

Gábor Kardos¹:

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

Introduction: Social Rights and Poverty

There are different ways to fight against poverty. For example, you could simply rely on economic development, on charity or it can solely be based on governmental initiatives. Sustainable economic development is a precondition to significantly diminish poverty but it does not lead to this outcome automatically. Charity does not help if there are too many free-riders who think that others have contributed and there is no need for their sacrifice and governments could come and go having very different social preferences.

The guarantee of the state's commitments to fight against poverty could flow from constitutionally and/or internationally secured social rights. You can argue that this way freely elected governments may be "overcommitted" losing a significant part of their economic policy freedom or those rights are trumpets giving the impression that in a debate over the resources only the right holders may be right,² but these approaches definitely overestimate of the consequences of recognition of social rights.

Constitutional and/or international legal regulation provides limited protection because social rights are rarely subjective rights and in many respects they do not represent more than legally secured state goals. The states have lost much more of their economic policy freedom by globalisation than by the maintenance of the institutional base of social rights because they enjoy a relatively wide freedom to decide on the level of services arising from those rights. As far as the trumpet argument is concerned rights having relative protection can hardly be real trumpets. Their *relative argumentative power* could help those who belong to the weaker side of the society, especially those who do not have real conflict capabilities, - not having a voice in social debate, - those who can not choose, like handicapped people or the inhabitants of slums and the homeless people.

¹ Gábor Kardos is professor and head of the Department of International Law of the Faculty of Law of the Loránd Eötvös University of Budapest

² The „trumpet” interpretation comes from Ronald Dworkin: Taking Rights Seriously. London, Duckworth, p. 11. It has been developed by Martti Koskenniemi: The Effects of Rights on Political Culture. In: Philip Alston (de.): The EU and Human Rights. Oxford, University Press, 1999, pp. 113-116

On practical ground it could be underlined what the people really need is education, job, flat, health service, not the legal guarantee of those.³ But unfortunately the people who do not have those things need guarantees not to be left alone. You could argue that universal suffrage resolves this problem but in affluent society having a satisfied majority interested in tax cuts those political forces which favour the bottom through state spending rarely have a chance.

Social rights can provide entitlements for social services for those who are not able to buy them on the market. The right to social security can provide a safety net for social rights. If the social services are provided in the context a social security system, it means that the law creates a risk community based on two things. The first is a duty to pay fee and its amount reflects your income, the second are entitlements for those who have paid the fee and are in need to receive services. It is not by chance that according to the approach taken by the European Committee of Social Rights – having the duty to supervise the implementation of the European Social Charter – the social security system should not only be adequate with the needs of the vulnerable groups of the society but it can secure basic subsistence to all members of the society.⁴

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

“There are men who fall helplessly into the workhouse because they are good for nothing; but there are also men who are there because they are strong minded enough to disregard the social convention (obviously not a disinterested one on the part of the ratepayer) which bids a man live by heavy and badly paid drudgery when he has the alternative of walking into the workhouse, announcing himself as a destitute person, and legally compelling the Guardians to feed, clothe, and house him better than he could feed, clothe, and house himself without great exertion.”⁵

The answer to such behaviour is the conditionality of the minimal provisions. The minimal provisions are financed by the social security budget or the state budget. But even if the social security budget covers the expenses the money comes from the state budget, from the state revenue. To satisfy certain basic human needs – like education, housing or the above mentioned minimal social and health services– does not go without public spending, or if you wish without “compelled charity” through taxation.⁶ The expenses are significant and the market solves the

³ This argument comes from a US diplomat, het has been quoted by Philph Alston: U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Enterely New Startegy. AJIL vol. 84, number 2 (1990) p. 375

⁴ As it has been quoted by Martin Scheinin: The Right to Social Security. In: Asbjorn Eide, Catarina Krause, Allan Rosas (eds.): Economic, Social and Cultural Rights. A Textbook. (2nd ed.) Dordrecht, Nijhoff, 2001, pp. 212-213

⁵ G.B.Shaw: Man and Superman Act III (1903) <http://www.bartleby.com/157/3.html>

⁶ The compelled charity argument comes from Jeremy Waldron: Liberal Rights. London, Cambridge, University Press pp. 225-250

problems at best partly. Freedom and welfare services in mass societies finally depend on readiness to pay taxes.⁷ Governmental programmes involving legislation and high expenditures are needed and such programmes should have firm grounds. Beside other things like moral or religious beliefs, or social citizenship, the theory of basic human needs, the legal concept of social right can serve this goal.

