
Housing Rights—The New Benchmarks for Housing Policy in Europe?

Dr. Padraic Kenna*

I. Introduction

RIGHTS TO HOUSING are regularly proposed as the solution to poor housing and homelessness by advocates and campaigning organizations. This approach is viewed as having the critical international acclaim and legal clarity to cut through the Gordian knots of political wrangling, resource deficiencies, programmatic and policy conflicts, and theoretical dissonance in housing approaches. Of course, most (States) have ratified rights to housing at an international level in a range of instruments, from the United Nations (UN) to the Council of Europe. Implementation of these rights is obliged and promoted within both a programmatic approach, as well as a violations and remedies approach (opportunities for litigation in the event of breaches). Each ratifying State regularly produces monitoring reports for the relevant international treaty body on how these rights are being given effect, legally, at policy level, and programmatically. However, in the age of New Public Management (NPM) there are regular attempts to reduce such internationally established human rights norms to the level of nonlegal approaches, such as customer charters rights to “participation” and administrative complaint systems.

There are, however, important contextual issues for the development of housing rights within industrial economies with hegemonic housing market ideologies and developed welfare systems, especially in European countries. The Council of Europe has recently developed a modern monitoring procedure in relation to Article 31 of the Revised European Social Charter 1996.¹ This defines many international obligations in relation to housing rights, such as those relating to housing adequacy,

*Faculty of Law, National University of Ireland, Galway, Ireland. E-mail: padraic.kenna@nuigalway.ie. This article is based on a paper delivered at the European Network of Housing Researchers Conference at Cambridge in July 2002. The author would like to express his appreciation for the assistance given by Otto J. Hetzel, Professor Emeritus of Wayne State University Law School, Detroit, Michigan.

1. European Soc. Charter (Revised), Council of Europe, ETS No. 163 (May 3, 1996), available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> (last visited Nov. 25, 2004). As of October 7, 2004, thirty-seven States have signed the Revised European Social Charter, and eighteen of these have ratified it a national level.

affordability, reduction of homelessness, etc. The development of this machinery for measuring European States compliance with housing rights standards has significant implications in the context of the new European Constitution. As currently proposed, this would establish rights to housing with the same obligations as set out in Article 31, on a legally binding basis under European Union (EU) law.

II. New People, New Housing

The development of a human rights approach to social and political issues has pervaded many areas of life in recent years. This has been attributed to the end of the Cold War, the acceptance of liberal market systems as the world dominant ideology, the growth of individualism, and the absence of any coherent and credible alternative political ideological approach.²

Some writers in the field of land, property, and housing law see the move toward a rights approach contemporaneous with a move toward individualization in social policy.³ Individualization theory recognizes that a “standard deviationism,” in which we each develop our own “legitimate strangeness,” has replaced the traditional socially imposed models of lifestyle, ethics, and others. This arises from such influences as the growth and varieties of consumerism, development of modernist and post-modernist social theory, and the effects of globalization.⁴ Individualization theory is often expressed by those who “wish to transcend the fragility of their bodily separation from other individuals and seek to do this by cloaking themselves in a protective armour of rights and entitlements.”⁵ Modernity means that a world of traditional cer-

2. See ASBJRN EIDE ET AL., *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (2d ed., rev. 2001).

3. There are many discourses on rights, ranging from the natural law approaches, to the legal positivist approach of Bentham’s rights bearers (described by Marxists as the ideological embodiment of individual bearers of reified property rights arising from historically unique social relations), to the analysis of the meanings of rights and responsibilities by Hohfeld and Dworkin’s views that individual rights trump State action. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., 1919); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., 1970); Sol Picciotto, *The Theory of the State, Class Struggle and the Rule of Law*, in *CAPITALISM AND THE RULE OF LAW* 164 (Bob Fine et al. eds., 1979); RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978). Currently, the notion of individual justiciable rights versus communitarian, universal, or programmatic approaches seems to dominate the debate on the development of socio-economic rights, such as in the field of housing in Europe.

4. See Alastair Hudson, *Equity, Individualisation and Social Justice: Towards a New Law of the Home*, in *NEW PERSPECTIVES ON PROPERTY LAW, HUMAN RIGHTS AND THE HOME* 1 (Alastair Hudson ed., 2004).

