLM bodies is decreasing.[26]

In the context of the link between housing and climate change challenges, especially regarding energy efficiency, it is important to note that European policy has demonstrated a capacity to evolve in order to reach common objectives. Since 2009, through EU cohesion policy,[27] energy renovation of social housing is eligible for European Regional Development Funds (ERDF). As part of a partnership established by the regional associations of HLM bodies and the French regional authorities that manage the ERDF, more than EUR 1 billion in European funds has been used to support local-level projects by social housing bodies. Of all Member States, France has been most successful at using structural funds for the period 2021-2027 (more than EUR 500 million are programmed). Added to this is the EUR 550 million allocated to the sector as part of the COVID-19 recovery plan (the recovery plan amounts to a total of EUR 40 billion). Finally, since 2020, the European Investment Bank and the CDC (French Fund for Deposits and Consignments) have established an "*Alliance for Social Housing*",[28] which is a new financing line for eco-loans with the goal of mass deployment of home energy renovations.

Conclusion

The European Union and community law has legal and financial tools at its disposal to support implementation of the right to housing as well as the operators responsible for it (which in France are mainly the HLM bodies). This support requires a coherence between different European policies, along with innovation in how they are implemented. There are always barriers to overcome[29] but the issue of housing and social housing is becoming better understood today by the EU institutions. Support is thus possible – and is increasing – because the worsening effects of the housing crisis are visible across all of Europe, making the European Union a key stakeholder in implementing the right to housing.

26. Council Recommendation on the 2022 National Reform Programme of France and delivering a Council opinion on France's Programme for Stability for 2022, SWD(2022)612 final, 23 May 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022SC0612.

27. https://www.europarl.europa.eu/factsheets/en/sheet/93/cohesion-economique-sociale-et-territoriale

28. https://www.caissedesdepots.fr/actualites/alliance-europeenne-pour-un-logement-social-durable-et-inclusif

29. Such as economic governance of public expenditure in Member States, the weight of decisions regarding competition rules, the complexity of using EU funds, etc.

In support of a control of housing policies based on international human rights law

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Housing policy budgets are significant but subject to close examination. Each country, each region, each city relies on good practices, benchmarking, and evaluations to maximise the impact of their housing interventions. But signs of the contemporary crisis in housing access and affordability are deepening everywhere, and governments are experiencing similar challenges in overcoming these.

The astonishing contrast between the State action of public authorities and the evolution of housing conditions

Poor housing conditions are a reality throughout Europe, even if the difficulties are not reflected everywhere or always in the same way. In the last ten years, even before the health crisis and energy price inflation, the number of homeless people has soared across Europe (except in Finland).[1] Housing costs and the share of household expenditure on housing are at an all-time high. Some 17% of the European population lives in overcrowded housing,[2] some 9.4% live in overpriced housing (35% among low-income households)[3]. Housing has become a driver of social and geographical segregation, with home ownership becoming increasingly confined to higher income groups. European housing markets are being disrupted both by the emergence of corporate financial giants, such as Blackstone, and by the spread of the so-called "*collaborative economy*", which is making ordinary rental supply scarcer.[4]

However, housing is subject to significant regulation and public expenditure in all European countries.[5] The right to housing is recognised by all, sometimes even in their Constitution. Every coun-

1. Report - *7th Overview of Housing Exclusion in Europe*, Feantsa and Foundation Abbé Pierre, 2022. https://www.feantsa.org/fr/report/2022/06/30/the-7th-overview-of-housing-exclusion-in-europe-2022

2. Source: Eurostat, 2019. A dwelling is considered over-occupied when the number of inhabitants exceeds the number of rooms (given that one third of European households are composed of only one person and that the average is 2.3 persons per household, in reality one family in five is concerned by over-occupation).

3. Households that spend more than 40% of their income on housing.

4. Feantsa and Abbé Pierre Foundation, *How to Regulate Airbnb in the Face of a Housing Crisis*, November 2020. https://www.feantsa.org/en/report/2020/11/18/the-city-is-ours-how-to-regulate-airbnb-in-the-face-of-a-housing-crisis

5. The share of public expenditure on housing is variable, depending on fiscal strategies, the production of social rental housing and individual housing grants. It varies in particular according to the rate of owner-occupiers and the tension of urban markets. In the ten countries with the most tense housing markets, public housing expenditure is generally between 1.5% and 2.5% of gross domestic product. DREES, 2020..

try can rightly boast of a network of legal protections, systemic and curative policies, intended to guarantee - on paper and often at great expense - housing conditions and "*minimum housing*".

In spite of this, public action seems to be increasingly subject to the whims of chaotic markets. This is due to the growing share entrusted to the free market in all European countries and to the privatisation of social housing in the former communist European countries, in England and Germany, and more extensive elsewhere.[6] The entanglement of housing policies with other policy objectives often blurs the priorities, which, in fact, are primarily supporting real estate construction – which provides many employment opportunities, banking activity – which allows investment, and reinforcing towns attractiveness, etc. Thus, a housing market that is painfully costly for citizens can, at the same time, be perceived as "*healthy*" from an economic perspective, and as part of a "*healthy competition*" between territories.

The consequence of having more and more people deprived of their right to decent housing in a mainly private sector dominated by markets, which make public intervention increasingly expensive (rents, land, energy, construction and renovation materials, etc.), results in less and less universal benefits and assistance. It also leads to the exclusion from the scope of ordinary law of some groups (young, foreign, disabled and sick people), for which dedicated social residual policies have been created, but today whose main characteristic is that they are not sufficient to provide the quality of life that they claim to guarantee.

In France, for example, emergency accommodation is provided for as non-conditional according to the law.[7] When the state does not provide this, homeless people can take the matter to court to compel it to do so. On 10 February 2012,[8] the "*State Council*"[9] recognised this right as a fundamental freedom, thus opening up a new remedy, particularly well suited to the situation of homeless persons, as it aimed at compelling the State to provide shelter within 48 hours.[10] On this occasion, the French State Council also decided to weigh up the means used by the administration, its diligence, and the applicant's situation (age, family situation, state of health).

However, the State Council held that the steady increase in the number of emergency accommodation places was proof of significant and sufficient State efforts, regardless of the the higher increase of the number of people who were homeless and being refused shelter. The argument allows the judge to conclude until recently:

> *"(...) despite the increase in emergency accommodation capacity in the Bouches-du-Rhône county (department) in 2022, more than 70% of the requests submitted by households with children in the week from October 31st to November 6th 2022 could not be met. Although the applicants point to the presence of their minor daughter, aged ten, and the state of health of Mr. C..., who suffers from several pathologies, including type 2 diabetes, the information they provide is not such as to establish a degree of vulnerability such that they should be considered as having priority over other families waiting for accommodation."*[11]

6. The small-scale financialisation of social and intermediate housing in France, Weak signals, controversies and perspectives, Gimat, Guiromet et Halbert, SciencesPo, Chair Cities, Housing, Real Estate, Working Paper n°1/2022.

7. L. 345-2-2 of the Social Action and Family Law Code.

8. Council of State, 10 February 2012, n°356456, Fofana.

9. "*Conseil d'État*", France's supreme court in the area of public and administrative law.

10. Instead of several weeks in the other emergency procedures available in administrative law.

11. Council of State, Judge of summary proceedings, 10 November 2022, 468570.

However, this analysis of the "*efforts*" by the public authorities is clearly different from the one held by the court in the 2015 case of Tchokontio Happi:

> "*50. In the present case the Court notes that the authorities' failure to act, which, in the Government's submission, was due to the shortage of available housing, is not based on any valid justification within the meaning of the case-law. The Court reiterates that, according to its settled case-law, it is not open to a State authority to cite the lack of funds or other resources as an excuse for not honouring, for instance, a judgment debt.*"[12]

In the 2020 case of *NH and Others*, the European Court of Human Rights held that:

> "*182. The Court would first note that it is mindful of the continuous rise in the number of asylumseekers which began in 2007 and of the fact that this incrementally pushed the National Reception Scheme to capacity. The Court observes that the events in this case were part of a gradual upward trend and hence did not take place against the backdrop of a humanitarian emergency prompted by a major migration crisis describable as exceptional and giving rise to considerable objective difficulties of an organisational, logistical or structural nature (see Khlaifia and Others, cited above, §§ 178185). The Court notes the efforts undertaken by the French authorities to add further accommodation capacity and shorten asylum processing times (see paragraphs 125-126 above). However, those circumstances do not rule out the possibility that asylumseekers were placed in a situation capable of engaging Article 3 of the Convention.*"[13]

Good will, increasing resources, etc., cannot be invoked indefinitely as an exoneration for States. As long as fundamental rights are not effective, there is default in the implementation of the law.[14] The paradigm of "*good practices*" and ideological paralogisms mean that housing policies - and the national courts that issue rulings - lack a compass,[15] which nevertheless exists in European and international case law.

Towards a system of quality indicators for public policies, based on respect for fundamental rights

The main function and purpose of courts in public law are certainly not to organise public action, but when deciding on a case that involves the State administration, to highlight the latter's excesses and shortcomings, at the level of the decision being examined, in order to provide corrections and compensation. At the international level, this produces more: a corpus of positive

12. ECHR, Tchokontio Happi v France, n°65829/12, 9 avril 2015.

13. ECHR, 2 juillet 2020, N. H and others v France, n°28820/13.

14. In this case, the emergency accommodation system is becoming overcrowded because the right to housing is not being respected. One aspect of the situation is, for example, that the people housed do not leave the shelters because another policy, Housing First, is not being implemented: it focuses on access to social housing that is closed to people who do not meet the required conditions of regularity and permanence of residence; only 6.32% of the 400,000 annual allocations will go to homeless people in 2021, and a quarter of the applicants are successful each year. The construction of social housing is insufficient and the latter are produced at increasingly high rents (because they are more profitable for financially weakened social landlords), although the gap with private market rents remains immense. This is an overview that the judge does not take into account.

15. O. De Schutter, "*The human rights approach and the reduction of multi-dimensional inequalities. A combination to achieve the 2030 Agenda*", Papiers de recherche n°260, AFD, October 2022. *"Human rights are a compass, and they are locks: it is precisely through the constraints they impose that they force us to imagine a different future"*. https://www.afd.fr/fr/ressources/lapproche-fondee-sur-les-droits-humains-et-la-reduction-des-inegalites-multidimensionnelles-une-combinaison-indissociable-la-realisation-de-lagenda-2030

obligations to the States, a classification of required State actions, objectives to reach, and steps to take to guarantee the effectiveness of the right to housing.

These State positive obligations do not all relate directly to the right to housing but highlight the extent to which the right to housing is at the crossroads and core of many other rights: the right to information, to legal protection, to a healthy environment, to respect for the home, to property and to respect for lifestyles, to a minimum standard of living or simply to life.

These State obligations concern the general legal framework (a protective legal framework, effective means of recourse, reliable data on social realities, etc.), the fight against discrimination and segregation, the size and quality of housing available, access to basic amenities such as water, electricity and other networks, protection of privacy, protection from pollution and a dangerous environment, the conditions for eviction from the home, protection of family life, housing adapted to a diversity of lifestyles, reasonable access to social housing, etc.[16] These are based on seven key factors: affordability, security of tenure, the existence of equipment and infrastructure, habitability, accessibility, location and cultural appropriateness.[17]

This jurisprudence reveals a constant: housing is a material condition of dignity and a pivotal point for access to other essential rights (school, social services, transfer income, access to work, etc.).

Its implementation is a responsibility that is a core function of the public authority. This implies an obligation to provide legal protection to housing, to produce a sufficient stock of accessible and decent housing and a range of services targeted at the most vulnerable categories of the population (e.g. mental distress) or of housing types ("*non-standard*", ephemeral, mobile, etc.), including associated support or participation services, or minority needs that ordinary law might either not protect, exclude, or even repress if they were not specifically taken into account.[18]

These positive obligations form the backbone of the necessary public policies, the legal terms of reference for public action. In this respect, they can also constitute a relevant analysis framework, for domestic courts as well as for the European Union. Indeed, these positive obligations resulting from case law provide a matrix that can be used as a measuring index to assess the quality of public policies.

There is no room for complacency anymore. Public policies that have been sieved through these positive obligations have seen their compliance validated by the result they did achieve. These policies will not tell us whether the resources allocated are the most efficient, because each context imposes a strategy that is difficult to compare with others, and that is not fully reproductible. But they will allow us to validate the progress made.[19]

16. Housing Rights Obligations of States through European Case Law, Housing Rights Watch, Feantsa, June 2020.

17. General Comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing.

18. Council of Europe, European Committee of Social Rights, ATD Quart-Monde v France, n°33/2006, on the violations inappropriate solutions offered to a family group of Travellers.

19. If we take the key example of the "Housing First" strategy, which makes housing a means of social integration and no longer the end of a social integration pathway, the practical forms of its implementation have differed from one country to another, but the various evaluations have all shown the performance of this paradigm, compared to systems of specific care in dedicated forms of accommodation.

But how do we define the criteria for how such an evaluation can be carried out and conclude whether or not States are indeed meeting their obligations? And where does one place the threshold for expected outcomes?

