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The right to housing and sitting tenants in Central and Eastern European Countries

The Significance of the Decision No. 53/2008 of the ECSR

Introduction

The decision of the European Committee of Social Rights (ECSR) on Collective complaint No. 53/2008 from September 8, 2009 is the first concrete international legal document with binding effect that addresses the problem of the so-called sitting tenants in Central and Eastern Europe (hereinafter: CEE).

The Committee decision pertains to the Slovenian tenants in denationalized dwellings. These individuals and families have, in the period prior to transition which started 1991, obtained the housing right on formerly public flats, have moved into them upon administrative allocation order and consequent housing contract, all in good faith, and by doing so, solved their housing problem. When this pre-transition housing right was abolished as part of the transition, a large majority of these individuals and families were given, in place of the withdrawn housing right, the right to equitable purchase of the flat they occupied. In this way, a large portion of the population was able to consolidate their housing situation. Exempt from this transformation rule was only a single category of tenants who occupied denationalized flats. They were using flats that were, following WWII, nationalized from private owners. In the transition, the national authorities decided to restore these flats to the original owners and their heirs rather than make possible for the tenants to purchase them. The latter had their new legal position protected by law-regulated right to further tenancy with a legally regulated rent and formal legal protection.

The said category of tenants in denationalized flats in Slovenia represents one of the forms of the so-called sitting tenants' problem. The term sitting tenants designates all the present tenants within Central and Eastern Europe who have, like the Slovenian tenants of denationalized flats, obtained the housing right on the public flat in pre-transition times, but were stripped of this right in the process of transition and were, simultaneously, excluded from the general system of consuming their pre-transitional right by equitable purchase of the flat. Instead, they were able to continue living in their flats, but under changed conditions of the newly established tenancy right.

The reasons for the exclusion of some minority categories of CEE residents from the general process of transformation of pre-transition housing right holders to home owners varied from country to country as well as within each country. The exclusion was in most cases a consequence of legal obstacles since these tenants were not granted the right to purchase their flats under transition regulations, but may have resulted also from the actual circumstances of the tenants themselves. Generally, sitting tenants can be divided into four basic categories: the tenants in denationalized flats[1], tenants in privatized flats[2], tenants in private flats[3], and tenants in

[1] The Slovenian situation as explained above; the housing right holders of once expropriated dwellings were prohibited from buying their existing as well as any other substitute dwelling because privatization priority was given to the prewar private owners and their heirs. Such situations are – besides Slovenia, reported also from Czech Republic and Latvia.

[2] The tenants did not purchase their or substitute flats because their flats were privatized by others, for instance, within privatization of a public company (dwellings were consistent part of company assets), or for instance by delegating the right to purchase, sometimes with the flat user`s consent.

[3] The tenants have already prior to transition occupied the flats that were formally in private ownership, but were, according to the then regulations, administered by public authorities. During transition, the national authorities changed the housing legislation, abandoned the administration of such flats, and changed the terms of perusal to the tenants in privately owned flats. Such cases were frequent especially in Poland and Croatia.

public flats.[4] All four categories possessed the pre-transition right to occupy their flats on the grounds of pre-transition housing right, and have thus comprised the majority of population that sought to solve their housing situation in this way. Following the transition processes of privatization, denationalization, and the changes of housing law, they have become a minority category of tenants whose legal and housing standing worsened substantially, and who, unlike other pre-transition housing right holders were unable to consume the right to purchase of their own, or a substitute flat, under equitable conditions.

The here cited decision of the Committee is, although pertaining to the specific problem of Slovenian tenants in denationalized flats, in certain aspects applicable to all cases of sitting tenants, as will be argued below.

Points of departure

The specific circumstance that has to be accounted for when assessing the situation of sitting tenants in CEE is their housing situation prior to transition. The Committee has, in assessing the Slovenian case and all the transgressions of the revised European Social Charter (hereinafter: RESC), consistently invoked the position that the Slovenian tenants of denationalized flats have had prior to transition.

Identifying the transgression of the right to adequate housing, the Committee affirmed that the pre-transition position of the Slovenian tenants in denationalized flats was in accord with this right. As one of key actions of the state in discord to this right, the Committee also explicitly quoted the "*evolution of the rules on occupancy*", and the "*increase of rents*" (para. 70). Identifying the transgression of the right to affordable housing, the Committee stressed that by denying the tenants in denationalized flats the right to equitable purchase or lease of a substitute flat, their pre-transition housing right was likewise withdrawn (para. 72). Identifying the transgression of the prohibition of discrimination pertaining to the right to affordable housing, the Committee took as the basis of its deliberation the original, pre-transition relations, and the positions of Slovenian tenants of denationalized flats, comparing their prior situation with other pre-transition housing right holders. It is precisely the transition-induced difference of their comparative position, that is to say, the reason of the present situation that the Committee identified as discriminatory (para. 74).

