newsletter

HOUSING RIGHTS WATCH

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Editorial

Welcome to the first issue of the Housing Rights Watch newsletter!

Housing Rights Watch is a European network of interdisciplinary group of associations, lawyers and academics from different countries, who are committed to promoting the right to housing to all. The right to housing has been recognized as one of the most important fundamental human rights and we seek the realization of the right to every person to live in dignity and to have a secure, adequate and affordable place to live.

The network has been set up in Cardiff in November 2008 in order to facilitate exchange and mutual learning among housing rights experts and advocates.

The aims of Housing Rights Watch:

- Share information on legislative and judiciary initiatives (case-law database, judicial analysis, monitoring of normative outcomes);
- Support judicial proceedings at local, national and international level;
- Monitor and intervene on the factual and systemic denial of rights observed at various levels;
- Monitor the development of the housing situation from a rights-based perspective;
- Support change in public policies at national and European level with the aim of better implementing the right to housing;
- Support the setting up of national networks on the right to housing across Europe.

The main activity of the network in 2010 is the Housing Rights conference Feantsa is organising together with Prohabitatge and the University of Barcelona on 6 May. Some initial details of the conference are available in the EVENTS section below. Further activities of the network include the production of various publications such as tri-annual newsletters that document recent development in the field of housing rights.

Who is part of Housing Rights Watch?

The network at present counts seven national correspondents and is currently being further expanded. In order to learn more about the network and the nature of work carried out by its correspondents, in the next issues of the newsletters our correspondents will be introduced. A brief overview of the housing rights situation in each country and the activities of the correspondents will be described.

If you would like to be part of Housing Rights Watch or would like to sign up to the newsletter, publish an article, include information in it or just have a question or comment on Housing Rights Watch, please contact: dalma.fabian@feantsa.org

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FEANTSA

Across Europe

Recent developments in housing rights in Ireland

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Introduction

Housing rights in Ireland remain very much underdeveloped, while the State suffers from a major property price hangover. The Irish State strongly promoted home ownership and market based housing for the past three decades, and market values have pervaded all aspects of housing, even redefining social housing. State rescue measures for failed financial institutions have diverted social housing funding into mopping up housing market oversupply, with State rents to poor tenants being recycled to repay developer loans. A new "incremental ownership" scheme seeks to divert new social housing tenants into subsidised home ownership arrangements, making the State the ultimate sub-prime lender.(1)

This first report to Housing Rights Watch covers key issues relating to housing rights in Ireland for people with disabilities, social and private tenants, including those of charitable housing associations, and Travellers. It outlines new social housing arrangements and increased protection borrowers of home loans.

People with disabilities, Travellers and asylum-seekers

People with mental health, intellectual and physical disabilities in Ireland have been incarcerated within large institutions for generations. Although care in the community policies from the 1980s have resulted in many small community group housing settings, over 1,500 people with mental health problems were in long stay wards in psychiatric hospitals (for 1 year or more) in 2006, often in housing conditions described as "inhuman" by the Inspector of Mental Hospitals.(2) As these large hospitals gradually close people are increasingly being accommodated in "community residences", - housing units for 13 or more people, which provided accommodation to over 1,500 people in 2008. Even in the smaller "community" or "residential setting" housing centres over 4,000 people with intellectual disabilities live in groups of ten or more. Local authorities have failed to assess or address their housing needs, despite specific obligations in the Housing Act 1988. Figures for 2008 tri-annual assessments show an increase from 480 to 1,155 in people with disabilities experiencing housing need, but this clearly excludes all those living within substandard institutional housing.

Travellers in Ireland have only been included in housing policy since 1988, yet, some 1,137 households (up from 1,012 in 2005) still live on the sides of the roads. Consistent levels of cases arise where Travellers seek accommodation to be provided by local authorities, and where authorities plead lack of resources, problems with development plans or other reasons.