The Council of Europe's Committee on Social Rights provides the answer to this question. It gives meaning of the obligation, to make *"continuous and measurable progress"*[20] based on specific targets, which we propose here to define as indicators. These are the evolution of the number of homeless people; the level of substandard housing; the number of households living in non-standard housing and without statutory protection; the ratio between households with special needs and the production of housing corresponding to their needs; the delays in accessing social housing; the share of household income spent on housing, particularly among low-income households; exposure to pollution; access to water and energy; the number of evictions and guarantees of rehousing.

The evolution of all these indicators can provide the rating of housing policies in different countries and the unified framework for a "*technical control*" of public policies grounded on fundamental rights. On this basis they make it possible to define a sufficient level of state compliance and to identify convergences and necessary interferences between related or competing public policies. Observation today focuses to a great extent on the object (housing production, tax measures, energy efficiency, etc.), and less on the objectives pursued: whether we are getting closer to them, whether we are allocating the best resources to achieve them as quickly as possible and whether other competing objectives are detrimental to them.

Any public policy or measure, taken alone or in combination with others, promotes, limits or reduces the effectiveness of the right to housing. This is what needs to be checked against the criteria identified through the positive obligations, and adjustments and even reversals must be clearly examined. If the renovation of the housing stock reduces substandard housing, but contributes to a rise in prices, then regulation (rents and sales) coupled with sufficient financial aid to fulfil these obligations, is necessary.

Positive obligations are therefore also instrumental for measuring the complementarity of norms: a flagship measure is often insufficient in itself and is not equivalent to compliance with the obligation to which it attempts to respond; it may contribute to the fulfilment of several obligations but is not sufficient to fulfil them all; an obligation requires a complementarity of measures, all of which are indispensable to be fully complied with.

An application: containing private investment within the limits of human rights

Leïlani Farha, former UN Special Rapporteur on Housing, advocates a monitoring system designed to ensure that public policies are going in the right direction. Her recommendations, "*from financialised housing to rights-based housing*",[21] produce a coherent system, structured around the definition of the right to housing in international law and related jurisprudence, which makes it possible to measure the contribution of private actors or their obstruction to its effectiveness.

20. Council of Europe, European Committee of Social Rights, Feantsa v France, No. 39/2006, 5 December 2007, ATD Fourth World v France, No. 33/2006, 5 December 2007.

21. *The Shift Directives, from financialized to human rights-based housing*, 2022. https://make-the-shift.org/directives/

In addition to the UN Committee on Economic, Social and Cultural Rights' General Comments No. 4 on the right to adequate housing (1991) and No. 7 on forced evictions (1997), which detail the factors of adequate housing. This relies on General Comment No. 24 on States' obligations in the context of corporate activities (2017) to "*prevent and remedy adverse human rights impacts. It includes a positive obligation to regulate markets and mobilise resources*[22] *to fulfil its obligation*":

> *"18. States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance (...) by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all (...)."*
>
> *"23. The obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment. Discharging such duties may require the mobilization of resources by the State, including by enforcing progressive taxation schemes. It may require seeking business cooperation and support to implement the Covenant rights and comply with other human rights standards and principles."*

The State is not the only entity that must contribute to the realisation of the right to housing: private actors must also contribute, especially those whose macro-economic activity shapes an economic model with a strong social impact on individuals, as is the case of housing, and which the latter can only influence to a very limited extent. It should not only encourage these actors to act in the direction of improving the effectiveness of the right to housing, but should not remunerate or compensate them for doing so (except in the case of a disproportionate or excessive burden). This obligation should be imposed on them as a "*normal*" economic operation. It is clear that states cannot - any longer - meet the needs of even minorities on their own, but this is not a call for help to be addressed to private actors. It is a matter of the public and private sectors working together in a common direction.

As such, Leilani Farha provides guidance to states in their relationship with financial actors and her guidelines include:

- The existence of a legal responsibility - neither lesser nor subsidiary - of private actors and investors towards the right to housing;
- Full transparency around housing: a public database (name and contact details of owners, successive sales and works, evolution of rents...); a human rights impact assessment prior to any purchase, sale or renovation of real estate by investors and accessible to residents; giving a voice to all users who might see their rights threatened and creating mechanisms of recourse in case of possible violation of the right to housing;

22. On the words *"to the maximum of its available resources"* in Article 2§1 of the ICESCR, see Section 2.2 in O. De Schutter, *The human rights approach and the reduction of multi-dimensional inequalities. A combination to achieve the 2030 Agenda*, Papiers de recherche n°260, AFD, octobre 2022. *"In a more progressive reading, the "progressive realization" clause can instead be used more affirmatively, as the Committee on Economic, Social and Cultural Rights and national courts rely on it to examine the macroeconomic and budgetary choices of States parties in light of the requirements of the Covenant. The affirmative use of the "progressive realization" clause relates both (on the revenue side) to resource mobilization and (on the expenditure side) to the investment choices of the State."*

- Develop new financing models based on human rights principles and direct monetary and fiscal policies towards the realisation of the right to housing: reform any law or monetary and fiscal policy (national, European or international, institutional or banking) that favours institutional investors engaged in the financialisation of housing; do not participate in the financing of operations that lead to the displacement of population, encourage those that produce affordable housing (in the sense of international law) in perpetuity; take into account the accumulation of property by the same company (or person) in tax rates, such as use or non-use (vacancy tax); systematically allocate a proportion of real estate transactions to affordable rental housing (as defined by international law); support non-profit housing providers as a priority;
- Bring all forms of housing, even alternative forms, back into the fold of international standards: student housing, homes for the elderly and nursing homes, shelters for the homeless and migrants, prisons, etc., and protect these sectors from financialisation;
- Give communities the power to regulate, or even ban, practices that disrupt their housing markets and are detrimental to their residents, such as short-term rentals;
- Create or maintain strong tenant protection: limit rent or maintenance fees increases; prohibit no-fault evictions and evictions that result in homelessness, regardless of landlord and tenure status. [23]

Refocusing housing policy objectives on human rights should prioritise areas of rights application, and relegate the economic health of the housing sector to a subordinate level, viewed only as a means to an end. Equally, the concentration of wealth or environmental risks should be considered in the context of their impact on the application of housing rights, allowing the evaluation of public policies to embrace more systemic issues and unfulfilled social objectives.

23. The Shift Directives, from financialized to human rights-based housing, 2022. https://make-the-shift.org/directives/

Chapter V

Strategy to end fuel poverty

The right to energy, taken for granted by many Europeans until the recent explosion in electricity and gas prices and the ensuing economic crisis, has re-emerged as a core issue in the EU's political and policy discourse. Of course, energy poverty predates this crisis and its eradication has long been at the centre of struggles on the ground and policy discussions alike. It is now more topical than ever to ask ourselves the question of what a right to energy truly means and what can be done to ensure that everyone is able to heat, cool and light their home, and consequently to cook, to store food, to access hot water, etc.

This Chapter sheds light on some aspects of those key questions.

Considering the right to energy as a self-standing right under the broader right to an adequate standard of living would contribute to enhancing its status, clarifying the legal obligations it entails and draw raising attention to the sustainability aspects embedded in this right. Under international human rights law, states must ensure that disconnections due to the inability to pay for basic services are prohibited, which should be the point of departure of any serious regulatory attempts to review the framework surrounding the right to energy at EU level.

The general human rights framework can be turned into practice by mechanisms available for states to improve the energy efficiency of homes as a sustainable, long-term solution to energy poverty. The introduction of mandatory energy performance standards for homes requires that the entire housing stock be improved to a minimum adequacy level. The enforcement of these standards must be strongly controlled and accompanied with a solid regulatory framework coupled with financial and practical assistance. However, there is a need to protect tenants in the private rented sector, who are otherwise the most at risk of renovictions and retaliatory rent rises following energy renovation measures by landlords. In the midst of the EU's Renovation Wave and with discussions on the Energy Performance of Buildings Directive still ongoing, these considerations should guide European and national decision-makers in delivering a socially just energy transition.

Legal standards for addressing energy poverty under the right to housing: Towards a new right to energy?

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Energy poverty is a major concern in the European Union (EU). Even before the COVID-19 pandemic, the energy price crisis, and the war in Ukraine, millions of households in Europe were struggling to afford or access basic energy services for their daily needs, facing unhealthy damp or mould, or unable to invest in greater energy efficiency.[1]

Since 2018, the EU has been strengthening its stance on energy poverty on several fronts, including through several new legislative initiatives.[2] For example, according to Regulation 2018/1999 (EU) on Governance of the Energy Union and Climate Action and Electricity Directive 2019/944, all EU Member States are now legally obliged to: (a) draft up a national definition of energy poverty; (b) develop a set of criteria to measure its incidence, and; (c) take policy action as necessary.[3] The European Energy Poverty Observatory proposes that energy poverty should be viewed as a multi-dimensional problem, signifying people's inability to access or afford essential energy services due to "*low income, high expenditure on energy and/or poor energy efficiency of homes*", as well as various (intersecting) personal, geographical, climatological, structural and other factors.[4] EU policymakers and Member States recognize that energy poverty negatively affects many aspects of life. They consider for example that:

> *"Energy services are 'fundamental to safeguarding the well-being of the Union citizens'. Adequate warmth, cooling and lighting, and energy to power appliances are essential services to guarantee a decent standard of living and citizens' health. [It also] enables Union citizens to fulfil their potential and enhances social inclusion".*[5]

1.*This contribution is based on the authors finishes PhD dissertation entitled "Human Rights and Access to Energy Services". For further practical insights into the concept and meaning of the right to energy, also see: Marlies Hesselman, Sergio Tirado-Herrero, Marilyn Smith and Marine Cornelis (eds) *Moving Forward on the Right to Energy in the EU: Engagement Toolkit* (ENGAGER COST Action: November 2022) www.engager-energy.net/wp-content/uploads/2022/02/ENGAGER_Right-to-Energy-Toolkit_FINAL.pdf.
E.g. see Commission Recommendation (EU) 2020/1563 of 14 October 2020 on energy poverty, OJ L 357/35.

2. See e.g. Marlies Hesselman, Governing Energy Poverty in the European Union: A Comparative Analysis of International and Regional Human Rights Law (European Journal of Comparative Law and Governance, forthcoming 2023a).

3. EU Governance Regulation 2018/1999, Article 3; EU Electricity Directive 2019/944, Article 29; Commission Recommendation (EU) 2020/1563 of 14 October 2020 on energy poverty, OJ L 357/35 (1-2); Commission Staff Working Document, EU Guidance on Energy Poverty: Accompanying the Document Commission Recommendation on Energy Poverty of 14 October 2020, SWD(2020) 960 final, 7; Communication from the Commission, "Tackling Rising Energy Prices: A Toolbox for Action and Support" (13 October 2021) COM(2021) 660 final.

4. Johannes Thema and Floris Vondung, "EPOV Indicator Dashboard: Methodology Guidebook" (Wuppertal Institut für Klima, Umwelt, Energie GmbH: 2020); Ana Stojilovska et al, Energy Poverty and Emerging Debates: Beyond the Traditional Triangle of Energy Poverty Drivers (2022) 169 Energy Policy 113181.

5. EU Electricity Directive 2019/944, recital 59.

Tackling energy poverty effectively can therefore increase people's living standards, improve their physical and mental health, comfort and well-being and social inclusion (as welle as reduce exposure to indoor and outdoor air pollution, e.g. by replacing heating sources that are not fit for purpose). All of this also means that health burdens and costs may be lowered.[6]

Alongside growing recognition of the importance of tackling energy poverty, EU legislative initiatives have increasingly begun to refer to "*fundamental rights*" as the legal basis or framework for action.[7] The EU Electricity Directive, for example, states that it must be interpreted and implemented in line with the EU Charter on Fundamental Rights, whilst recent proposals for revising the Energy Efficiency and Energy Performance of Buildings directives, explicitly refer to and build on the right to housing assistance in Article 34 of the Charter, so as to ensure a decent existence for all those who lack sufficient resources. These proposals also expressly refer to the EU Pillar of Social Rights of 2017, including a right to housing assistance in Principle 19, and the right to essential services of good quality, including access to energy, in Principle 20.[8] Nevertheless, it is still poorly understood how modern international, regional and national human rights law specifically applies to the many manifestations and drivers of energy poverty across Europe, and what forms of action are required.[9]

Amongst the different human rights that may underpin access to modern energy services as a human right – e.g. the right to life with dignity, an adequate standard of living or health – the "*right to adequate housing*" stands out as a key right.[10] This contribution briefly explains some of the key standards that have been derived from the international right to housing specifically, and their relevance to energy poverty alleviation in Europe specifically.