The Problem

The scale of the housing problem is amazing, according to the data of UN Centre on Human Settlements (HABITAT) in 2006 an estimated billion people did not have adequate housing and another hundred million did not even have a home.⁸ The presently ongoing economic crises have started in the house market and its one of the most painful consequences is that many people lose their home. It comes from the fact that in the developed world increasing number of people are forced to rely on the housing market, with high interest 'sub-prime' lending and repossessions for non-payment can easily result in homelessness. Many falls in the affordability trap because they overestimated their income, not expecting unemployment, pursuing their dreams about their own house or not able to cope with increasing rent. Segregated minorities and people with disabilities suffer from discrimination most on housing market. Although evictions are generally legally regulated in many cases arbitrary evictions are taking place.⁹

The Right to Housing in International Law: Beyond Inspirations and Aspirations

Supreme responsibility for the implementation of human rights is vested in the constitutional system of the state. (The state should cope with its contradictory position: being the greatest violator and guarantor of human rights at the same time.) International law with certain exceptions in the field of civil and political rights provides only guidelines for national legislation. If massive state spending or if you wish macro-economic decisions are at stake as it is the case with the implementation of social rights it can not be done differently.

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

Article 25 (1) of the Universal Declaration of Human Rights (1948) and Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (1966) recognize the right to

⁷ The costs of rights argument originally comes Stephen Holmes and Cass R. Sunstein: *The Costs of Rights: Why Liberty Depends on Taxes*. They are quoted in Henry Steiner, Philip Alston: *International Human Right sin context. Law, Politics, Morals*. (2nd ed.) Oxford, University Press, 2000, pp. 260-1 but they confine it to the importance of pay taxes to secure civil and political rights.

⁸ http://www.unhabitat.org/downloads/docs/3777_54054_HS-568.pdf

⁹ *Housing Rights: The Duty to Ensure Housing for All*. Commissioner for Human Rights, Council of Europe. Strasbourg, 25 April 2008, pp 3-5.

housing as a part of the right to an adequate standard of living, „right of everyone to an adequate standard of living for himself and his family, including *inter alia* housing”.

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

„In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in Article 11 (1) must be read as referring not just to housing but to adequate housing.”¹⁰

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

The most important statements are the followings: All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction and harassment. States should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. Tenants should be protected by appropriate means against unreasonable rent levels or rent increases. The implementation of the right requires the adoption of a national housing strategy with effective monitoring relying on whatever mix of public and private sector measures considered appropriate. The Committee emphasises the importance of legal procedural guarantees against planned eviction, discrimination in the allocation and in availability of access to housing and unhealthy conditions.¹¹

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

The intervention into the market could easily lead to a frozen market. The regulation aiming a ceiling in rents can be an incentive to the investors to select other economic areas for their investments and the deregulation can ends in a boom in the construction of houses.¹² The

¹⁰ General Comment No. 4 (1991) on the Right to Adequate Housing. Para 7

¹¹ Ibid. paras 8-14

¹² Cass. R. Sunstein: Free Markets and Social Justice. New York, Oxford University Press, 1997, p. 283

solution is not only the fine tuning of the rent level, – giving a help to the tenants but not alienating the investors - but to give tax incentives to those who invest in the housing market.

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

„The term "forced evictions" (...) is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.”¹³

The forced evictions are frequently associated with violence, international armed conflicts, internal strife and communal or ethnic violence. Other instances of forced eviction are carried out in connection with conflict over land rights, development and infrastructure projects, such as the constructions, urban renewal, the clearing of land for agricultural purposes, unbridled speculation in land. Even if the evictions are justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it must be ensured that they are carried out incompatible with a law which respects the Covenant and all the legal recourses and remedies should be available to those affected.¹⁴

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

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

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

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

The European Committee of Social Rights in its *Conclusions* (on state reports) has clarified the notions which are essential to understand the content of the obligations, such as adequate housing, homeless persons, forced eviction and housing affordability. It has also established what action States are needed to ensure the effectiveness of the right to housing: the control of adequacy, construction policy, social housing, housing benefits, judicial remedies, and emergency housing for homeless people, etc.¹⁵

¹³ General Comment No. 7 on (1997) the Right to Adequate Housing – forced eviction. Para 3

¹⁴ Ibid. Paras 4-15

¹⁵ See Conclusions of the Committee on Social Rights available at: www.coe.int/t/e/human_rights/esc/3_Reporting_procedure/2_Recent_Conclusions/defa

In a collective complaint case¹⁶ the European Committee of Social Rights: the *FEANTSA* (European Federation of National Organisations Working with the Homeless) *v. France* case came to the conclusion that the following governmental behaviour violate Article 31:

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

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

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

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

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

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

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

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

“While supporting housing rights at international level, many States fail to address these rights obligations within national legislation, administration systems, monitoring and policies. Some have difficulties in defining and enforcing a minimum standard of housing rights protection, or in securing the resources for effective State action. Indeed, where they exist, many programmatic approaches preclude any remedies for violations, while some rights approaches ignore the role of housing markets.”¹⁷