Some 6,500 asylum seekers awaiting application decisions are housed in what is described as private State-funded accommodation, such as hotels, caravans, and camps. They receive a weekly allowance of €19 per adult and €9 per child to cover their costs other than meals and accommodation. Families are regularly overcrowded, living in single rooms, and single men live alongside families and single women. Mental illness and depression are rife, with occasional suicides. Many have described the conditions as "like jail, except that in jail you would know when you are getting out".(3)

Housing cases involving tenants rights

Across Europe housing rights are being developed under the European Convention on Human Rights, particularly Article 3 relating to State obligations to prevent inhuman and degrading conditions, Article 6 relating to fair procedures on evictions and Article 8 on respect for home.(4) The Convention has been incorporated into Irish national law through the European Convention on Human Rights Act 2003, requiring every organ of the State to carry out its functions in line with the State's ECHR obligations.(5) Damages and/or a *Declaration of Incompatibility* can be awarded by courts where State law or practice diverges from Convention standards.

Recent Irish cases have challenged the compatibility of Section 62 of the Housing Act 1966, which provides for a summary procedure (a procedure before the District Court) for the recovery of possession of dwellings let by local authorities. A judge has no discretion but to issue a warrant once the formal proofs are in order.

In *Donegan v Dublin City Council*,(6) the plaintiff challenged a decision to end his tenancy because of his son's alleged anti-social behaviour. The court found a breach of Article 8 on the grounds that the S. 62 process offered no real procedural safeguard to protect rights to a home. The process relating to the eviction was not fair or proportionate to housing management requirements. The court issued a *Declaration of Incompatibility* under s 5, stating that S. 62 was incompatible with Article 8 of ECHR.(7) In *Pullen v Dublin City Council* (8) the court again found a breach of Articles 6 & 8 in relation to this process, awarding damages to the tenants involved. However, despite this decision, the local authority successfully sought to proceed with the eviction, arguing that the only remedies under the ECHR Act were damages and a Declaration, but not an injunction preventing the eviction from taking place.(9) This now creates a

major conflict between the Irish law and the Convention itself.

While the ECHR applies to "organs of the State", it has now emerged that at least one large charitable housing association in Ireland uses similar tenancy agreements, based on Deasy's Act 1860. This legislation, dating from the period of English landlordism in Ireland, provided a speedy eviction procedure for "caretakers, servants and herdsmen". It allows evictions for no reason and offers no defence for tenants. In one recent case, being challenged by a 73 year-old tenant, this charitable association has stated to the court that no reasons are required for the eviction to take place.

The ECHR Act 2003 is also being used to develop housing rights in areas which were not previously envisaged.(10) In *O' Donnell v. South Dublin City Council* (11) the High Court ordered that the local authority provide a second wheelchair accessible and fully fitted mobile home for a Traveller family with three severely disabled children, to comply with Article 8 obligations. This case considerably clarified the obligations on local authorities under the 2003 Act, pointing out that a gap in domestic law will not preclude wider ECHR obligations being imposed on State bodies.

New forms of "social housing"

The collapse of the banking system in Ireland has resulted in a State body (NAMA) is taking over many loans and unfinished housing projects, often described as "ghost estates" where a few houses are completed within a deserted building site.(12) Housing associations and social housing funding are being diverted into using some of these properties to house people in need. No new social housing will be developed for the foreseeable future (except a small number of special needs projects). Using a new arrangement - "chapter 4" tenancies, from the Housing (Miscellaneous Provisions) Act 2009, practically all new social housing lettings will be to these properties.(13)

Provisions in these "chapter 4" and other private and social tenancies require or enable landlords to evict tenants who engage in "anti-social" behaviour, but also where their visitors engage in such behaviour in the vicinity of their homes. This approach has been compared to a return of feudal incidents, where tenants of the local lord were subject to certain obligations which others (such as owner-occupiers) were not.(14)

Mortgages and housing rights

While less than half of Irish homeowners have mortgages, *Hypostat* figures for 2008 show that Irish residential mortgage loans as a percentage of GDP was 80%, compared to an EU average of 50%. This burden is borne disproportionately by those who purchased their homes in the past five years. In December 2009 some 3.6% of all mortgages were more than 3 months in arrears, while there some 5,000 formal demands for repossession.(15)