The human right to adequate housing and (the right to) modern energy services access

The human right to adequate housing has been recognized as a legal human right in several international and regional human rights law treaties, to which *all* European States have committed themselves, including the International Covenant on Economic, Social and Cultural Rights (ICESCR)[11] the Convention on the Rights of the Child (1989)[12] and the Convention on the Elimination of All Forms of Discrimination Against Women (1979).[13] The most important formulation of the right to housing can be found in Article 11 of the ICESCR, which states that all persons have the "*right*

6. Commission Recommendation (EU) 2020/1563 of 14 October 2020 on energy poverty, OJ L 357/35.

7. See e.g. Hesselnan (2023a).

8. European Commission, "*Proposal for a Directive of the European Parliament and of the Council on energy efficiency (recast)*" (14 July 2021) COM(2021) 558 final, e.g. recital (95); European Commission, "Proposal for a Directive of the European Parliament and of the Council on the energy performance of buildings" (recast) (15 December 2021) COM/2021/802 final.

9. E.g. Marlies Hesselman, *Human Rights and Access to Energy Services* (PhD Dissertation, Faculty of Law University of Groningen, publication forthcoming 2023b); Panos Merkouris, " *Is Cutting People's Electricity Off "Cut Off" from the Ratione Materiae Jurisdiction of the CJEU and the ECtHR?*" in: Hesselman, Hallo de Wolf, Toebes (eds), Socio-Economic Human Rights in Essential Public Services Provision (Routledge 2017); Stephen Tully, "*The Contribution of Human Rights to Universal Energy Access*" (2006) 4 Northwestern Journal of International Human Rights 518; Adrian Bradbrook, Judith Gardam and Monique Cormier, "*A Human Dimension to the Energy Debate: Access to Modern Energy Services*" (2008) 26 Journal of Natural Energy & Resources Law 526.

10. Hesselman (2023b).

11. U.N. Doc. A/6316, *International Covenant on Economic, Social, and Cultural Rights,* G.A. Res. 2200A (XXI), (1966).

12. UN Doc. CRC/C/GC/10 [1989].

13. UN Doc. CEDAW/C/TUN/3-4 [2000].

to an adequate standard of living", including adequate access to food, housing and clothing. Over time, additional sub-entitlements have been read into this provision, including the rights to water and sanitation, as well as, more recently, access to affordable energy services.

Both the right to an adequate standard of living and right to housing can be seen as "*umbrella rights*": they are closely intertwined with important legal entitlements related to other human rights, including rights to several essential services, or healthy living environments.[14] International human rights law bodies have consistently held since the early 1990s, that the right to adequate housing should not be interpreted "*narrowly*". It does not merely entail having "*a roof over one's head*"; it implies the "*right to live somewhere in security, peace and dignity*", with opportunities for full and free development of human life.[15] The content of the right to housing has expanded over time through developments in legal jurisprudence and theory. It is still expanding in response to new issues and challenges, such as energy poverty, climate change, just transition as well as other modern threats to human rights.

For instance, in 2020, the UN Special Rapporteur on the Right to Housing noted that the COVID-19 pandemic "*starkly illustrated the fact that having a functioning home – with running water, electricity, heat and Internet – is a matter of survival and therefore a key aspect of the right to adequate housing*". He noted that whilst "*some of these elements were already well recognized in human rights law*" earlier, other aspects came to the fore during lockdowns, isolation periods, and homeschooling and working.[16] In 2022, the UN Special Rapporteur on the Right to Housing additionally noted that in light of the climate crisis and imperative needs for just transition, the right to housing should be interpreted to include another core element: "*sustainability*".[17] To ensure that the right to adequate housing is interpreted in line with the right to a clean, healthy and sustainable environment, public policies must take holistic and long-term views, including on energy efficiency, renovations, and energy poverty alleviation, and pursue a "*just transition towards rights-compliant, climate-resilient and carbon-neutral housing for all*".[18]

The basic framework and normative content for the human right to housing stems from the authoritative interpretation of Article 11 ICESCR by the UN Committee on Economic, Social and Cultural Rights in CESCR General Comment No. 4 on the Right to Housing (1991). This document noted that the "*adequacy*" of housing in any given context will depend on several factors, amongst which the *availability, affordability and habitability* of adequate housing. These standards apply always, even if, based on certain local, personal, cultural, climatological or ecological needs, the implementation of these standards may look differently. [19]

Importantly, all three normative elements are important for understanding how the right to housing is relevant to energy poverty too. First of all, the concept of "*availability*" of housing may

14. E.g. Jessie M Hohmann, Housing as a Right, in Katharine Young and Malcolm Langford, Oxford Handbook on Economic, Social and Cultural Rights (Oxford University Press: 2022).

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

16. HRC, Report of the Special Rapporteur on the Right to Adequate Housing: COVID-19 and the Right to Housing (27 July 2020) UN Doc. A/75/148, para. 20.

17. HRC, "Report of the Special Rapporteur on the Right to Adequate Housing: Towards a Just Transformation: Climate Crisis and the Right to Housing" (23 December 2022) UN Doc. A/HRC/52/28, paras. 5, 63. For further reflection on the element of sustainability, e.g. Hesselman (2023b), chapter 3.

18. *Idem*. paras. 71, et 73-74.

19. CESCR (1991) para. 8.

not only refer to availability of adequate housing in sufficient quantity for all, but also more specifically, to the the "*availability of services, materials, facilities and infrastructures*" that are necessary to enjoy the right to adequate housing.[20] According to UN and European legal practice, "*an adequate house must possess certain facilities essential for health, security, comfort and nutrition*", including specifically "*energy for cooking, heating and lighting*".[21] Further essential household energy services would include those necessary for access to (digital) information, communication and education (e.g. through internet, phone, TV, radio); use of essential health equipment or assistive devices; food storage; or personal and domestic hygiene (e.g. energy for water boiling).[22]

In short, an adequate house thus comes with certain basic expectations in terms of basic amenities. Respecting, protecting or fulfilling the human right to adequate housing means that States have to take certain positive measures, in line with their maximum available resources, and must design laws and policies in such a way that adequate housing is best guaranteed for all by the State and by third parties. A concrete measure that would arise from the right to housing, is that States must ensure that disconnections of energy supply due to sheer inability to pay for basic services, are prohibited – or otherwise avoided, e.g. by ensuring that essential energy services are always affordable to all.[23] The ICESCR Committee has noted on this point that it has been concerned about "*the practice of cutting off gas and electricity for non-payment of bills*" and the high numbers of people living in energy poverty in Germany and Belgium, especially among those with low income and receiving social benefits. It has recommended their governments "*adopt effective measures to ensure that all households are able to meet their basic electricity needs*", including by taking measures to ensure "*minimum supply of energy, even when a meter is installed*" and "*avoid power shutdowns for households that are unable to pay for their minimum needs*".[24] States have also been asked to expand access to social tariffs, and devote more financial resources to support schemes.[25]

More generally, General Comment No. 4 has clarified that the requirement of "*affordability*" of adequate housing implies that all housing-related costs – including e.g. rent, service costs, utilities or taxes – are "*commensurate with income levels*".[26] Personal or household expenditure on housing-related costs may not threaten or compromise "*the attainment and satisfaction of other basic needs*".[27] These are important rights-based principles for the affordability of housing costs generally. UN bodies clarified too that States are obliged to regulate and subsidize costs for those with insufficient means to enjoy adequate housing, including through targeted pro-poor measures.[28] Such obligations extend to retrofitting and energy efficiency measures. According to UN human rights supervisory bodies, energy efficiency must be widely available, affordable and ac-

20. CESCR (1991) para. 8(b).

21. CESCR (1991) para. 8(b); European Committee of Social Rights, Complaint No. 110/2014: *International Federation for Human Rights (FIDH) v Ireland*, (Decision on Merits of 12 May 2017) paras. 106, 109.

22. *Ibid*; see also more generally Hesselman (2023b).

23. See e.g. Hesselman (2023b).

24. CESCR "Concluding Observations on Belgium" (26 March 2020) E/C.12/BEL/CO/5, paras. 42-43, https://www.ohchr.org/fr/documents/concluding-observations/ec12belco5-committee-economic-social-and-cultural-rights; CESCR, Concluding Observations on Germany (27 November 2018) E/C.12/DEU/CO/6, paras. 56-57, https://digitallibrary.un.org/record/1653881?ln=fr.

25. *Ibid*.

26. CESCR (1991) para. 8(c).

27. CESCR (1991) para. 8(c); see also OHCHR 2013.

28. E.g. see: HRC, "Report of the Special Rapporteur on Adequate Housing: Mission to Serbia and Kosovo" (26 February 2016) UN Doc. A/HRC/31/54/Add.2., para. 100; HRC (2022) A/HRC/52/28, paras. 42, 56, 74; HRC, Report of the UN Special Rapporteur on Extreme Poverty and Human Rights: Just Transition (7 October 2020) UN Doc. A/75/181/Rev.1, para. 26, 29-35.

cessible to all, including low-income households. Energy efficiency programmes have to be designed in such a manner that they "*do not undermine affordability*", or affect people's security of tenure (e.g. through creeping "*climate gentrification*"). Instead, energy efficiency programmes must "*proactively address energy poverty*".[29] New proposals for amendments of EU energy efficiency directives also ensure that "*public funding available at national and Union level should be strategically invested into energy efficiency improvement measures, in particular for the benefit of vulnerable customers, people affected by energy poverty and those living in social housing*".[30] Yet, it will be important to monitor how such objectives are effectively and equitably implemented in practice. In this sense, it is encouraging to see that EU proposals for new legislation also refer to the fact that:

> *"Member States should empower and protect all people equally, irrespective of their sex, gender, age, disability, race or ethnic origin, sexual orientation, religion or belief, and ensure that those most affected or put at greater risk of being affected by energy poverty, or most exposed to the adverse impacts of energy poverty, are adequately protected. In addition, Member States should ensure that energy efficiency measures do not exacerbate any existing inequalities, notably with respect to energy poverty."*[31]

The element of "*habitability*" is also a key housing-related concept relevant to energy poverty alleviation. It stipulates that an adequate house must protect inhabitants "*from cold, damp, heat, rain, wind or other threats to health*", as well as from "*structural hazards and disease vectors*", and ensure physical safety otherwise.[32] As explained by Sunderland (in the next chapter), improving energy efficiency and comfort of homes is a very important part of energy poverty alleviation and energy transition. This applies both to heating and thermal comfort in the form of adequate warmth, but also to "*summer energy poverty*" and a lack of access to cooling services. This is increasingly flagged in energy poverty literature and human rights law practice too.[33] For example, UN Rapporteurs on the Right to Housing and Extreme Poverty have expressed concern that poor households in Spain may be struggling with unacceptable "*heating-or-eating*" dilemmas in the winter, and (unaffordable) space cooling needs in summer.[34] They fear that energy poverty can lead to "*dramatic*" consequences in summertime, especially as global warming and heat stress intensify: "*poor families without access to electricity or air conditioning*" may be increasingly at risk of suffering heat-related illnesses and even death.[35] In this instance, the Spanish government was recommended to expand access to the national "*social bonus*" system – which currently already subsidizes energy bills for certain groups – and to ensure that energy supplies are not cut off to vulnerable households.[36]

29. *Ibid.*

30. COM/2021/558 final, 59.

31. *Ibid.*

32. HRC, Report of the Special Rapporteur on the Right to Adequate Housing: Security of Tenure (14 March 2006) UN Doc. E/CN.4/2006/41, Annex with Principles, 55.

33. Harriet Thomson et al, Energy Poverty and Indoor Cooling: An Overlooked Issue in Europe (2019) 196 *Energy and Buildings* 21-29; Marlies Hesselman, Addressing the Energy-Poverty Health Nexus Through International Human Rights Law, *Health and Human Rights Journal* (forthcoming June 2023).

34. HRC, Report of the UN Special Rapporteur on Extreme Poverty and Human Rights: Mission to Spain (2020) A/HRC/44/40/ADD.2, para. 9, 40.

35. *Idem*, para. 50.

36. *Idem*, para. 40.

On the other hand, Spain has also been critiqued by the same rapporteurs for practices of cutting off essential energy supplies to households living in informal settlements, including households with children, in the middle of the winter. On that occasion, UN bodies noted that the right to housing requires "*permanent access [...] to heating and lighting, sanitary and toilet facilities, and food storage*";[37] efforts to dissuade people "*from staying in informal settlements or camps by denying them [...] basic needs*" would amount to "*cruel and inhuman treatment*" and constitutes "*a violation of multiple human rights, including the right to life, housing, health and water and sanitation*".[38] More specifically, "*stripping the home of one of the essential services that allows inhabitants to protect themselves from the cold*" during the months with the lowest temperatures violates human rights standards.[39] This time, the Spanish government was asked to "*take the necessary measures to urgently restore the electricity supply to affected families*", including in view of the imminent arrival of winter,[40] and to explain in more detail which measures it has taken, "*legislative and otherwise, to guarantee that families in a situation of economic vulnerability do not suffer power cuts*".[41] The statements of these international bodies are not binding, and these bodies lack direct enforcement powers at the international or national level. However, from a perspective of legal interpretation and the normative development of the legal content of human rights, these statements are very relevant. States are under a legal obligation to implement human rights treaties in good faith, and in many cases, national courts are equipped to apply rights nationally, in a binding manner.