5. *Id.* at 9.

tainty is perishing and replaced, if we are fortunate, by legally sanctioned individualism for everyone. Meanwhile, globalization offers new lifestyles, ambitions, and tastes, as well as an unsavoury side of poverty, breakdown of communities, and social exclusion.⁶

The popular lamentation for community or communitarianism, often expressed as an antidote to the growth of this individualism, can hide the spectres of oppression of minorities. Indeed, such utopian approaches often involved the imposition of conservative and oppressive norms of behaviour upon people, on pain of loss of benefits, loss of status, and other deprivations. The “socially conditioned human being” was generated over time, and the many problems of phenomenological philosophy are grounded in trying to resolve the perspectives of such social conditioning with individual perception.⁷

So too, this dichotomy operates within housing perspectives in European industrialized societies with large housing stocks. Here, the requirements of individuals tend to be expressed more and more as individual consumer choices, fashioned to individual lifestyles, in both private and public housing. Housing policy, and indeed social commentary on housing, is expressed in market based consumer jargon, reflecting the hegemony of the commodity, and consumer aspects of housing provision and distribution.

Everywhere in the world, there is a greater role for markets in the production, allocation, and financing of housing.⁸ The World Bank has urged governments to abandon their earlier role as producers of housing and adopt an enabling role of managing the housing sector as a whole.⁹ It also claimed that policies which constrain market efficiency and the responsiveness of the housing supply system result in reduced investment, housing which is less affordable and of lower quality, and a lower quality residential environment. The “enabling” approach involves a

6. Despite the claims that socio-economic rights cannot be justifiable in modern societies, for reasons of breaching of separation of powers, and bypassing the democratic mandate in relation to public spending, there are many States developing such rights. See, e.g., Martin Scheinin, *Protection of Economic, Social and Cultural Rights in Finland: A Rights-Based Variant of the Welfare State?*, in *WELFARE STATE AND CONSTITUTIONALISM: NORDIC PERSPECTIVES* 245 (Martin Scheinin ed., 2001). See also TARA MELISH, *PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A MANUAL ON PRESENTING CLAIMS* (2002).

7. See Hudson, *supra* note 4, at 12.

8. The correlation of housing development, standards and accessibility with the economic development of States along a linear path of rising investment in housing, rising and then declining, as adequacy of housing stock was reached, now appears as a chimera of a bygone age. See CHESTER C. MCGUIRE, *INTERNATIONAL HOUSING POLICIES* (1981).

9. WORLD BANK, *HOUSING: ENABLING MARKETS TO WORK* (1993).

major shift away from the “balanced tenure” approach involving some direct State provision, and represents an important shift in international housing policy. It stresses the role of the market, not the government in housing delivery, and it focuses on regulatory and institutional reform, not on direct housing production.

The enabling paradigm promulgated by the World Bank that was endorsed by UN bodies, and implicitly accepted as an integral part of much European housing policy, goes “hand-in-hand with a centrist agenda of a liberal democracy, trying to restrain the predatory instincts of both capitalist and state monopolies in an age where information is no longer the prerogative of the few.”¹⁰ While these universal tenets of enablement have a superficially populist appeal, they operate within a particular set of economic postulates. Their implementation has led to wholesale privatization of State housing in Eastern Europe, and a denial of State support to people in poor housing conditions in developing countries.¹¹ Indeed, such strategies of promoting “participation” and “decentralization” in housing provision have “induce[d] people to experience tightly controlled and carefully delimited forms of pro-market activity as empowerment.”¹²

In European urbanized societies with high levels of housing stock, housing policy has shifted from mass solutions to individual solutions. Newly industrializing countries, such as Spain, Ireland, and Portugal, are utilizing market systems in the production and allocation distribution of housing.¹³ This approach largely involves providing support to people as consumers of housing. Such support includes mortgage subsidy, low start mortgages, starter homes, subsidized sites, first time buyers’ grants, housing benefit, and other subsidies at an individual level.¹⁴ Public provision of social or “affordable” housing merely facilitates people to “get on the ladder.”¹⁵ In some cases, the producers are the recipients of the subsidies, again with particular objectives such as urban renewal, regeneration, or market support. In most European

10. See SHLOMO ANGEL, HOUSING POLICY MATTERS: A GLOBAL ANALYSIS 13 (2000).

11. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HOUSING FINANCE IN TRANSITION ECONOMIES (2002).