¹⁶ Decision on the Merit, 5 December 2007

¹⁷ Housing Rights: The Duty to Ensure Housing for All. Ibid. p. 4

The Justiciable Aspects of Right to Housing in International Law

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

The European Court of Human Rights in the *James and others*¹⁸ analyses certain aspects of the connection between right to property and housing and comes to the conclusion that in modern societies housing is a primary social need and it can not be left to the market completely. Consequently, it is legally justified if legislation in serving greater social justice intervenes into private contracts. According to *Connors*¹⁹ and *Prokopovich*²⁰ forced eviction may amount to a violation of right to privacy, family life and home such as displacements and destructions of home and also to a violation of right to property (*Aakdiwar and others*²¹). In *Marzari*²² the Court considering the violation of right to privacy, family life and home has stated:

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

An extreme destruction of home - in which the authorities have set fire on the house of the relative of terrorist suspects – the Court has held the violation of inhuman and degrading treatment (*Yöyler*²³).

In cases of forced eviction, displacements and destruction of homes the Inter-American Courts of Human Rights has come to same conclusion: violations of right to freedom from interference with private life, family, and home (*Ituango Massacres*²⁴) of freedom of residences and right to property (*Moiwana Community*²⁵)

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

¹⁸ Judgement, February 28, 1986, paras 47, 63

¹⁹ Judgement, May 27, 2004 paras 85-95

²⁰ Judgement, November 8, 2004, paras. 35-45

²¹ Judgement, September 16 1996 para 88

²² Judgement, 4 May, 1999. It has been quoted by Housing Rights: The Duty to Ensure Housing for All. Ibid pp. 9-10

²³ Judgement, May 10, 2001, paras 74-76

²⁴ Judgement, July 1, 2006 paras 175-188

²⁵ Judgement, July 15, 2005 paras 168-189

Domestic Legislation

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

The new law on the enforceable right to housing adopted in France in 2007 (“DALO Act”) provides a gradually introduced procedural right to turn to administrative tribunal if the right to housing has been violated. The measures foreseen in the new Act entered into force on 1 December 2008 (for certain categories of persons) and will enter on 1 January 2012 (for other categories of persons). From 1 January 2008, negotiated settlement application to mediation committees are provided for social housing applicants on the waiting list for “excessively long” times (Group 1) and good faith applicants who are unhoused or underhoused (Group 2) and applicants for temporary accommodation (Group 3). From 1 December 2008, those who belong to Group 2 and Group 3 have a court action if a committee decision in their favour is not implemented. From 1 January 2012, Group 1 will have the same right on the same conditions.

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

Sophisticated framework legislation for housing, with clearly defined goals and target groups, with good implementation regulation, with time-table and with necessary financial resources and incentives is really a must for the realisation of the right to housing. But aiming to high and to provide a justiciable right might lead to disappointments, especially if the financial resources are not guaranteed. And the impact of constitutional or legislative recognition of right to housing *and* landmark cases like *Grootboom*²⁶ in South-Africa (2000) is maximum „significant but limited”. In South-Africa although still millions live without adequate housing in informal settlements but the *Grootboom* decision of the South African Constitutional Court has had two positive impacts as regards housing rights. First, it has created a powerful tool for the advocates of specific communities involved in evictions proceedings; second, it has paved the way to a national program for housing assistance in emergency circumstances.²⁷

²⁶ 2000 (11) BCLR 1169 (CC).

²⁷ Elisabeth Vickeri: *Grootboom's Legacy. Securing the Right to Access to Adequate Housing in South Africa?* Center for Human Rights and Global Justice. Working Paper. Economic, Social and Cultural Rights Series Number 5, 2004 NYU School of Law pp. 6-7

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

Instead of Conclusions

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

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

*But Jockin Arputham, president of the National Slum Dwellers Federation in Mumbai, was doubtful. "It's unfortunate to say that our system is not equipped to deliver that [target]," he said. "This kind of political statement that the government delivers is not the best. Some of my slum people told me: 'What a wonderful joke!' If he had said 20 years, I would say it is worth doing." Mr Arputham said the government should concentrate its efforts on one city to create a model of how to untangle disputes over property rights issues and lack of amenities surrounding informal settlement. He challenged the central government to release land it owns to people who have illegally settled on it.'*²⁸

The resolution of the property disputes, the transformation of the actual possession of land into right to property in the Developing World are the key elements of social development including housing.²⁹

²⁸ India drives plans to end slum living. Financial Times, July 10, 2009

²⁹ See Hernando De Soto's fascinating book. Hernando De Soto: The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else. New York, Basic Books, 2000