More generally, the habitability requirement means that States must develop, through consultation and participation of affected groups, a rights-based housing strategy that includes setting and implementing "*minimum quality standards for heating, insulation and electric systems in (rental) homes*", as well as other relevant standards that may be relevant to establishing what constitute adequate housing conditions.[42] The World Health Organisation has developed several guidance documents in this regard, e.g. in terms of indoor air quality and practices of solid-fuel heating or cooking; prevention of damp and mould; or healthy indoor temperatures. The human right to housing requires States to take "*positive steps and measures*", both locally and nationally, to ensure that the national housing stock is monitored, maintained and upgraded.[43]

Need for recognition of a separate right to energy (services)?

The aforementioned developments lead to the question, whether it may be time to recognize the "*right to energy (services)*" also as a more "*self-standing*" right under Article 11 ICESCR, under the right to an adequate standard of living, or as flowing from the right to housing. A key benefit of formulating a more "*autonomous*" right, is that it would allow for the development of a more distinct set of rights and obligations in the sphere of energy access and energy poverty.

37. OHCHR, Joint communication of UN Special Procedures to Spain (18 December 2020) ESP 6/2020, 4.

38. *Idem* 5.

39. *Ibid*.

40. *Ibid*.

41. *Idem* 6.

42. CESCR, "Concluding Observations on New Zealand" (1 May 2018) UN Doc. E/C.12/NZL/CO/4, para. 40(d); HRC, "Report of the Special Rapporteur on Adequate Housing: Mission to Serbia and Kosovo" (26 February 2016) UN Doc. A/HRC/31/54/Add.2., para. 100.

43. HRC (2016) UN Doc. A/HRC/31/54/Add.2, para. 28; CESCR (1991) 12-14.

Such a development fits in with calls for legal recognition of a "*right to affordable and clean energy*" in EU law by European civil society (e.g. through the Right to Energy Coalition), as well as Principle 20 of the EU Pillar of Social Rights. UN Special Procedures have also noted that given the relevance of electricity to "*the right to an adequate standard of living, the right to housing, and the right to health*", international legal standards that have previously been developed for the right to water as an essential service, could be relevant to the regulation and implementation of energy as a human right too. These standards would include sufficient quantity, quality, safety, regularity, affordability and accessibility of energy services.[44]

In short, a separate right to energy would allow for the identification of more concrete positive and negative obligations, and relevant human rights standards, for access to affordable, reliable and good quality energy services access. Specifically, it would allow for the formulation of similar standards as applying to the right to water, amongst which are the so-called "*AAAQ*" standards of availability, (economic, physical, non-discriminatory and information) accessibility, (cultural, life-cycle or gender-based) acceptability, and quality (e.g. technical, scientific, capacity).[45] In addition, it may allow for more attention to sustainability aspects of access to energy (services) as a human right, e.g. in terms of standards for energy efficiency, renewable energy access, the cleanliness and safety of fuels used, or lack of harm to health etc. At present, legal obligations in relation to human rights and renewable energy access for households are not well-developed,[46] although there is increasing recognition that human rights protection in the age of climate change, just transition, and energy poverty alleviation entails the "*expansion of access to electricity produced in an environmentally friendly manner and other green sources of energy where households still depend on fossil forms of energy for heating, cooking and other needs*".[47] There are still several dimensions of the "*right to energy*" that may have to be fleshed out further, including with inputs from those who are affected by it. Yet, standards developed under several existing rights will provide a firm basis for developing such a right in the future.[48]

Conclusions

A human rights perspective is relevant to law and policy-making in the sphere of energy poverty, energy transition and climate action. Internationally accepted legal human rights comprise rights and obligations that must be respected, protected and fulfilled.[49] In addition, such rights and obligations are owed to each and every human person, especially those most marginalized or struggling. Human rights standards must be part of EU and national law-making efforts at the in-

44. See OHCHR (2013); CESCR (2017); see further, Marlies Hesselman, The Right to Energy, in Binder et al (eds) Edward Elgar Encyclopedia on Human Rights (Edward Elgar 2022); Hesselman (2023a).

45. Hesselman (2023a); see also Marlies Hesselman, Brigit Toebes and Antenor Hallo de Wolf, International Guideposts for Essential Public Services Provision, ; in Hesselman, Toebes and Hallo de Wolf (eds), *Socio-Economic Human Rights in Essential Public Services Provision* (Routlegde 2017).

46. See e.g. Hesselman (2023a); e.g. Margaretha Wewerinke, A Human Rights Approach to Energy: Realizing the Rights of Billions Within Ecological Limits (2022) 31 *Review of European, Comparative and International Environmental Law* 16-25.

47. HRC (2022) para. 70(a); See also further discussion on the sustainability requirement, Hesselman (2023a).

48. See e.g. Hesselman (2022); Tully (2006); Lars Löfquist, "Is There a Universal Human Right to Electricity?" (2020) 24 *International Journal of Human Rights* 711-723; Giovanni Frigo et al, Energy and the Good Life: Capabilities as the Foundation of the Right to Access Energy Services (2021) *22 Journal of Human Capabilities and Development* 218-248; Gordon Walker, "The Right to Energy: Meaning, Specification and the Politics of Definition" (2015) 378 *L"Europe En Formation* 26-38.

49. Hesselman (2023).

tersections of energy services access, climate action and adequate housing, for example through the EU Better Regulation Agenda.[50] National governments must implement these rights in and through their domestic legal and policy systems as well.

When human rights protection is lacking, those affected may seek to use international human rights treaties, or national laws and constitutions, to articulate their experiences of energy poverty as violations of human rights. Human rights provide both a legal and conceptual tool to challenge and address existing (structural) inequalities, and to demand better realization, oversight and accountability of those needs recognized as human rights.

So far, not many court cases have tested the many ways in which international human rights law might be leveraged to achieve better access to energy services, or to improve habitability in the context of energy poverty, or to achieve prohibitions of disconnections.[51] At the national level, some evidence of litigation on energy poverty exists, especially in response to disconnections. Such litigation has been yielding significant normative and practical successes, but more insights into these developments are necessary. So far, litigation has resulted in the legal recognition of energy as a human right by national courts, and led to important practical interventions, and changes in legislation.[52] European civil society organisations have a major role to play in putting the right to energy on the agenda of policy-makers, courts and other human rights bodies; they can also play a major role in seeking enforcement of human rights. The legal basis for this may be the right to housing, but also in a range of other housing-related rights, e.g. in the area of basic services access or a dignified life.

50. See *idem*; Marlies Hesselman, Human Rights and EU Climate Law, in: Woerdman et al (eds) EU Essential Climate Law (Edward Elgar 2021); EU Fundamental Rights Agency, *Handbook on Applying the Charter of Fundamental Rights of the European Union in Law and Policymaking at National Level* (FRA: 2018); European Commission, Better Regulation Guidelines (3 November 2021) SWD(2021) 305 final, 5, 35-36; European Commission, Better Regulation Toolbox (3 November 2021) Tool #29 on Fundamental Rights.

51. See for discussion e.g. Hesselman (2022).

52. *Ibid*, and more recently rights-based litigation in the Israel High Court recent led to a major expansions of the number of households protected against disconnections, as well as endorsement of the right to energy in court proceedings: https://www.english.acri.org.il/post/historic-achievement-380-000-households-will-be-protected-from-power-cuts.

"Decent" housing standards as a strategy to alleviate energy poverty

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Energy poverty is broadly understood as the inability of households to enjoy adequate levels of energy services at an affordable cost.[1] It is caused by the interplay of three main factors: low incomes, high energy needs due to inefficient housing and energy-using appliances, and high energy prices. In addition, many households across Europe lack guaranteed access to sufficient energy sources, particularly when they are reliant on non-grid fuels like biomass.

The measures taken by national and local government to alleviate energy poverty can take many forms, but predominantly fall into three types: income support; support to pay the energy bills; or support to reduce energy use through efficiency measures. The third approach, improving the energy efficiency of the home, is the most sustainable, long-term solution.[2] It is linked to one of the main structural causes of energy poverty – inadequate housing – and can prevent some of the significant negative impacts on human health associated with cold and damp homes.[3]

Much of the EU housing stock is inefficient, and approximately 75% of it needs some form of energy renovation.[4] Lower-income households are much more likely to live in inefficient housing and housing with defects. Across EU Member States, some 7% of citizens in the highest income decile reported living in a dwelling with a leaking roof, damp walls, floors or foundation, or rot in window frames or floor. In the lowest income decile, this percentage rises to 22%.[5]

A review of energy poverty policies in Member States shows that while most countries have some form of targeted energy subsidy, fuel price support or income support, fewer have targeted energy efficiency and home renovation programmes dedicated to low-income households.[6]

1. EU Energy Poverty Observatory. (2019). *Addressing energy poverty in the European Union: State of play and action.* https://www.energypoverty.eu/sites/default/files/downloads/observatory-documents/19-_06/paneureport2018_updated2019.pdf

2. Ugarte, S., van der Ree, B., Voogt, M., Eichhammer, W., Ordoñez, J.A., Reuter, M., Schlomann, B., Lloret, P., & Villafáfila. (2016). *Energy efficiency for low-income households*. Directorate-General for Internal Policies. https://www.europarl.europa.eu/RegData/etudes/STUD/2016/595339/IPOL_STU(2016)595339_EN.pdf

3. Geddes, I., Bloomer, E., Allen, J. & Goldblatt, P. (2011). *The health impacts of cold homes and fuel poverty*. Department of Epidemiology and Public Health, UCL. https://www.instituteofhealthequity.org/resources-reports/the-health-impacts-of-cold-homes-and-fuel-poverty/the-health-impacts-of-cold-homes-and-fuel-poverty.pdf

4. Buildings Performance Institute Europe. (2017). *97% of buildings in the EU need to be upgraded* [Factsheet]. https://www.bpie.eu/publication/97-of-buildings-in-the-eu-need-to-be-upgraded

5. Figure 4 in Sunderland, L., Jahn, A., Hogan, M., Rosenow, J., & Cowart, R. (2020). *Equity in the energy transition: Who pays and who benefits?* Regulatory Assistance Project. https://www.raponline.org/knowledge-center/equity-in-energy-transition-who-pays-who-benefits

6. EU Energy Poverty Observatory. (2020). *Member State reports on energy poverty 2019*. https://energy-poverty.ec.europa.eu/discover/practices-and-policies-toolkit/publications/epov-member-state-reports-energy-poverty-2019_en

Ensuring that all homes across Europe meet a decent standard, including a decent standard of energy efficiency, supports not only the right to adequate housing recognised by the UN Committee on Economic, Social and Cultural Rights,[7] but also the right to access essential services of good quality, including energy, which is enshrined in principle 20 of the European Pillar of Social Rights.[8]

Mandatory energy standards for homes

Mandatory energy performance standards for homes are policy tools designed to ensure the entire housing stock is improved to a minimum standard. The benefit to this whole-stock approach over programmes that invest in targeted renovation of individual homes occupied by low-income or energy-poor households is that access to a decent home is assured for all. Any home a household moves into should meet the minimum standard. A number of countries and regions in Europe have introduced or are considering such standards for private homes or privately rented homes as summarised in the table below.[9]

Jurisdiction	Homes targeted	Standard	Implementation date
France	Private homes	Energy Performance Certificate* label E	2028
France	Logements locatifs	Consommation inférieure à 450 kWh/m^2/an	2023
France	Rented homes	Using less than 450 kWh/m2/year	2023
Scotland (proposed)	Privately rented homes	Energy Performance Certificate label C	2028 (from 2025 at tenancy change)
Scotland (proposed)	Owner-occupied homes	Energy Performance Certificate label C	2033 (from 2025 at sale)
Flanders, Belgium	All homes (enforced only for rented)	Roof insulation Double glazing	2020 2023

* Energy Performance Certificates are the national assessment and labelling frameworks introduced by EU countries and required by the Energy Performance of Buildings Directive. They label buildings on a scale of (usually) A to G, with A being the best performance and G being the worst. The scales are not harmonised across Europe, therefore homes with the same EPC label will not have the same level of performance in different countries. More countries use these standards in the social housing sector. Social housing standards are not covered here, given the different ownership structure of that stock. In many countries the social housing performs on average better than the rest of the housing stock.