12. Paul Cammack, *Attacking the Poor*, 13 NEW LEFT R. 125, 130 (Jan.-Feb. 2002).

13. See MICHAEL BALL, RICS EUROPEAN HOUSING REVIEW 2004 (2004).

14. See Duncan MacLennan et al., *Report to the European Parliament*, in HOUSING POLICY IN THE EU MEMBER STATES (197). See also K. Gibb, *Trends and Change in Social Housing Finance and Provision Within the European Union*, 17 HOUSING STUD. No. 2, Mar. 1, 2002, at 325–36.

15. This is a term of general use to denote people who buy their first home, with the assumption that they will continue to trade up as income increases in a “housing career.”

countries, however, the need for a residual housing stock for those who will never enter the market is socially and politically acceptable.¹⁶

Kleinman points out that in recent times, almost all European countries, including many hitherto large-scale State providers, have adopted a bifurcated approach to housing policy and legislation.¹⁷ Both law and policy have developed along two paths, which appear to diverge further over time. The primary policy consideration is to facilitate the market to operate effectively, ensuring exchange of housing, land use planning, and access to mortgage financing and sustainable equity, among others.¹⁸ The other part of housing law and policy “relates to the circumstances of the disadvantaged, who are badly housed or homeless, whose prospects of future betterment are uncertain, and whose residential segregation, in many cases, compounds social and economic inequality. . . . ‘Housing policy,’ as defined in this narrow way is thus mainly concerned with social housing (including its privatisation).”¹⁹

The maintenance of owner-occupation as a route to social stability and the normalization of property ownership has become the predominant force in housing policy.

Despite the rhetoric about the fight against social exclusion, the reality is that the European political economy is now founded in practice on the acceptance at a more or less permanent level, of a continuing divide between the haves and the have-nots, in each country. In housing policy, this underlying belief finds expression in the retreat of national governments from responsibility for achieving more equal housing outcomes. As the divide grows, policy bifurcates between, on the one hand measures to maintain market stability for the majority, either in terms of mass owner-occupation or a more balanced private renting/owner-occupation split, and, on the other hand, measures to alleviate some of the worst excesses for the poor, while transferring responsibility from national to local, or even community level.²⁰

The main role of the State in the production and allocation of housing is to limit and correct dysfunction in the market (and in some cases to supplant the market through direct provision). This role is therefore concerned with ensuring the sustainability of the housing market as the primary system for the production and allocation of housing. However,

16. See *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions: Joint Report on Social Inclusion*, COM(2003)773 final (Dec. 12, 2003) (summarizing the results of the examination of the National Action Plans for Social Inclusion (2003–2005)).

17. See Mark Kleinman, *Western European Housing Policies: Convergence or Collapse?*, in *EUROPEAN INTEGRATION AND HOUSING POLICY* 242 (Mark Kleinman et al. eds., 1998).

18. *Id.*

19. *Id.* at 242–43.

20. *Id.* at 250.

there are emerging European-wide problems around affordability, social segregation, and decline in affordable rental housing, diminished affordable housing, and homelessness.²¹

At the EU level, there is no coordinated response yet, except in the standardization of consumer protection measures in relation to mortgage lending, standardization of building components, issues of State aid, and measures to ensure nondiscrimination based on race or migrant worker status in housing eligibility.²² In terms of the EU Social Policy Agenda, the Commission has placed obligations on States to prepare national action plans for reducing poverty and social inclusion, but housing and homelessness issues are scarcely considered.²³

There is also an emerging market-oriented approach to public management, especially in affordable housing.²⁴ This involves new managerially driven performance indicators, value for money audit processes, competitive ratings between providers, and a general orientation towards New Public Management.²⁵ The approach that originated in New Zealand, Australia, and the United Kingdom is concerned with the political and organizational processes through which policy change takes place, as well as the analysis of public management contextual approaches.²⁶ Some of the new managerialist approaches actually encompass the policy making process itself, within the culture of public management, effectively sidelining much political activity or legal argument.²⁷ The economics approach to public management tends to predominate within contemporary approaches to the role of the State. In many cases there is a developing culture of customer service akin to the private sector being incorporated into public housing bodies. An array of procedures, such as customer consultation, feedback systems, and participation of stakeholders in “strategic planning,” are proposed, which purport to improve efficiency and target resources. Indeed, there

21. See BILL EDGAR ET AL., ACCESS TO HOUSING: HOMELESSNESS AND VULNERABILITY IN EUROPE (2002).

22. See Council Directive 00/43 of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22–26.

23. See *Communication from the Commission to the Council*, *supra* note 16.

24. In some European countries, “social housing” relates to publicly funded housing for rent where there is a right, but no compulsion, to purchase, while “affordable” housing relates to low-cost, publicly funded home ownership schemes.