It follows then that from the point of view of the right to housing, the present sitting tenants are to be treated as a special category of households whereby their pre-transition housing situation is the point of departure. They are not, therefore, a vulnerable group whose present housing situation calls for the current national authorities to solve their housing problem, but a group whose housing problem was solved prior to transition, but was rendered vulnerable precisely because of the current legal arrangements of their housing situation.

Unlawful active intervention of the national authorities

When assessing the situation of sitting tenants with regard to the housing situation they were in prior to transition, the interventions of the national authorities into their acquired legal status are demonstrably inadmissible with regard to the right to housing.

[4] Some tenants failed to benefit, or could not benefit, from the right to equitable purchase during transition, but were satisfied to have their pre-transition housing right transformed into tenancy in pubic flat. Once the transition was completed, however, the conditions of lease worsened considerably due to changed housing law, e.g. by changing the durability of the lease, with raising the rent, and limiting the inheritableness of the lease. These cases are frequent especially in the Czech Republic and Slovenia.

The Committee identified the interventions of the national authorities into the acquired rights of the tenants as untenable from the point of view of the right to housing. This is most clearly stated in the identification of the transgression of the right to adequate housing whereby the Committee holds as untenable the combination of three procedures, explicitly singling out the "*evolution of the rules on occupancy*" (para. 70). Indirectly, the interventions into acquired rights was designated as untenable also in the identification of the transgression of the right to affordable housing; the identification of the transgression itself was tied to the supposition that Slovenian tenants in denationalized flats were stripped of their pre-transition housing right (para. 72).

The withdrawal of the pre-transition housing right, and the substitute newly imposed terms of lease, can be seen as an intervention into the former legal status; and likewise so also worsening of the conditions of lease through a period of several years of transition, and/or after the completed transition. In order to answer the question whether the conditions of perusal worsened, the pre-transition legal status must be compared to the actual one. As it is evident in the decision of the Committee, FEANTSA succeeded in proving the untenable actions of the national authorities in the case of Slovenian tenants in denationalized flats by proving numerous elements of the worsening of the situation, notably:

- interventions into the duration of the lease (increasing the number of culpability eviction reasons, the introduction of the possibility to move the tenants against their will)
- several instances of increase of maximum rent (although regulated)
- interventions into inheritableness of the lease (denying the right to continuation of tenancy under unchanged conditions following the death of actual tenant).

Unlawful passivity of the national authorities

Intervening into the acquired legal status of sitting tenants, however, cannot be defined as absolutely unlawful or *per se* untenable even from the point of view of the right to housing. Such intervention can be tenable if it is simultaneously made possible that the group affected replaces the withdrawn housing position, or improves it in an alternative way. The withdrawal of the pre-transition housing right would therefore not be questionable should the national authorities have provided the sitting tenants with the possibility to simultaneously acquire a comparable or, from the point of view of the right to housing, superior housing situation to the one enjoyed on basis of the withdrawn pre-transition housing right.

It has to be noted here that CEE states sought so solve the problem of withdrawn pre-transition housing right by passing laws on the right to equitable purchase of leased or substitute flats. This very right to purchase made it possible for the population to consume the abolished housing right within the framework of the new ownership right, thereby improving their position, from the point of view of the right to housing, from tenants to home-owners. This did happen in Slovenia as well. The enactment of such evolution of the right in the Slovenian case the Committee designed as in accordance with the right to access to adequate housing (para. 70).

This model of transformation of pre-transition housing right to ownership, or that is, the position of the holder of such right into home-owner made a single exception that created the narrower category of sitting tenants in CEE. Instead of improving, the situation of this category deteriorated. Their position of holders of pre-transition housing right was forcibly changed into that of tenants. By having failed, and by continuously failing, to make it possible for this category of population to improve their housing situation, the national authorities encroached on their right to housing. Thus the Committee, in assessing the untenable actions of the national authorities with regard to the right to adequate housing, explicitly quoted the failure to secure adequate means for substitute housing (para. 70), and in assessing the transgression of the right to affordable housing the failure to acknowledge the right to equitable purchase of the flat (para.

72.). Substantiating the charge of discrimination, the Committee quoted the differentiation between tenants in denationalized flats and other holders of pre-transition housing right of public flats (para. 74).

There exists no basis to read the decision of the Committee as asserting that the national authorities were, from the point of view of the right to adequate housing and the right to affordable housing *a priori* obliged to enact the right to purchase for the holders of pre-transition housing right. However, once they did enact it, they should have done so exercising their diligent duty in accordance with the right to housing. Neglecting to enact such a right, or its subsequent abolishment, however, comprise untenable action in combination with the other untenable act, namely, the withdrawal of the pre-transition housing right. Once the national authorities withdrew this right, it was untenable from the point of view of the right to housing not to substitute it with another legal basis or right which would make possible the preservation, or improvement of the housing situation. This is all the more so in cases where the national authorities did recognize the right to purchase to other ex-owners of the abolished housing right, since the comparison between the two categories clearly demonstrates the prohibited discrimination that the Committee was able to identify in the Slovenian case.