The standards in Europe and beyond[10] focus predominantly on privately rented homes. This results from tenants being more vulnerable to poor housing standards, as they do not have the right to upgrade their homes and landlords may have little incentive to improve the home. The standards focus on the worst-performing homes and tend to require them to be improved so that they

7. "*An adequate house must contain certain facilities essential for health, security, comfort and nutrition*", such as "*energy for cooking, heating and lighting, sanitation and washing facilities*", as well as protection against "*cold, damp, heat, rain, wind or other threats to health.*" UN Committee on Economic, Social and Cultural Rights. (1991). *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, E/1992/23. https://www.refworld.org/docid/47a7079a1.html

8. European Commission. (n.d.). *European pillar of social rights*. https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights_en

9. Sunderland, L., & Santini, M. (2021). *Next steps for MEPS: Designing minimum energy performance standards for European buildings*. Regulatory Assistance Project. https://www.raponline.org/knowledge-center/next-steps-for-meps-designing-minimum-energy-performance-standards-for-european-buildings and Sunderland, L. and Santini, M. (2020) Case studies: Minimum energy performance standards for European buildings. Regulatory Assistance Project. https://www.raponline.org/knowledge-center/case-studies-minimum-energy-performance-standards-for-european-buildings/

10. Further standards that address rented homes can be found in New Zealand, Victoria in Australia, and Boulder, Colorado, in the USA. Sunderland, L., & M. Santini. (2020). *Filling the policy gap: Minimum energy performance standards for European buildings*. Regulatory Assistance Project. https://www.raponline.org/knowledge-center/filling-the-policy-gap-minimum-energy-performance-standards-for-european-buildings

no longer fall into this category. A slightly different approach is taken in the standard in Flanders which, similar to Australia and New Zealand, focusses on the presence of basic insulation or heating measures in the property, as a proxy for adequacy.[11]

These standards have received increased attention across Europe since the European Commission launched the Renovation Wave Strategy[12] in 2020, which proposed the introduction of common standards across Europe. In December 2021, the Commission published its proposal for inclusion of the common standard in the Energy Performance of Buildings Directive.[13] In it, the minimum standards proposed broadly follow the design of the national examples, requiring the worst-performing homes, with Energy Performance Certificate G and F, to be improved to the higher energy label, F and E, by 2030 and 2033 respectively. At the time of publication, these standards are under negotiation.

Setting mandatory minimum energy performance standards for the housing stock has the potential to protect households on low incomes from very poor housing, addressing one of the key structural causes of energy poverty and a key contributor to broader inequity. The existence of a standard alone does not, however, guarantee that the rights to both adequate housing and basic (energy) services will be realised.

Case study of housing standards in the UK: standards and rights do not guarantee benefits of renovation and decent housing

The UK is, perhaps, one of the first European country to introduce and enforce legally-binding minimum energy standards in private housing. The primary legalisation that enabled the standard for privately rented homes in England and Wales was introduced in 2011[14] with the regulations that defined the standard and its implementation issued in 2015.[15] But, the history with housing standards goes back further.

The basis for the privately rented housing standard was an earlier Housing Health and Safety Rating system used to assess threats to human health in housing.[16] This classified a home below an EPC "E" rating (on the UK's A to G scale) as a category one health hazard, defined as a serious and immediate risk to a person's health and safety. This classification of an energy inefficient home as a health risk was first translated into a guidance standard – the Decent Homes standard - for

11. In Flanders, minimum roof insulation and double gazing are required for homes, although enforced only for rented homes. In New Zealand, roof and floor insulation and a fixed heating system are required for privately rented properties. In Victoria, Australia, heating and cooling devices and appliances must meet minimum efficiency standards in privately rented homes.

12. European Commission. (2020, 14 October). *A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives* [press release]. https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1835

13. European Commission. (2021, 15 December). *Proposal for a Directive of the European Parliament and of the Council on the energy performance of buildings (recast).* https://ec.europa.eu/energy/sites/default/files/proposal-recast-energy-performance-buildings-directive.pdf

14. Energy Act 2011. UK Public General Acts, 2011 c.16, part 1, chapter 4 (2011). http://www.legislation.gov.uk/ukpga/2011/16/part/1/chapter/4/enacted

15. The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015. UK Draft Statutory Instruments, ISBN 978-0-11-112835-0 (2015). https://www.legislation.gov.uk/ukdsi/2015/9780111128350/contents

16. UK Department for Communities and Local Government. (2006). *Housing health and safety rating system: Guidance for landlords property related professionals*. https://www.gov.uk/government/publications/housing-health-and-safety-rating-system-guidance-for-landlords-and-property-related-professionals enabled by UK Government (2004) *Housing Act 2004*. https://www.legislation.gov.uk/ukpga/2004/34/contents

social housing that covered a broad range of housing quality issues beyond energy efficiency like sanitation and accessibility.[17] Then it informed the legislated minimum energy efficiency standard for privately rented housing enforced from 2016.

The privately rented housing standard was introduced, in part, to address the high levels of energy poverty in the private rented sector. At the time, 19% of private sector households were in fuel poverty compared to 8% in the owner-occupier sector. Around 50% of the privately rented homes with an energy performance certificate label of F or G, targeted by the standard, were occupied by fuel-poor households.[18]

The standard was introduced in three stages. From 2016, tenants were given the right to request their landlord make improvements to the home if it fell below the standard. From 2018, landlords were required to improve the homes when either the tenant changed or the contract with the existing tenant changed or was renewed. From 2020, the standard applied to the whole privately rented housing stock, meaning homes under long-term contracts were included. The design and enforcement of these standards offers lessons about their efficacy to protect households from poor housing.

The only enforcement in the period from 2016 to 2018 relied on tenants to request their landlord to make improvements, with enforcement support from the local authority. This method overlooked the power imbalance between tenants and landlords. Relying on the tenant to request their rights puts them at risk of retaliatory eviction, or rent rises, when they seek repairs and maintenance of their home.[19] In 2019, tenants' awareness of their rights with regard to housing standard was still low, as was their willingness to report a below-standard home,[20] illustrating the limitations of this approach.

The stronger enforcement triggers in 2018 and 2020 did not, however, guarantee full implementation of the standard or guarantee decent private rented housing.

Local authorities were designated in the legislation as the enforcement body. These public bodies were, however, not adequately resourced with public funds for this task, which was identified as a barrier to implementation.[21] Enforcement was further complicated for local authorities by the highly unregulated nature of the UK private rented housing sector. In England, there is no register of landlords and no inspection regime for rented homes that could be used to check compliance with the standard. As a result, local authorities have no single data set by which they can easily find rented homes or rented homes that fall below the standard. Due to lack of funding and poor integration of enforcement into existing processes or regimes, local authority enforcement activ-

17. UK Department for Communities and Local Government. (2006). A decent home: definition and guidance. https://www.gov.uk/government/publications/a-decent-home-definition-and-guidance

18. UK Department for Business, Energy & Industrial Strategy. (2020). *Improving the Energy Performance of Privately Rented Homes in England and Wales* [Consultation].
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934534/prs-consultation-2020.pdf

19. Cromarty, H. (2021). *Housing conditions in the private rented sector* (England). House of Commons Library. https://researchbriefings.files.parliament.uk/documents/CBP-7328/CBP-7328.pdf

20. RSM UK Consulting LLP. (2019). *Enforcing the enhancement of energy efficiency regulations in the English private rented sector*.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825485/enforcing-enhancement-energy-efficiency-regulations-English-private-rented-sector.pdf

21. Department for Business, Energy & Industrial Strategy (2021) *Post Implementation Review of the Private Rented Sector Energy Efficiency Regulations*. https://www.legislation.gov.uk/uksi/2015/962/pdfs/uksiod_20150962_en.pdf

ity was very low[22] and compliance in 2020 had not reached 100%.[23] An interim evaluation report found that where local authorities were more actively increasing awareness and enforcing the regulations, an increased number of landlords would be encouraged to take action.[24]

As a counterpoint to the UK standard, which was difficult to enforce, the standard for rented homes in Boulder, Colorado, in the United States, achieved full compliance within eight years of introduction. Rented homes make up more than half of Boulder's housing stock. The standard in Boulder was designed in consultation with stakeholders including rental housing association members, energy efficiency experts and the City, which raised awareness and acceptance. The standard utilised existing rental licencing, which includes an inspection every four years to renew a licence, for compliance checking. It was also supported by a framework of linked financial and practical assistance via the City's energy efficiency grants programme. Finally, public disclosure of compliant and non-compliant homes, via an online database and map of rental properties, allowed visibility and transparency.[25]

To address the implementation challenges in the UK, the government has established enforcement pilots to identify and test new methods with a small number of local authorities. These pilots have included efforts on data and evidence gathering, data matching, and promoting awareness and engagement of landlords through trade associations and participating in local landlord forums coordinated by local authorities.[26]

This experience from the UK highlights that decency standards are only as effective as their enforcement and the surrounding regulatory framework on which they rely.

Framework of enabling and enforcing

Standards alone do not improve homes. Effective design and a complete enabling and enforcement framework linked to standards are key.

When engaging with the introduction of standards at European level, civil society stakeholders from a range of social groups including housing, homelessness and poverty organisations, have called for a broader set of social safeguards to accompany new regulations.[27] These include protections for tenants from rent increases resulting from housing improvements and eviction as part of gentrification. Homeowners should also be supported with adequate and appropriate fi-

22. RSM UK Consulting LLP. (2019).

23. Department for Business, Energy and Industrial Strategy (2020). *Evaluation of the Domestic Private Rented Sector Minimum Energy Efficiency Standard regulations: 2020 Interim Process and Impact Evaluation Report.* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/969540/domestic-private-rented-sector-minimum-energy-efficiency-standards-interim-synthesis-report.pdf

24. *Ibid*.

25. Petersen, A., & Radhika, L. (2018). *Better Rentals, Better City: Policies to Improve Your City's Rental Housing Energy Performance*. Rocky Mountain Institute. https://rmi.org/how-cities-can-ensure-better-rentals-for-everyone

26. Centre for Sustainable Energy (2022) Compliance & Enforcement of the Minimum Energy Efficiency Standard (MEES) in the Private Rented Sector. https://www.cse.org.uk/news/view/2713

27. Right to Energy Coalition. (2021). *Tackling energy poverty: Ensuring the Renovation Wave delivers to households who need it most*. https://righttoenergy.org/wp-content/uploads/2021/11/Briefing-How-to-alleviate-energy-poverty-in-the-EPBD-1.pdf

nance for all situations[28] to ensure that standards do not become burdens on those who are already struggling with high energy costs. Finally, stakeholders have called for the integration of energy efficiency standards into broader housing supply, affordability and regeneration strategies and monitoring of the wider social impact on housing supply and affordability.[29]

What is a "decent" home in energy and climate terms?

Countries introducing standards to be implemented almost a decade from now, in 2030 or 2033, must answer the question of what constitutes a decent home in the future. Europe now has a 55% carbon reduction target for 2030 that requires significant energy demand reduction and decarbonisation in the buildings sector. Extreme weather events are on the increase and the current energy price crisis has illustrated the high risk of volatile fossil fuel prices. All of this makes clear the need for a decent home to do more than escape the very worst category of energy performance of today.

Homes that meet only a low level of energy and thermal performance will not be adequate to protect households from extreme weather events like heat waves or cold spells. These homes do not offer protection in times of energy outages. Low-performing houses also fail to meet the challenge of switching from fossil fuel heating to the use of renewable sources affordably.[30]

Conclusion

The rights to adequate and decent housing, and to access essential services of good quality, can be supported through the application of mandatory minimum energy performance standards for homes. These standards are also a key tool to alleviate energy poverty as they reduce one of the main structural energy inequalities that cause it. To be effective, the concept of a "*decent home*" should take into account the future climate and energy performance trajectory of the buildings stock. Future proofing homes is the only way to avoid them falling back into the underclass of worst performing buildings that pose a risk to low-income households. Rights and the standards that underpin them are, however, only empowering if households can exercise and access the benefits.

28. The frameworks in Scotland and France are good examples of support designed to suit different household incomes and tenures. energy saving trust. (2020). *Home energy programmes delivered by energy saving trust on behalf of the Scottish Government.* https://energysavingtrust.org.uk/report/home-energy-programmes-delivered-by-energy-saving-trust-in-scotland; and Ademe. (2022). *Rénovation: Les aides financières en 2022* [Financial assistance in 2022].

29. Maby, C. (2020). *Improving energy efficiency in owner-occupied homes in Scotland.* Existing Homes Alliance Scotland. https://existinghomesalliancescotland.co.uk/information/istrong-support-for-energy-performance-standards-in-scotlands-homes

30. District heating systems and heat pumps, the two predominant clean heating options, both run more efficiently when delivering heat at lower temperatures through wet heat distribution systems (pipes, radiators and underfloor heating). To enable homes to be heated to required indoor temperatures, minimum thermal efficiency of the building and size of the pipes and radiators are important. Sunderland, L. (2022). *How much insulation is needed? A low-consumption, smart comfort standard for existing buildings.* Regulatory Assistance Project. https://www.raponline.org/knowledge-center/how-much-insulation-needed-low-consumption-standard-for-existing-buildings/. Significant reductions in the need for heat will also be required, alongside other measures, to make heating with a heat pump affordable for low income households. See Sunderland, L. and Gibb, D. (2022) *Taking the burn out of heating for low income households.* Regulatory Assistance Project. https://www.raponline.org/knowledge-center/taking-burn-out-of-heating-low-income-households/

Conclusion

Conclusion

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The Conference on The European Contribution to the Right to Housing Standards, Litigation and Advocacy, organised by Abbé Pierre Foundation and FEANTSA Housing Rights Watch network in Brussels, in May 2022, created a valuable, historical and unique forum for housing and climate rights advocacy and expertise. The event and this publication provide a contemporary examination of European developments in these two areas. While there are many grounds for optimism, there were also some distressing observations.