25. See CHRISTOPHER HOOD & MICHAEL W. JACKSON, ADMINISTRATIVE ARGUMENT (1991). See also CHRISTOPHER HOOD, ART OF THE STATE: CULTURE, RHETORIC AND PUBLIC MANAGEMENT (2000).

26. See MICHAEL BARZELAY, THE NEW PUBLIC MANAGEMENT: IMPROVING RESEARCH AND POLICY DIALOGUE 156–57 (2001).

27. *Id.*

are regularly references to rights in the consumer sense. Some believe a State commitment to human rights is emerging from the new language within the new public administrative managerial approaches.²⁸ Appeals to the theoretical approaches of European post-war values of equal and democratic citizenship and universal welfare state provision in health, education, social welfare, and housing, so clearly articulated by Marshall, are looking increasingly dated.²⁹ Indeed, these arguments are now regularly cited to reject human rights approaches in situations of violations of rights in access to services, controlled by public service bureaucracies.³⁰ All this is taking place in the context of global pressure to minimize States' expenditures and taxation with the goal of attracting global capital and global (usually American) corporations.³¹

III. The Human Rights Backdrop to Housing Policy

Housing rights have always been an integral element of human rights law. Yet, in Europe, the adoption of rights based approaches in this area, as an aid to the formulation of policy, is not well developed.³² Notwithstanding the overwhelming influence of certain disciplines and stakeholders in the field of housing policy, the dilemmas faced in modern housing policy now require some new paradigms. Significantly, human rights approaches, including those relating to housing, have

28. See MARY E. DALY, *ACCESS TO SOCIAL RIGHTS IN EUROPE* (2002).

29. See Bo Bengtsson, *Housing as a Social Right: Implications for Welfare State Theory*, 24 SCANDINAVIAN POL. STUD. 255, 257 (2001). Bengtsson considers that housing rights are a socially constructed concept instituted in Western countries largely as a market corrective. Market contracts now serve as the main mechanism for distributing housing and the State intervention takes the form of correctives defining the economic and institutional setting of those market contracts. See also T. H. MARSHALL & T. B. BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* (Pluto Press 1992).

30. For a detailed rejection of rights as a threat to the modern public service bureaucratic approach, seen in the context of obligations on the State to guarantee a minimum level of rights and services, see BRIAN NOLAN, *ON RIGHTS-BASED SERVICES FOR PEOPLE WITH DISABILITIES* (2003).

31. See JOHN PILGER, *THE NEW RULERS OF THE WORLD* (2002). Pilger points out that in the advent of globalization, social democratic States have progressively shed their social functions, while their repressive functions have grown. Certainly, the contemporary preoccupation with controlling the lives of tenants, rather than using housing provision as a means of enabling people and communities to achieve their full potential reflects this policy shift. See also DAVID C. KOREN, *WHEN CORPORATIONS RULE THE WORLD* (1995).

32. See DALY, *supra* note 28, at 55–73. The treatment of justiciable international human rights, described as “social rights,” is largely interpreted within the bureaucratic management approach as involving monitoring and enforcement (including a charter for users), as well as improving resources within the system (minimize imbalances in resources between levels of administration), management and procedural issues, information and communication issues, psychological and socio-cultural issues, and inadequate attention to vulnerable groups and regions. *Id.*

been developing progressively since the 1990s.³³ The *Reports of the UN Committee on Economic, Social and Cultural Rights* has established jurisprudence mechanisms for the evaluation of States' approaches and well-developed sets of comparative and historical benchmarks for examining housing policy.³⁴

In EU countries, the sources of housing rights instruments and jurisprudence emanate from the United Nations and its monitoring machinery, the Council of Europe with its European Social Charter and Convention on Human Rights, and the EU. While the EU is not directly addressing housing rights, it is circumscribing much of the national housing law and policy within its own rights approaches. EU Member States are, and will remain, the principal guardians of human rights within their own territories.³⁵ However, there are clear examples of meaningful and justiciable rights, such as equality in employment and equal treatment on race and ethnic grounds.