The Land and Conveyancing Law Reform Act 2009 (LCLRA) created a separate system for all new housing loans, separating their treatment by the courts from other mortgages, and integrating consumer protection measures into housing. The LCLRA defines a housing loan as an agreement for credit to a person on the security of a mortgage of an interest in land for the purpose of constructing, improving or purchasing a house.(16) As part of the State bailout of Irish banks, following their excessive and imprudent lending, the State Financial Regulator introduced a *Code of Conduct on Mortgage Arrears* in February 2009 (updated in February 2010). This requires that all lenders undertake not to repossess homes for at least one year after arrears arise. These Codes have a statutory basis under the Central Bank and Financial Services Act 2003 which established the Office of the Financial Regulator.(17)

In recent times, the Master of the High Court has struck out three cases where mortgage lenders sought orders for possession, on the basis that there was no evidence that the lenders had complied with the *Code of Conduct on Mortgage Arrears* 2009.(18) He stated that the court '*must be satisfied each step in the code is complied with: it is not an option, it is mandatory. The code is not a hollow formula, you must verify it.'*

Private sector tenants

The Housing (Standards for Rented Houses) Regulations 2008 (19) raised the standards for private rented housing, resulting in new bedsit accommodation being no longer acceptable. Each rented unit must have its own toilet, bathroom and other facilities, such as individual heating system, cooking and laundry facilities. The new regulations will not apply to existing tenancies until 2013, but State tenants will not be able to benefit from all the changes at all.

The Housing (Miscellaneous Provisions) Act 2009 provides for improvement notices to be served on landlords for breaches of housing standards in private rented housing, and where the landlord fails to comply, a prohibition notice can be issued. This public notice prohibits the letting of the accommodation until the standards have been achieved. There are criminal sanctions for breaches of these orders, up to 6 months in prison and fines up to €400 per day.(20)

Conclusion

While there is a strong antipathy to the advancement of housing rights by the Irish government, there are many cases and indirect developments taking place which are progressing housing rights. Some of these are presenting

challenges to the methods used by the State to ratify the international human rights instruments, while others are gradually increasing the protection of people's rights to housing. As they say in *Desperate Housewives*, "not everything works out as people expect it."

(1)This scheme is introduced under the Housing Miscellaneous Provisions) Act 2009.
(2)The Irish Council for Social Housing is working with the Minister for the development of new housing for some of these people.
(3)The Irish Times, 25 March 2010.
(4)Council of Europe, The European Convention on Human Rights, ROME 4th November 1950. FEANTSA has compiled a database of housing related ECHR cases , available at www.feantsa.org
(5)See Kenna, "Local Authorities, the European Convention on Human Rights Act and Judicial Review Litigation" in *Irish Human Rights Law Review* (Dublin, Clarus Press, 2010).
(6)Unreported, High Court, 8th May 2008, Laffoy J.
(7)The decision is being appealed to Supreme Court. For more on *Donegan*, see "*Donegan v DCC and the Attorney General*: Summary of Judgment by Ms Justice Mary Laffoy" (April-June 2008) 18(2) *Flac News* 4. See also *Dublin City Council v Gallagher*, Unreported, High Court, 11th November 2008, O'Neill J.
(8)Unreported, High Court, 13th December 2008, Irvine J.
(9)See *Pullen v Dublin City Council* [No. 2] Unreported, High
(10)Court, 28th May 2009, Irvine J.
(11)The Centre for Housing Research has now published a Legal Briefing for local authorities on the ECHR, available at: http://www.chr.ie/
[2007] IEHC 204.
(12)In January 2010, there were some 621 "ghost estates," defined as housing estates where more than half of the properties are empty or remain under development, in Ireland. Some 86 of these estates had more than 50 properties. See *The Irish Times*, January 27, 2010. NAMA is the new National Asset Management Agency created in 2009.
(13)The terms are similar to those set out in the Residential Tenancies Act 2004.
(14)See Paper presented by Cormac O' Dulachain SC to the IHRC Conference – Economic, Social and Cultural Rights – making States Accountable, 21 November 2009.
(15)See Free Legal Advice Centres, http://www.flac.ie/
(16)Section 96.
(17)The Irish Banking Federation and the State Money Advice and Budgeting Service Operational Protocol: *Working Together to Manage Debt* (June 2009) was a voluntary agreement on dealing with mortgage arrears. The Financial Regulator established a *Consumer Protection Code* in 2006 which applies to all lending, and places significant obligations on lenders to acts with due skill, care and diligence in the best interests of its customers and not to recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service.
(18)See *The Irish Times*, 21 November 2009.
(19)S.I. No. 534 of 2008 Article 14(1).
(20)Housing (Miscellaneous Provisions) Act 2009. Part 4.