In Europe, a particularly rich and developed continent, housing conditions are worsening in many respects. The costs of housing and the numbers of homeless and inadequately housed people are constantly increasing. The contributors to this publication unanimously highlight this reality. Marc Uhry and Noria Derdek point out that this situation affects all European countries.[1] The authors responsible for the study of specific national cases support them, whether in Germany,[2] France[3] or the United Kingdom.[4] Given the urgency and seriousness of this situation, the initiators of this collective project, the Abbé Pierre Foundation and Housing Rights Watch, have proposed a reflection on the guarantee of the right to housing as a human right. [5] In doing so, these organizations wanted to focus on the obligations that this right requires from States. In an even more specific way, they questioned the States' positive obligations, that is to say their obligations to act in favour of housing rights. Could such obligations, formulated by European and international treaties, constitute the driver by which all stakeholders, especially the European States, would be encouraged to radically improve the current situation?

In order to answer this fundamental question, several ideas and themes have been considered. First, the identification of positive obligations arising from the main international instruments binding European States: European Union law, the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), to which the International Covenant on Economic, Social and Cultural Rights (ICESCR) must be added. Then, the concrete instruments for implementing positive obligations, and for engaging the responsibility of public authorities were examined. In terms of strategy, the possibility of transposing the modus operandi of recent climate trials to the litigation of the right to housing was discussed. Finally, three more sectoral themes gave rise to

1. M. Uhry et N. Derdek, *In support of a control of housing policies based on international human rights law*, pp.95.

2. M. Althoff, *Discharge and rent control in Germany*, pp.81.

3. V. Toussain, *Social housing in France and European law*, pp.87.

4. L. Sunderland, *"Decent" housing standards as a strategy to alleviate energy poverty*, pp.115.

5. The European contribution to the right to housing: Standards, litigation and advocacy | Housing Rights Watch (abusivelending.org)

workshop discussions: the control of proportionality of home deprivations, the role of public authorities in controlling real estate markets against the drift of prices and fees, and standards and actions aimed at eradicating energy poverty.

This book brings together the thoughts of experts invited to answer these questions. Beyond their great competence, the contributors are remarkable for their diversity of functions, points of view and the different origins of their legitimacy: judges and European monitoring bodies, lawyers, academics, legal officers of national and international non-governmental organizations, housing project leaders, etc. I would like to share with you the modest reflections that the reading of these beautiful and stimulating contributions have inspired me to write. In my opinion, these reflections have a spirit: that of human rights (I), a substance: that of the positive obligations of States (II) and a form: that of the effective activation of these obligations (III).

I. The Spirit: Shifting the Paradigm with a Human Rights Approach

From a legal point of view, housing can be qualified as a property - or part of a property - inhabited by one or more persons. It is, however, a peculiar property that is understood in different ways. On the one hand, it comes under a market logic as a rare material good, having a pecuniary and appropriable value. On the other hand, because of its function, housing is an essential good for every human being, which implies that it must be understood in terms of human dignity and formulated as a human right.

Housing is thus at the crossroads of private economic interests and the adoption of public policies that constrain the free play of the market. The objectives of the political authorities can meet those of private interests (creation of wealth, renewal and modernization of the housing stock, etc.), but only in a partial way. Public authorities are still responsible for pursuing goals of general interest, such as ensuring access to decent housing for all. States therefore pursue policies of urban planning, construction of conventional and social housing, rent regulation, housing improvement, etc., which constrain economic actors. The balance between respect for private interests and the pursuit of the general interest depends on political choices that may vary according to the economic and structural situation, and to societal aspirations from one period to another.

The national representatives of the European States are well aware of the complexity of the housing issue, which may explain the reluctance to formally enshrine the right to housing as a human right, whether in their constitutions or through their international commitments. In this respect, as Judge Pinto de Albuquerque states, "*the right to housing falls into the category of social right*s".[6] Among human rights, social rights are those rights dedicated to the protection of workers and social welfare, including the rights of the most vulnerable groups.

Judge Rossi agreed that the Charter of Fundamental Rights of the European Union (hereafter the Charter) does not guarantee such a right per se, even if its article 34§3 refers to the "*right to housing assistance*", which is only one element of the right to housing. This provision alone cannot provide a demanding and enforceable protection in terms of access to housing. Its normative scope is very limited for various reasons. The first reason is that the Charter is only applicable within the scope of European Union law, and is therefore inseparable from existing Union law, "*just as the*

6. P. Pinto de Albuquerque, *State obligations in relation to housing rights - views of the ECHR*, pp.29.

shadow of an object follows its form".[7] Indeed, the EU does not have a competence to adopt common housing standards (in the strict sense of defining a public housing policy). [8] In other words, housing policy, as such, remains the sole responsibility of the Member States. We can therefore understand the meaning of the second restriction that results from the formula in Article 34§3 of the Charter indicating that respect for this right must follow "*the rules laid down by Union law and national laws and practices*", i.e. according to the law in force, which is essentially defined at national level. It is in the light of these clarifications that Principle No. 19 of the 2017 European Pillar of Social Rights relating to housing and assistance to the homeless[9] should also be read as not granting the EU any competence in this area. Last but not least, Article 34§3 only contains a principle that does not create any direct subjective right for individuals. [10] Member States are only required to observe this principle when implementing a European standard. Thus, as Judge Rossi points out, Article 34§3 was used by the CJEU in the *Kamberaj* and *Land Oberösterreich v KV* judgments, but on each occasion with a view to interpreting a European directive relating to the access of third-country nationals who are long-term residents to social benefits. [11]

Similarly, the ECHR and related case law do not enshrine a right to housing. [12] As Judge Pinto de Albuquerque points out, this would require a "*social reading of the Convention*" which, although in line with the case of *Airey v Ireland*, has never led to the adoption of a "*clear and simple position*" by the Strasbourg judges.[13] Nevertheless, the Convention does provide indirect and partial protection of certain housing-related guarantees, mainly through Article 8 of the ECHR, with its right to respect for private and family life and the home. However, this protection remains incomplete insofar as the Court often confines itself to a limited review. It inevitably leaves a wide margin of appreciation to States in matters of economic and social policy, which reflects a liberal vision of State action.[14] Moreover, there is little hope of strengthening this protection in the current context of increasing contestation of the role and legitimacy of European judges. [15]

On the other hand, the right to housing is formally recognised in the treaties enshrining social rights. This is the case, first of all, of the revised European Social Charter of 1996, which now recognises a right to housing through Article 31.[16] However, the remarkable nature of this provi-

7. L. S. Rossi, *Member States' obligations in relation to housing rights - views of the CJEU*, pp.23, citing the president of the court K. Lenaerts.

8. It does have competence to combat social exclusion by virtue of Article 153 of the Treaty on the Functioning of the European Union, but this is only a supporting competence that can only support and supplement the action of the Member States in this area.

9. "*a. Access to social housing or housing assistance of good quality shall be provided for those in need.*
b. Vulnerable people have the right to appropriate assistance and protection against forced eviction.
c. Adequate shelter and services shall be provided to the homeless in order to promote their social inclusion."

10. In fact, everything indicates that Article 34§3 is among the "principles" enshrined in the Charter in Title IV on solidarity, and not "fundamental rights" as they appear in Title II of the Charter (although Article 7 on the right to respect for the home is part of Title II). Indeed, the Charter itself distinguishes among its provisions between those which constitute subjective rights directly benefiting individuals, and those which only formulate principles, which must be implemented by legislative acts and can only be invoked before a court for the interpretation of these acts.

11. Moreover, according to the Court, when Member States determine the benefits available under the European directive, they must "respect the rights and observe the principles (...) set out in Article 34" of the Charter.

12. Cf CEDH, *Faulkner v Ireland*, 31 mars 2022, n° 30391/18 and case law cited, see P. Kenna et Maria José Aldanas, *Proportionality and Evictions*, pp.65.

13. P. Pinto de Albuquerque, *State obligations in relation to housing rights - views of the ECHR*, pp.29.

14. P. Kenna et Maria José Aldanas, *Proportionality and Evictions*, pp.65.

15. P. Pinto de Albuquerque, *State obligations in relation to housing rights - views of the ECHR*, pp.29.

16. "*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*".

sion must be put into perspective by the fact that, as Giuseppe Palmisano reminds us, only 15 of the 46 States Parties to the Council of Europe have accepted this article, and 4 of which are only committed to one or two of its paragraphs. Secondly, while the Universal Declaration of Human Rights (1948) adopted by all countries in the world, was the first international treaty to recognise the right to housing as part of the right to an adequate standard of living, the ICESCR (1966) developed these obligations in more detail, and used the same wording in Article 11§1 which guarantees "*the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing*". This provision and its interpretation by the UN Committee on Economic, Social and Cultural Rights (UNCESCR), which contains specific obligations, are valuable sources of inspiration for European and national law. Here again, it should be emphasised that the drafters of the ICESCR wished to restrict the normative content of their undertaking by providing only for an obligation of progressive implementation, to the maximum of their available resources. [17]

In the end, European states recognise the right to housing as a human right, but have tended to reduce the normative scope of this right, both in their international and European commitments and in their respective constitutions.[18] They consider that its implementation implies the adoption of a public policy which must be a matter for their sovereign decision-making in economic and social matters. They clearly do not wish to be constrained in their choices by supranational obligations. And if, in order to ensure suitable housing conditions, they have to decide between interests that may seem contradictory (support for the economy and employment in the construction sector versus access to housing for the most disadvantaged), the choice of increasing the free market and privatising the housing sector prevails, to the detriment of the public interest.

However, the liberalism of the housing market (which gives precedence to economic interests and the protection of private property) must be largely regulated because housing is not a good like any other. Indeed, like other goods such as food, water or energy, housing is, in many respects, necessary for human existence and can be compared to common goods, which require specific protection.

Nevertheless, the authors of this book are unanimous in their observation that the deterioration of housing conditions and the increase in the number of poorly housed people is due to the inadequacy of public authority action and the prevalence of the commodification of housing. They consider that only an understanding of the right to housing as a human right in itself and a reorientation of public policies in order to guarantee this right effectively, could contribute to improving the situation. Such a project would imply putting the fundamental nature of the right to housing back at the heart of political decision-making, which would give more power and legitimacy to public authorities in their function of regulating and supervising the market, private actors and economic operators. It would ultimately be a matter of assigning a "social function" to property ownership and to the economic activities surrounding it, which would certainly imply re-founding the "social pact" around the issue of housing.

17. Cf. Article 2§1 CESCR. "*1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures*".

18. For example, the right to housing is not recognized in the French Constitution and the Constitutional Council has only recognized "*the possibility of having decent housing*" as an objective of constitutional value and not as a right (CC, Decision n° 94-359 DC du 19 January 1995, *Law on housing diversity*).

The positive obligations of the European States, which stem from their international commitments, are the first steps towards this potential paradigm shift.

II. The substance: which are the positive obligations under the right to housing?

Some obligations relating to housing have been more easily accepted, including on the basis of the European Convention on Human Rights, insofar as they do not require the State to respect and protect a right to access or maintain housing. Others are more ambitious in that they require the effective implementation of the right to housing. This requires the adoption of public policies and/or state interventionism that is more complex for individuals to demand, and for judges to review. The latter obligations have mainly been formulated by the supervisory bodies of social rights treaties such as the European Social Charter and the ICESCR.

A. The obligation not to discriminate in access to housing and housing benefits

The principle of non-discrimination is a fundamental right that is effectively guaranteed by all European States at both constitutional and supranational levels.

As this principle is at the basis of Community integration, it is not surprising to find this requirement at the basis of European Union law, including with regard to access to housing and the right to benefit from housing assistance provided by national law. Thus, as Judge Rossi points out, certain rules of European Union law provide "*indirect protection*" of the right to housing by requiring Member States to treat nationals and certain other legal categories equally: European workers, who enjoy full equality of treatment, and all European citizens with a right of residence[19], third country nationals who are long-term residents (of more than five years of legal residence), including with regard to housing benefits.[20] Finally, the EU regulations on the standards of reception of asylum applicants stipulates that Member States shall provide them with accommodation while their asylum application is being examined. The logic of fundamental rights requires Member States to ensure that these especially vulnerable persons do not find themselves in such a state of destitution that it would undermine their human dignity, which must be guaranteed to all persons in all circumstances[21].

In order to comply with the principle of non-discrimination, the State must take positive measures, particularly regarding specific groups of beneficiaries. The ECSR has thus developed a rich jurisprudence on the right to housing of Travellers and Roma migrants, thanks to the complaints brought by FEANTSA and the International Movement ATD Fourth World, among others. For these people with their specific way of life, equal treatment implies that the States adopt specific adapted measures[22].

19. Even if, for the latter, the State can impose a condition of stay of 3 months in order to benefit from social housing aids (cf. Directive 2004/38/CE du 29 April 2004).

20. Directive 2003/109 du 25 November 2003, read in the light of Article 34 of the Charter of Fundamental Rights of the European Union; CJEU, 10 June 2021, *Land Oberösterreich (Aide au logement)*, C-94/20, in L. S. ROSSI, *Member States' obligations in relation to housing rights - views of the CJEU*, pp.23.