Collision with the protection of private property in the national legal order

As is evident from the context of the Committee decision, the situation into which the Slovenian tenants in denationalized flats were forced can also be seen as a consequence of private property protection that the national authorities kept upgrading during transition at the expense of the original tenants protection.

The Committee stressed that in the case of the tenants in denationalized flats, the right to housing has to be interpreted in the context of other international instruments, notably in the context of the European Convention on the protection of human rights (hereinafter: ECHR). The Committee especially stressed that Article 31 of RESC has to be interpreted in accordance with the relevant provisions of the ECHR (para. 32-37). The Committee disregarded the degree of protection of private property that the national authorities in a given state guarantee, and the state's view on the degree to which the state can intervene into the rights of private owners in order to protect the tenants, but has cited as relevant the degree of protection guaranteed by the ECHR in accord with the established practice of the European Court of Human Rights in Strasbourg.

For sitting tenants, this means that in the collision of rights and interests of sitting tenants and those of actual owners of their flats, the protection of private owners follows the ECHR, and not the possibly higher degrees of protection of private ownership provided by the national legal order and /or the rulings of the national courts. The national authorities of course have the right and possibility to grant higher degrees of protection to certain ECHR defined rights than does the European Court of Human Rights in Strasbourg but surplus protection above the line drawn by the European Court does not constitute a valid reason to diminish the rights, and failure to fulfill the obligations that the national authorities have in the domain of housing rights according to RESC.

Possible solutions: a projection

The Committee decision in the case of Slovenian tenants in denationalized flats offers paths to possible solutions that the national authorities could adopt in order to rectify the identified transgressions. Such solutions could naturally apply also to sitting tenants in other countries inasmuch as their situations are comparable to that of the Slovenian tenants in denationalized flats.

The rectification of identified transgressions can take two principal directions. The first possible solution would be the restitution of the situation such as it existed prior to transition. The second would be granting a substitute housing solution to the actual sitting tenants. In any case, status quo such as it exists in individual countries of CEE is not permissible. The Committee was clear in its assertion that pre-transition position of the Slovenian tenants in denationalized flats, and the basic transition solution which made

possible the transformation of the majority of the holders of pre-transition housing right into home-owners were in accordance with the right to adequate housing. When assessing the transgressions of the rights to adequate housing and the right to affordable housing, the Committee designated as untenable precisely the combination of the encroachment on pre-transition rights on the one hand, and the denial of favourable purchases of the flats in question on the other.

Resolving the situation would entail either the restituting of pre-transitional housing rights, or a change of existing housing laws to such an extent that the sitting tenants would be granted legal protection of their housing position to the same degree as was the case prior to transition. The substitution solution would, on the other hand, require the commitment of adequate financial means to either acquisition of substitute flats, or making possible the purchase of leased flats from the private owners. The variations within the solutions are many from country to country and depend upon the pre-transition conditions of the housing right(s), the present situation, the financial possibilities etc.; nevertheless, given the above, the two basic directions in seeking the solutions remain the only possible ones.

Conclusion

The position of sitting tenants in CEE is undoubtedly markedly different from other vulnerable groups in housing. The above is undoubtedly important for sitting tenants in CEE as their demands and rights are often rejected by the state authorities on basis of comparison between their position with that of other (new) tenants and other vulnerable groups in housing. Sitting tenants are, namely, a specific category of tenants who represent an unsolved problem from the past; a problem that is not systemic, but a residual problem caused by poorly reflected political decisions and national legal solutions taken during the transition period in the CEE countries. The mere assertion that at least formally, the sitting tenants possibly enjoy the same legal protection as other (new) tenants in CEE thus is not sufficient to meet the criteria of the RESC: their present position has to be consistently compared to their former legal position and ascertain whether or not a substantial worsening of their housing situation came to bear.

Such an approach to the understanding of the right to housing indeed broadens its aspects. It is no longer the case of the obligation to diligence on the part of the national authorities, but rather, the right to housing therewith acquires the aspects of human right of a negative status. This means that not only the national states have the obligation to act positively towards attainment of set goals, but are at the same time prohibited from intervening into the acquired housing positions. In this view, the right to housing grants the holders of any kind of rights to perusal of flats the protection similar to that granted by the right to peaceful enjoyment of possessions according to Article P-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the protection similar to that granted by the commonly recognized legal principle in European legal orders that prohibits retroactivity of the law and the protection of acquired rights.

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February 2010

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