Interpretations Regarding the Enforceability of the Rights to Housing in Spain

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When analyzing the right to housing in Spain, *the legal extent of Article 47 of the Spanish Constitution* cannot be disregarded.(2) The necessary starting point is Article 53.3 of the SC that demands the recognition, observance and protection of the principles acknowledged in Chapter III of Title I on the *Guiding Principles of Social and Economic Policy*, adding that such principles *"may be alleged only before ordinary jurisdictions pursuant to the provisions of the laws that develop them"*: It has been deemed *"particularly unfortunate"*, as it denies its direct legal applicability in the absence of legislative development. In this article, we will argue that this is not the interpretation that should be given to this principle.(3)

In this regard, case law has made both the direct legal effect of Article 47 and the existence of a right very clear. A ruling by the Spanish Supreme Court on 16 June 1998 (Ar. 6149) notes that *"irrespective of the dogmatic difficulties implied in the consideration as 'constitutional rights' of all those that stem from the state's actions consistent with the principles of social and economic policy as enumerated by Chapter III of Title I, it is obvious that the aforementioned Article 47 has a constitutional mandate or guideline that must guide the action of all the public powers"*, while a Supreme Court ruling dated 18 February 2002 (Ar. 4826), for its part, highlights that Article 47 *"consecrates a social right or right of performance that consequently demands the State's intervention in the social and economic sphere, and positive action by the public powers to achieve the material equality put forth by Article 9.2 of the Constitution"*.

Therefore, one cannot deny the existence of the actual right, and the discussion on this issue may be justified only by the marginal attention that the Social State has been given in administrativist doctrine and by the interpretation of constitutional principles through *" glasses of a liberal jurist"*.(4) It should be noted that, obviously, Article 47 does not guarantee each individual's right to own a house. This is, of course, a cartoonish and maxi-

malist vision of the constitutional text, which to a certain degree seeks to deny the right to housing by using the well-known argument of *reductio ad absurdum*.

The right to housing attributes a true *legal right of means* for the public powers. It is possible to set an analogy with Article 43 of the Spanish Constitution in reference to the right to health: there is no constitutional right to be healthy, but there is a legal duty on the part of the public powers not to jeopardize the health of persons, and to promote it through specific activities. In this regard, Article 47 of the Spanish Constitution establishes three clear legal duties in relation to the right to housing. It demands the establishment of *"relevant regulations"* such as regulation of *"the use of land in accordance with the general interest in order to avoid speculation"*, which entails establishing a regulatory mandate for the competent public authorities. Moreover, this principle demands that *"the necessary conditions"* be promoted, which means taking steps that go beyond merely regulatory measures and justifies the deployment of promotional measures and material services.

In light of the above mentioned, the public powers should not only respect the right to housing (as should any private ones, pursuant to Article 9.1 of the SC), but also protect, guarantee and promote it, either through *regulatory activity* or – concurrently, if need be – through promoting private activity or the provision of services. The right to housing thus involves a set of negative as well as positive mandates: in other words, a series of *don'ts* (not to jeopardize) on one hand, and *do's* (to protect, guarantee and promote) on the other. Its nature, in spite of appearances, does not differ, in this regard, from political or civil rights, and does not call for public expenditure in all cases. Similarly to political or civil rights, the right to housing may require public expenditure, and not merely abstention on the part of the public powers.

The legal duty to provide means in respect of the right to housing involves, according to the terminology of Alexy,(5) an *optimization mandate*. Public (and private) powers must respect it, and ,in addition, they must take all possible measures to guarantee and promote that all people should have a living space in a decent, adequate and unsegregated urban milieu. And in keeping with the maxim *ubi jus ibi remedium*, the violation of this legal duty by public or private actors either by action or omission, can give rise to the use of relevant judicial resources, either by resorting to the civil or the contentious-administrative jurisdiction, or even to the Constitutional Court.