21. This requirement stems from the case law of the CJEU, the ECtHR and the ECSR.

22. Voir C. Nivard, *Le droit au logement combiné avec le principe de non-discrimination [The right to housing combined with the principle of non-discrimination]*, in Dossier "Droit au logement et droit(s) européen(s)" ["Right to housing and European law(s)"], *RDSS*, n°2/2015, pp. 241-249.

B. Obligations in cases of deprivation of domicile

As Padraic Kenna and Maria José Aldanas[23] point out, although the European Convention on Human Rights and Fundamental Freedoms does not guarantee a right to housing, it does protect the housing of individuals on the basis of the right to respect for one's home guaranteed by Article 8 ECHR.

The ECtHR considers deprivation of home (evictions, seizures, etc.) as an interference with the respect of this right, which is only in conformity with the Convention if it is provided for by law, pursues an objective of general interest and is "*necessary in a democratic society*", i.e. proportionate. The authors note, however, that the proportionality test normally applies only to evictions from public buildings or land owned by the State. The public interest pursued must be of particular importance for the interference to be justified, and the individual concerned must benefit from certain guarantees such as effective access to a court of law as well as alternative accommodation in certain cases.

On the other hand, when the interest of a tenant conflicts with that of a private owner, the State must only ensure that the deprivation of the home takes place after a court decision on the legality of the situation. As the ECtHR is not competent to control the respect of the Convention by private individuals in a horizontal dispute (between two "private" parties rather than between a State and "private" party), it takes a step back here, reducing the States' obligation to the strict minimum. This creates a difference in treatment between tenants and owners and between tenants of public housing and tenants of private property, which has no justification with regard to the right to housing.

In contrast, recent UNCESCR decisions against Spain, under the new individual complaint's procedure provided for by the Optional Protocol, criticise national courts for failing to check the proportionality between the legitimate aim of an expulsion and its consequences for the person concerned. The UNCESCR applies the ICESCR in a horizontal situation by holding the State responsible for its national courts, as one of its components. Padraic Kenna and Maria José Aldanas conclude that the ECHR should be guided by this case law in interpreting the Convention in a way that is more favourable to the right to housing of, in particular, vulnerable and socially disadvantaged persons.

It should be noted that the ESC provides equivalent guarantees on the basis of Article 31§2 of the Charter, which commits States Parties to prevent and reduce homelessness with a view to its progressive elimination. The European Committee of Social Rights has specified that States must ensure that in the event of an eviction - including of privately rented accommodation - there is a consultation of those concerned with a view to seeking alternatives to eviction, and that a reasonable period of notice is given before the date of the eviction. The right to an effective remedy for evicted tenants must also be ensured. Finally, "*even where eviction is justified, the authorities must ensure that the persons concerned are rehoused or financially assisted*".[24]

23. P. Kenna et Maria José Aldanas, *Proportionality and Evictions*, pp.65.

24. See not. ECSR, *FEANSTA v France*, complaint n° 39/2006, decision on the merits of December 5, 2007.

C. The obligation to ensure access to housing of an adequate standard: the example of fuel poverty

The notion of "*housing of an adequate standard*" has been clarified by the practice of the Committee on Economic, Social and Cultural Rights and the European Committee of Social Rights. The latter considers that it is a dwelling provided with "*all the essential services (such as heating and electricity)*", which must be sanitary and "*have the essential amenities, but also to a dwelling of suitable size for considering the composition of the family in residence*".[25] Sufficient or decent housing therefore includes access to energy for heating, lighting and the operation of common electrical appliances. This requires significant infrastructure, which is lacking in many countries.

The exhaustion of non-renewable resources and the environmental risks raise more global challenges. In a context of scarcity and risk of shortages, the problem of energy costs is becoming increasingly pressing for European States. In particular, they are confronted with growing situations of energy poverty affecting specifically the most disadvantaged categories of people[26]. Marlies Hesselman argues for a human rights approach to energy poverty[27]. She recalls that obligations exist under Article 11 of the ICESCR which guarantees the right to adequate housing and which includes among its criteria "*the availability of services, materials, facilities and infrastructure*" (availability) including "*sustainable access to natural and common resources*" such as "*energy for cooking, heating and lighting*".[28] In addition, affordability and habitability require that housing costs are not disproportionate to income and that those who cannot afford them are provided with housing subsidies to ensure their protection and safety. On this basis, the UNCESCR has specified a set of obligations for Member States to ensure that all housing units, including that of the most disadvantaged, include adequate access to energy.

Marlies Hesselman considers that these international standards of human rights guarantees should be integrated into the policies of the European Union and its Member States. Indeed, the European Union has recently adopted standards to combat energy poverty in the framework of its competences in the field of environmental[29] and energy[30] policy. For the author, the effectiveness of these policy measures would be strengthened by being embedded in a "*human rights*" perspective. Indeed, according to her, human rights "*are both a legal and a conceptual tool to fight against existing (structural) inequalities and to demand a better satisfaction of needs recognised as fundamental*".[31]

25. ECSR, *FIDH v Irlande*, complaint n° 110/2014, decision on the merits of May 12, 2017, see G. Palmisano, *State obligations in relation to housing rights - views from the ECSR*, pp.33.

26. Defined as the inability of households to access an adequate level of energy services at an affordable cost (definition cited by L. Sunderland, *"Decent" housing standards as a strategy to alleviate energy poverty*, pp.115).

27. M. Hesselman, *Legal standards for addressing energy poverty under the right to housing: Towards a new right to energy?,* pp.107.

28. CESCR, *general comment no. 4: the right to adequate housing (Article 11§1 du Pacte)*, 9 December 1991, E/1992/23, § 8. https://www.ohchr.org/en/documents/general-comments-and-recommendations/committee-economic-social-and-cultural-rights

29. Article 192 TFEU.

30. Article 194 TFEU.

31. M. Hesselman, *Legal standards for addressing energy poverty under the right to housing: Towards a new right to energy?*, pp.107.

D. The obligation to make the cost of housing accessible [in particular] to those without sufficient resources

States may seek to make housing accessible to people on low incomes by regulating the private market on the one hand (1) or by building social housing and granting social housing subsidies on the other (2).

1. Regulation of the housing market

In its general comment on the right to adequate housing guaranteed by Article 11§1 ICESCR, the UNCESCR considered that "*in accordance with the principle of affordability, tenants should be protected by appropriate measures against unreasonable rent levels or rent increases*".[32]

Indeed, housing policies in all European countries include regulation of private housing markets, in particular to protect the rights of tenants in the event of eviction, whether legal or illegal, or against excessive rents. For the latter, the State can play a regulatory role by controlling rents as well as a social assistance role by providing housing benefits to tenants.

The example of German law presented by Max Althoff is particularly interesting in this respect. Legislation there has always been especially protective of tenants in a country where the proportion of tenants is in the majority. However, the situation of tenants has become more and more complicated since the real estate market, which is poorly regulated, has become an attractive place for financial investments. Rents have risen sharply, especially in cities with a tight property market, such as Berlin. The legal regulations are no longer sufficient to halt the continuous growth of rents and the consequent increasing numbers of tenants who are forced to move out of the major cities concerned. Max Althoff highlights the deleterious role of German national or federal jurisprudence, which is generally unfavourable to tenants and renders certain legal guarantees ineffective. He also points out the difficulties of certain Länder in having more protective legislation adopted at federal level. We understand how much this regulation must come from a strong political choice, which is the only way to stop the market game that is systematically detrimental to the poorest people.

Given this observation, Noria Derdek and Marc Uhry propose that international human rights law be used to assess, and possibly condemn, public housing policies. In particular, they question the responsibility of States, with regard to human rights, in response to the increasing liberalisation of the real estate market and the commodification of housing, which is proving distressing for citizens, particularly the most vulnerable. The State may face a dilemma when the objective of the economic health of the market is antagonistic to that of better protection of citizen-tenants. For Noria Derdek and Marc Uhry, this dilemma does not have to be a dilemma: it is essential to "*prioritise the concerns and relegate to a subordinate level the issues of the economic health of the real estate sector, which are only a means and not an end*".

This reorientation must be led and supported by States, which are the duty bearers under international human rights law. Amongst their obligations is the obligation to control the behaviour of private persons infringing the right to adequate housing. In this sense, the recommendations presented in 2022 by Leilani Farha, former UN Special Rapporteur on Housing, "*The Shift Direc-*

32. CESCR, *general comment no. 4: the right to adequate housing (Article 11§1 du Pacte)*, 9 December 1991, E/1992/23, § 8.

tives. From Financialized to Human Rights-based Housing" are particularly relevant. In this document, Leilani Farha proposes a sort of "*revolution*" in the mercantile logic of the housing sector by demanding that States subordinate the economic and financial activities of private actors to the objective of fulfilling the human right to housing. This call for greater State intervention in the housing and real estate market would be the only way to remedy the inequalities of access and exclusion of many people from the right to enjoy decent housing.

2. Social housing

Among the obligations that arise from the right of people without resources to benefit from housing, the obligation of States to provide sufficient public or social housing is essential, even if it is particularly complex to implement. Indeed, compliance with such an obligation implies a significant political and economic investment, to which some states object on the grounds of limited financial resources. The courts and supervisory bodies are therefore content to exercise limited control over what they consider to be an obligation of means and, above all, political arbitration (wide margin of appreciation before the European Court of Human Rights, consideration of alleged state efforts before the Council of State,[33] etc.).

In this respect, the caselaw of the ECSR,[34] inspired by the interpretative work of the UNCESCR, turns out to be very valuable in setting out a possible effective control by the courts of such a complex positive obligation. Indeed, the ECSR has specified, with regard to the right to housing, that "*when the achievement of one of the [Charter's] rights is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources*". This obligation of means, which could be described as "*reinforced*", requires the State to justify its actions and/or progress in order to meet its international obligations.

This assessment of the respect of the right to housing, carried out by the ECSR on the basis of "*quality indicators of public policies*", could be usefully taken up at national level according to Noria Derdek and Marc Uhry. This "scoring of housing policies" would have the advantage of questioning the objectives, effectiveness and efficiency of public policy choices and therefore of forcing public authorities to account for the implementation of the right to housing. This method of control makes it possible to preserve the political authority's discretionary power without absolving it of all responsibility.[35]

Social housing policy in France and its apprehension by European Union law are the subject of a study by Virginie Toussain.[36] She highlights the ambiguous position of the EU, namely, both as an activator and as an impediment to national policies in the field of social housing. Indeed, the construction and management of social housing, as economic activities, are normally subject to the European rules relating to freedom of movement and free competition. Therefore, in order to defend the specific economic functioning of French low-cost housing organisations, France had to

33. Cf. Voir entre autres, CE, Juge des référés, 10 November 2022, n° 468570, cited by Noria Derdek et Marc Uhry.

34. CESCR, *general comment no. 4: the right to adequate housing (Article 11§1 du Pacte)*, 9 December 1991, E/1992/23.

35. Thus, France's social housing policy and practice have been denounced before the ECSR because of its manifest insufficiency of supply, the dysfunctions of its allocation procedure and the discriminatory nature of its conditions of access. ECSR, *Mouvement ATD Quart-Monde v France*, complaint n° 33/2006, decision on the merits of the 5 December 2007; ECSR, *FEANTSA v France*, complaint n° 39/2006, decision on the merits of the 5 décembre 2007.

36. V. Toussain, *Social housing in France and European law*, pp.87.

invoke the derogation allowed by the Treaties in competition law for undertakings entrusted with a service of general economic interest (SGEI), as well as an overriding reason of general interest to avoid the controls on State Aid and EU competition law rules.

However, it is in the area of economic governance that the European Union's position is the most equivocal. Indeed, in the context of the European Semester, the European Commission's reports on France have criticised both excessive public spending on housing policy and assistance, and the inefficiency of the procedures for access to social housing. Virginie Toussain notes that these reports have led to the adoption of reforms in France that have drastically reduced the budget allocated to housing policy and the construction of social housing. However, since the introduction of social indicators in the evaluation of the European Semester following the adoption of the European Pillar of Social Rights, the European Commission has been highlighting the risk that the lack of social housing and the disproportionate cost of housing in household budgets pose to France's financial stability, particularly for the most disadvantaged. But the latest 2022 reports continue to target housing policy as a sector where savings of public money are welcome.

That being said, the author notes that the EU plays a parallel role as an activator of public policies thanks to the significant financial support it provides to Member States for the energy renovation of buildings, particularly social housing buildings, through the European Structural Funds and the European Investment Bank.

At the end of this overview of the positive obligations that can be imposed on States on the basis of the human right to adequate housing, it is clear that the most ambitious and comprehensive obligations have been identified by the UNCESCR and the ECSR. Their jurisprudence should be better known and applied. In particular, it should be considered by the ECtHR and the CJEU, whose decisions are much more cautious, notably because they cannot rely on a legal text that formally recognises the right of people to decent housing. Indeed, while the rulings of these two European Courts are binding, the decisions of the ECSR and UNCESCR are considered to be soft law, with no immediate binding effect on the States Parties (even if their commitment to the treaties implies that they consider them to be binding). So how can we ensure that these international obligations are translated into binding obligations in domestic law? At the very least, how can States be encouraged to respect them?