From a subjective point of view, it is worth to note that Article 47 refers to the right of "all Spaniards". Does this mean that non-Spaniards do not enjoy this right? The question of eligibility on the part of foreigners with regard to the right to housing has prompted regulatory changes in Spain. According to Article 13 of the Constitution and to Constitutional Court doctrine,(6) the right to housing under Article 47 is one of those rights that would pertain or not to foreigners as provided for by treaties and laws, and therefore a difference in treatment with Spaniards with regard to the exercising of such a right is thus admissible. This is what is done by the Organic Law 4/2000, dated 11 January, on the rights and freedoms of foreigners in Spain and their social integration, which in the version given by Organic Law 8/2000, dated 22 December, restricts foreigners' right to housing to those foreigners who are "residents", who *"are entitled to access the public system of housing aid in the same conditions as Spaniards"*.

However, we believe that a systematic interpretation of this Article 47 SC with other constitutional principles (for instance, Article 10 SC, which refers to the dignity and free development of persons, Article 9.2, in reference to the equality of "individuals", "groups" or citizens", or Article 14, which contains the right to equality that is extendable to foreigners, also according to Constitutional Court case law) and its interpretation in accordance with various international treaties could serve as grounds for the conclusion that the right under Article 47 is applicable to all persons – foreigners as well as nationals.

From an objective point of view, the right enshrined by Article 47 is not only the right to enjoy a living space, a dwelling, but also the right to a decent and adequate urban milieu. In other words, Article 47 is establishing the right to a decent and adequate *habitat*, that is, a set of physical and social conditions connected to the urban space, with the urban milieu in which such dwelling is situated. Here lies the evident connection between town planning (and town planning law) and housing (and the right to housing).

In addition, the right under Article 47 should be systematically linked to other constitutional precepts, referring to *rights* and *principles*. *As for the connection of Article 47 with other constitutional rights*, it is necessary to insist on the relationship between the right to housing and rights such as the right to equality (Articles 9.2 and 14, and now Law 62/2003, which has transposed various EU anti-discrimination directives), physical and moral integrity (Article 15), personal and family privacy (Article 18 SC), freedom of residence (Article 19), or education (Article 27 SC), for instance.

It is obvious that having a decent living space in an adequate urban milieu enables the effective enjoyment of these rights. It is difficult, however, in the absence of a home, to preserve physical and moral integrity, or to enjoy true personal or family privacy: All this requires a prior assumption: having a domicile, that is, a dwelling(7). The absence of a variety of offers in terms of affordable housing in a city or town can seriously compromise the true freedom of choice of a domicile.(8) Urban segregation in Spain, and the lack of corrective measures on the part of the public authorities can lead to the "eviction" of persons with low net wages toward the outskirts.

In conclusion, the right to housing is actually a subjective right, enforceable even judicially if need be, recognized at the highest level by the Spanish Constitution. Obviously, this does not impede the fact that it is the legislator's prerogative (and through their regulatory powers, that of the governments and administrations) to materialize this right and convert constitutional public obligations of means into legal obligations of results, which demand specific public (and private) behavior.

(1)PONCE, J & SIBINA, D (2008): El Derecho de la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo. Marcial Pons, Madrid.

(2)Article 47 SC *"All Spaniards have the right to enjoy decent and adequate housing. The authorities shall promote the necessary conditions and establish appropriate standards in order to give effect to this right, regulating land use in accordance with the general interest in order to prevent speculation. The community shall have a share in the benefits accruing from the town planning policies of public bodies"*

(3)PRIETO, 1990. Estudios sobre derechos fundamentales, Debate, Madrid

(4)MUÑOZ, S (2002): prologue to the book by VAQUER M (2002): La acción social, Tirant Lo Blanch-IDP

(5)ALEXY, R. (1993): Teoría de los derechos fundamentales, Centro de Estudios Constitucionales, Madrid

(6)Constitutional Court Ruling, hereinafter CCR, 107/1984, FJ 3)

(7)see CCR 22/1984, dated 17 February, FJ 2

(8)to which CCR 28/1999, dated 8 March, FJ 7, makes reference

Downgrading tenant protection declared illegal by the Council of Europe

The wider scope of the Council of Europe decision
Collective Complaint No. 53/2008 - FEANTSA v. Slovenia

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Fondation Abbé Pierre

The European Federation of National Organisations Working with the Homeless (FEANTSA) brought proceedings against Slovenia for diluting the rights of tenants whose homes were returned to their former owners after 1991. Deregulated rents have soared while the grounds for eviction have increased; in short, protection of tenants' rights has gradually been eroded by changes in legislation and new developments in case law. Several million people in the former people's democracies that have now become part of the European Union could be at risk of being made homeless. The decision will have repercussions not only in those countries, but right across the EU. The Committee of Social Rights agreed with FEANTSA that rolling back tenants' rights in this way violated the revised Social Charter.