III. The form: the effective activation of positive obligations

A. Strategic litigation in the light of recent developments in environmental litigation

The interview with Delphine Misonne and Marine Izquierdo[37] as well as the chapter by Nicolas Bernard and Koldo Casla[38] open up encouraging and innovative perspectives for thinking about the effective activation of State obligations in regard to housing rights. Indeed, the idea is to consider the possibility of transposing recent successes in the field of climate justice to housing rights. Reference is made in particular to the three major trials, *Urgenda* (Netherlands),[39] *l'Affaire*

37. D. Misonne et M. Yzquierdo, pp.45.

38. N. Bernard et K. Casla, *Lessons from strategic human rights litigation: From climate change to adequate housing*, pp.51.

39. The Hague Tribunal, 24 June 2015, *Foundation Urgenda v the Netherlands*, C/09/456689/HA.

du siècle (France)[40] and *Klimaatzaak* (Belgium),[41] in which public authorities were held accountable for their insufficient action to combat global warming.

These lawsuits can be qualified as strategic litigation "*understood as litigation that pursues objectives or is concerned with interests broader than those of the parties*".[42] Indeed, Marine Izquierdo describes these lawsuits as aiming "*not so much to obtain compensation as to reinforce the existing law or change its interpretation*" as well as "*tools for social mobilisation*" used by civil society with a view to "obtaining a societal change".[43]

The interest of these types of case lies in their high profile, which makes them "*the business of citizens who hold their respective States to account*".[44] They encourage judges to position themselves as judges of "*the credibility of public action*" and to hold the State accountable for its responsibilities and commitments by condemning its inaction, by compensating for the damage suffered, and even by using its power of injunction. They give rise to a kind of virtuous circle of strengthening climate action initiated by legal actions followed by legislative actions, potentially followed by other legal actions in case of insufficient political action, and so on.

Indeed, the cases mentioned have led to tangible effects. For example, the sanction of the German "*climate law*" by the Constitutional Court led to the adoption of a more ambitious law by the legislator, and the *Urgenda* case to the adoption of a three billion euro action plan to sufficiently reduce carbon emissions, as Marine Yzquierdo notes. As for the *L'Affaire du siècle* case, it is likely that the French Conseil d'Etat will order the State to pay financial penalties, for non-compliance with the injunctions made by the court to adopt, by 31 December 2022, the measures necessary to achieve the trajectory of reduction of greenhouse gas emissions by 2030.[45] France has already been subject to record fines for failing to meet EU air pollution standards.[46]

Is a transposition possible in view of the similarities and specificities of the right to housing compared to environmental rights? Nicolas Bernard and Koldo Casla first identified certain points of divergence between environmental rights and housing rights.[47]

Housing litigation is largely about tenants against private landlords in order to obtain a more immediate solution to an individual problem rather than to engage the responsibility of public authorities on their structural causes. Furthermore, tenants tend to seek out-of-court solutions in order to avoid the long, costly and risky process of litigation. On the other hand, since the environmental issue is of a global nature, it is regulated by sources of international public law and, at the domestic level, by rules of special administrative law. Stakeholders therefore often turn to the courts to challenge public authorities, who are primarily responsible for political action to combat global warming and control polluting activities. Finally, it would seem easier to identi-

40. Administrative Court of Paris, 14 October 2021, N^{os} 1904967, 1904968, 1904972, 1904976/4-1.

41. Court of First Instance of Brussels, 17 June 2021, *Affaire Climat ASBL*, n° 2015/4585/A.

42. H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact*, Hart, 2018, cité par N. Bernard et K. Casla, *Lessons from strategic human rights litigation: From climate change to adequate housing*, pp.51.

43. D. Misonne et M. Yzquierdo, pp.45.

44. *Ibid.*

45. https://notreaffaireatous.org/cp-au-31-decembre-2022-laction-climatique-de-letat-aura-ete-insuffisante-les-associations-demanderont-une-astreinte-financiere-en-2023/

46. CE, 10 juillet 2020, *Les amis de la Terre et al.*, n° 428409.

47. N. Bernard et K. Casla, *Lessons from strategic human rights litigation: From climate change to adequate housing*, pp.51.

fy the wrongful behaviour of States in environmental matters insofar as they are committed to quantified objectives based on scientific studies, particularly since the 2015 Paris Agreement. On the other hand, this responsibility seems more difficult to define in terms of the right to housing, as several policy options can be used to achieve it. Consequently, it appears that the right to the environment implies an obligation of result, whereas the right to housing would only require an obligation of means.

Despite these differences, the two authors develop points of convergence that make it possible to consider transposing the method and reasoning used in environmental cases to housing rights.

Firstly, the right to housing is also likely to give rise to specific obligations or obligations of result, as a result of the interpretative work of the courts[48] or the will of the legislator.[49] Secondly, with the increase in rent and energy prices, housing has become as urgent an issue as the environmental issue, as the risk of a major social crisis seems imminent. The ecological crisis and the housing crisis feed each other by subjecting the most precarious to the deterioration of their environment and living conditions. Thirdly, the right to the environment and the right to housing are largely intertwined. It is therefore not surprising that the ECHR's jurisprudence on the right to a healthy environment is based primarily on Article 8, which enshrines the right to respect for private and family life and the home. The authors then note the key role of activists and non-governmental organisations in both cases, as illustrated throughout the book. Furthermore, they note that both climate and housing require the contribution of all, not only States but also private actors, both collective and individual. Finally, they each specifically affect vulnerable groups of people, who are the first to be harmed.

Forming strategic remedies that highlight the State's failure to act, combined with a human rights approach, could take the housing issue out of an inter-individual perspective as well as out of the market logic – both of which can give the impression that the structuring and cost of housing and real estate is a state of affairs that "*can't be helped*", or that the poorly housed are responsible for their situation. The submerged part of the iceberg of the systemic dysfunction of housing policy should be exposed in court, beyond the emerging part of the many individual disputes. In short, it should be made "*everyone's business*". Certain argumentative strategies can contribute to this result, such as the demand for housing as a human right, the link between the environment and housing, or the cost of poor housing for the economy and society as a whole, which has already been evaluated.[50]

B. Mobilisation beyond central governments

A common point noted above between the right to housing and the right to the environment lies in the multiplicity of international/domestic, national/local, public/private, collective/individual actors on whom the full implementation of such rights depends. Everything cannot rest on the

48. As mentioned above concerning the determination of positive obligations at the European level. The national judge also contributes to this "*embodiment*", as illustrated by the decision of the Constitutional Council, which derived the prohibition on cutting off water in the event of non-payment from the constitutional objective of "*the possibility for all persons to have decent housing*" (Decision n° 2015-470 QPC du 29 May 2015, *Société SAUR SAS*.

49. For example, the French law n° 2007-290 of March 5, 2007 instituting the right to opposable housing and carrying various measures for social cohesion.

50. Pierre Madec, *Quelle mesure du coût économique et social du mal-logement ?* [*How to measure the economic and social cost of poor housing?*], OFCE, Sciences Po, *Revue de l'OFCE*, 146 (2016).

central State and on the control of the courts, which often restrain themselves, in the name of the principle of separation of powers, where economic and social issues are at stake.

It is true that European and international obligations are first and foremost binding on States and therefore on their central governments. Nevertheless, from the point of view of the international order, the responsibility of the State, considered as a unit, can be the responsibility of each of its emanations (agents, infra-State entity, independent public body or courts). It is the responsibility of the State to ensure that international obligations or the enjoyment of fundamental rights are effectively respected by all of its organs, just as it must protect any individual against the actions of private actors or other individuals who would infringe on one of his or her fundamental rights.

It is therefore not surprising that the legal recognition of the right to a healthy and sustainable environment is formulated in terms of rights but also duties. This is reflected in France's Constitutional Charter for the Environment, whose Article 2 states that "*Everyone has the duty to participate in the preservation and improvement of the environment*".[51]

The effective implementation of the right to housing thus requires the mobilisation of all stakeholders, through legal constraint and with pragmatism. In this context, Louise Sunderland usefully sheds light on a case study in the United Kingdom,[52] concerning a 2016 law imposing a minimum energy efficiency standard for private rented housing, with the aim, in particular, of reducing situations of energy poverty. The author finds that the impact of this law has been largely reduced by the lack of an associated implementation framework. The local authorities responsible for ensuring compliance have not been given sufficient financial and human resources to carry out effective monitoring, nor the data necessary to identify the dwellings concerned. In addition, there was originally no provision for tenant education to encourage landlords to bring their properties into compliance with the law. Louise Sunderland concludes that "*standards alone do not improve housing*", as their effectiveness depends on a comprehensive regulatory framework of support and enforcement. She further demonstrates how civil society actors involved in housing issues are demanding that effective support be included in future European standards.

Similarly, the effectiveness of monitoring compliance with the right to housing can only be verified by the existence of remedies. The tenants most affected by poor housing and/or energy poverty are often socially vulnerable people. For these people, it has long been recognised that their access to justice is obstructed by multiple factors, not only economic but also social and psychological. This phenomenon of non-recourse to rights[53] has been noted in particular with regard to the application of the DALO law.[54] The positive obligations of States are therefore not limited to establishing rights and providing the institutions and means for their implementation, but also require that the beneficiaries be supported so that they can effectively exercise their rights.

As mentioned in most of the contributions to the book, guaranteeing the right to housing requires that States regulate the housing market and impose certain constraints on private owners. This submission of the housing market to the respect of human rights must be the result of a clear

51. See also Article 3. Article 3: "*Every person must, under the conditions defined by law, prevent or, failing that, limit the damage that he or she may cause to the environment*" and Article 4: "*Every person must contribute to the repair of the damage that he or she causes to the environment, under the conditions defined by law*".

52. L. Sunderland, *'Decent' housing standards as a strategy to alleviate energy poverty*, pp.115.

53. Dossier "Ceux qui ne demandent rien" ["Those who do not ask for anything"], Vie sociale 2008/1 (N° 1).

54. Monitoring Committee for the Right to Housing, *Pour un plan national d'accès au droit et de lutte contre le non recours - Bilan Dalo hébergement 2008/2019*, novembre 2020.

political will. This paradigm shift will not come from judges alone, whether national or international, as European and international standards do not allow for such a "*revolution*". States can, however, make the choice to condition the economic freedom of the housing market and the full enjoyment of the right to property to the pursuit of the objective of guaranteeing decent housing for all. This would mean reviving the social function of property,[55] just as an environmental function of property has recently been identified.[56]

In conclusion of this very rich book, it appears that a human rights approach to the right to housing highlights the inequalities in access to housing experienced specifically by the most vulnerable, and aims to ensure the effective enjoyment of this right by all. These issues raise questions about the extent of the constraints that should be placed on the market, and about the modalities of redistribution within each society.

Therefore, the right to housing is resolutely a question of social justice, but it goes beyond the mere distribution of wealth and rewards. Access to decent housing is a basic fundamental right, necessary for the enjoyment of all other fundamental rights. What is at stake here is the right of every person to live with dignity among other human beings and, beyond that, the right of humanity to inhabit our planet in a sustainable manner.

55. Voir L. Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* [*General changes in private law since the Napoleonic Code*], Paris, F. Alcan, 1912 and N. Bernard, *Précis de droit des biens* [*Précis of property law*], Louvain-la-Neuve, Anthemis, 2014, pp. 130 et sq.

56. B. Grimonprez, *La fonction environnementale de la propriété*, Revue trimestrielle de droit civil, 2015, p. 539-550.

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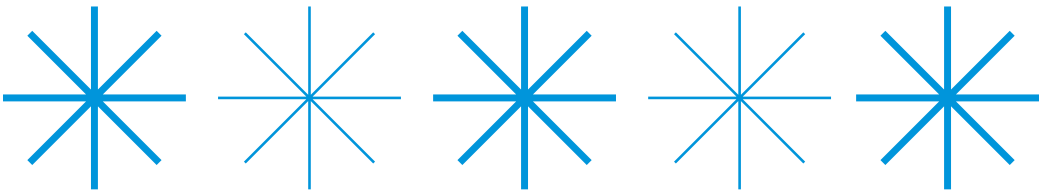
This publication is a continuation of the *European Contribution to the right to housing* conference held in Brussels in May 2022. It marked the end of the COVID lock-down period, and provided a contemporary review of the "state of the art" of housing rights in Europe.

The expert speakers, whose contributions are published here, are remarkable for their diversity of functions, points of view and the different origins of their legitimacy: judges and European monitoring bodies, lawyers, academics, legal officers of national and international non-governmental organizations and other experts.

Key topics addressed include housing rights, European Union law and obligations of European States, social and environmental rights, strategic litigation, the requirements of "proportionality" in evictions, rent control, housing standards, social housing, fuel poverty and regulation.

This publication outlines and evaluates key developments on housing rights in Europe in 2023, and will inform policy makers, legislators, housing rights advocates, adjudicators and decision-makers, on how the fundamental right to housing can be protected and promoted in Europe.



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