The first key point is that reducing occupancy rights has been held to violate the right to housing (Article 31.1 and 31.3: promoting access to adequate housing and making the price of housing accessible to those without adequate resources). Downgrading tenants' rights is not a policy option, therefore, but a violation of international law.

The decision will affect all social rights protected by the revised Social Charter, such as the right to health, education, working conditions, social protection, and so on. The important point is that the State has not just public policy but also civil law obligations, which it cannot chop and change at will. Freedom of contract, which is central to recent developments in European countries, can only be exercised within a framework that holds the excesses of relations of power and subordination (in this case, landlord/tenant relations) within bounds, and this framework is not to be loosened at the expense of the most vulnerable. And because international law prevails over domestic law, each country's parliament and constitutional court will have to accommodate this decision when drawing up and checking the compliance of future legislation.

The second key point is that the above-mentioned development has been recognised as discriminatory (article E). Tenants living in homes built during the socialist era have obviously not had to suffer the effects of restitution, but have actually been able to buy their homes for next to nothing. The Council of Europe found that while housing situations may differ, tenants' social conditions were similar, and differential treatment therefore constitutes discrimination, particularly where any distinction that might justify such differential treatment is *"in no way imputable to them*". In other words, the reflex being seen across Europe to make deep cuts in accrued social gains (pension reforms hitting first private-sector employees, then public employees, etc.) is prima facie unlawful. Again, this important development will have to be incorporated in national regulations. The third lesson is that cutting down tenants' rights is in itself a violation. Bearing down on the poorest households is enough to violate their rights, let alone its social consequences. The Council of Europe declares that "*insufficient measures for the acquisition or access to a substitute flat, the evolution of the rules on occupancy and the increase in rents (...) are likely to place a significant number of households in a very precarious position, and to prevent them from effectively exercising their right to housing*". Even if on average

households may benefit from national developments, the fate of the most vulnerable is what decides whether laws and policies are compliant with international law: "*in order to establish that measures are being taken to make the price of housing accessible to those without adequate resources, States Parties to the Charter must show not the average affordability ratio required of all those applying for housing, but rather that the affordability ratio of the poorest applicants for housing is compatible with their level of income*".

It will naturally take time for these decisions to filter down to local courts, and even longer before they inform policy. But having a legal resource that challenges the legality of policies that undercut the protection of the most vulnerable EU citizens can be nothing but good.

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

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

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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 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.

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.

(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.

(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.

Resources

Latest report of Rauqel Rolnik, the UN Special Rapporteur on the right to adequet housing

The report assesses the impact of mega-events such as Olympic Games and World Cups on the right to housing. It points out that although some positive legacies are evidenced in the housing sector as a result of mega-events, the negative legacies such as the practice of forced evictions, criminalisation of homeless persons, and the dismantling of informal settlements are disquieting. The Special Rapporteur draws attention to some indirect consequences of mega-event projects such as escalating rent and property houses, lack of affordability for the low-income population, reduction in the availability of social and low-cost housing, and disproportionate impact in vulnerable groups. See relevant document.

Council of Europe Human Rights Commissioner's recommendation on the implementation of the right to housing

The recommendation issued by Thomas Hammerberg calls onstates to ensure the implementation of the right to housing, in particular in times of economic crises. The Commissioner stresses that the international obligations on the right to housing must be recognised in appropriate ways in domestic law. "Remedies or means of redress must be available to individuals or groups aggrieved by the denial of housing rights.". See relevant document

New fact sheet by OHCHR on the right to housing

The Office of the High Commissioner for Human Rights has published a revised fact sheet (nr. 21) on the right to adequate housing. It explains what the right to adequate housing is, illustrates what it means for specifc individuals and groups, and then elaborates upon States'obligations. It concludes with an overview of national, regional and international accountablitity and monitoring mechanisms. See relevant document

Alpil's Manual

Alpil, a French NGO working on the right to housing drew up a manual designed for all actors involved in the housing of European migrants arriving to France. The manual contains the essential legal texts and lists the possible areas of action in protecting the right to housing of migrants. See relevant document

Recent Case Law

Landmark judgement of the European Court of Human Rights

Olaru and Others v. Moldova (application nos. 476/07, 22539/05, 17911/08 and 13136/07)

Relying on Article 1 of Protocol No. 1 (protection of property) and Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights, the applicants complained of the authorities' failure to comply with final judicial decisions delivered by the domestic courts between 1998 and 2006 and ordering the respective municipal authorities to provide the applicants with social housing. The European Court of Human Rights held unanimously that there had been a violation of Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention on account of the State's failure to enforce the final domestic judgments in favour of the applicants, and that the question of the application of Article 41 (just satisfaction) was not ready for decision.

Furthermore, the Court observed the existence of a widespread structural problem originating in the relevant Moldovan legislation which bestowed social housing privileges on a very wide category of persons. Because of chronic lack of funds on the part of local governments, the cases from the social housing group were very rarely enforced; this had resulted in the State's recurrent failure to comply with final judgments awarding social housing in respect of which aggrieved parties had no effective domestic remedy. The Court held that, within six months from the date on which the judgment became final, the State had to set up an effective domestic remedy for non-enforcement or delayed enforcement of final domestic judgments concerning social housing, and, within one year, to grant such redress to all victims of related non-enforcement in cases lodged with the Court before the delivery of the present judgment. It further held that it would adjourn for one year from the date on which the judgment became final the proceedings in all cases concerning social housing. See relevant page

Collective complaint (no.53/2008) FEANTSA v. Slovenia

The European Committee of Social Rights (ECSR), the Council of Europe body responsible for monitoring the implementation of the European Social Charter, has found that Slovenia is in violation of Article 31 (right to housing) of the Charter. In response to the Collective complaint launched by FEANTSA, the ECSR considered that downgrading tenants' legal protection is not in line with the international obligations deriving from the Social Charter. This decision provides case-law which will be useful in courts on a local, national and international level and is a step towards a more social Europe. Two detailed analysis of the decision can be found in the ACROSS EUROPE section of the newsletter.

Collective complaint (no.47/2008) Defence for Children International v. the Netherlands

Undocumented children evicted from Dutch reception centers following failed residence proceedings are put in a situation of outright helplessness and living on the street, according to the European Committee of Social Rights in response to a collective complaint submitted by Defence for Children International. The current eviction policy of the Netherlands denies to these children the right to housing and the right of children to social protection. In its decision, the Committee points out that the right to shelter is directly linked to the rights to life, social protection, and respect for the child's human dignity and best interests. See relevant page

Collective complaint (no.51/2008) European Roma Rights Centre v. France

In response to the collective complaint filed by the European Roma Rights Centre, the European Committee of Social Rights has found France in breach of Article 31 of the European Social Charter on the grounds that Travellers in France lack sufficient number of stopping sites, live in poor conditions, are being discriminated in access to housing and are subjected to forced eviction, as well as residential segregation. See relevant page

Events

European Conference

Housing Rights: from Theory to Practice

Barcelona, Spain, 6 May 2010

Hosts:

- **University of Barcelona**
- **Associació Prohabitatge**
- **FEANTSA**
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The goal of the conference is to explore the theoretical background to housing rights at the international, at the European and at the national level, to share experience on the practical implementation of housing rights and to provide a forum for existing and potential correspondents of the Housing Rights Watch network. The day after the conference, a Housing Rights Watch event will be organised with participants interested in further action in housing rights.

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The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA and EU candidate and pre-candidate countries.
To that effect, PROGRESS purports at:

- providing analysis and policy advice on employment, social solidarity and gender equality policy areas;
- monitoring and reporting on the implementation of EU legislation and policies in employment, social solidarity and gender equality policy areas;
- promoting policy transfer, learning and support among Member States on EU objectives and priorities; and
- relaying the views of the stakeholders and society at large.

For more information see: **http://ec.europa.eu/employment_social/progress/index_en.html**