The following examination of the wide range of instruments dealing with housing rights serves to demonstrate some of the range of internationally acknowledged and operated human rights systems, through which housing policies and procedures can be measured.

IV. The United Nations Approach to Housing Rights

The adoption by the United Nations General Assembly in 1948 of the Universal Declaration of Human Rights (UDHR)³⁶ marked a milestone in the development of human rights and fundamental freedoms. Article 25 states:

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, *housing*, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.³⁷

33. See Scott Leckie, *Where It Matters Most: Making International Housing Rights Meaningful at the National Level*, in NATIONAL PERSPECTIVE ON HOUSING RIGHTS 3, 7 (Scott Leckie ed., 2003); DAVID HULCHANSKI & SCOTT LECKIE, THE HUMAN RIGHT TO ADEQUATE HOUSING 1945 TO 1999: CHRONOLOGY OF UNITED NATIONS ACTIVITY (2000).

34. See the regular Reports of the UN Committee on Economic, Social and Cultural Rights at <http://www.un.org>.

35. Philip Alston & Joseph Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights*, in THE EU AND HUMAN RIGHTS 3, 7 (Philip Alston ed., 1999).

36. G.A. Res. 217, U.N. Doc. A/810 (1948).

37. *Id.* (emphasis added).

One hundred seventy States have ratified³⁸ the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.³⁹ Article 11 states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁴⁰

Essentially, there is a “minimum core obligation” on States to ensure a threshold of housing in a non-discriminatory way, even if international assistance is required.⁴¹ States are free to decide the manner of this provision. There is also an obligation to “progressively realize” the full extent of the rights set out in the ICESCR progressively, as resources are available.⁴² Under the ICESCR, States are obliged to adopt legislative and other measures with a view to the progressive realization of the right to housing.⁴³ This also implies that any deliberate retrogressive measures would need to be “fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”⁴⁴ The necessity of the availability of appropriate means of redress and accountability for violations has also been emphasized.⁴⁵

Significantly, the UN Committee on Economic, Social, and Cultural Rights (UNCESCR) monitoring system accepts that housing is provided as a market commodity in many countries, and applies its principles in relation to rights to housing across the both market and non-

38. Press Release, United Nations, Committee on Economic, Social and Cultural Rights to Hold Twenty-First Session from 15 November to 3 December 1999 (Nov. 11 1999) (U.N. Doc. HR/ESC/99/26).

39. G.A. Res. 2200A, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

40. ICESCR, *supra* note 39 (emphasis added).

41. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights* 9 HUM. RTS. Q. 156, 175 (1987).

42. *Id.*

43. *General Comment No. 4: The Human Right to Adequate Housing (Art. 11(1))*, Report of the U.N. Committee on Economic, Social and Cultural Rights, 6th Sess., at 114–20, U.N. Doc. E/1992/23 (1991) [hereinafter *General Comment No. 4*].

44. *The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant)*, CESCR General Comment 3, 5th Sess., ¶ 9, U.N. Doc. E/1991/23 (1990).

45. See *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998). See also Audrey R. Chapman, A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23 (1996).

market spheres. The requirements in relation to the implementation of housing rights are comprised of essentially three elements:

1. Minimum Core Obligations of the State in relation to housing;
2. Progressive Realization of the right to housing as resources permit;
3. No Regression of housing rights⁴⁶

The UNCESCR has been working on developing benchmarks and standards in relation to the rights set out in the ICESCR.⁴⁷ It has proposed that national organizations need to establish indicators and benchmarks as part of the development of national benchmarks and national monitoring by national Human Rights Commissions and Non-Governmental Organizations (NGOs).⁴⁸ As part of the monitoring process, the ICESCR can develop and *scope* National Action Plans, involving NGOs and others.⁴⁹ For example, this would allow a comparison over time in the national implementation of housing rights.⁵⁰

The UNCESCR has used the General Comments “as a means of developing a common understanding of the norms by establishing a prescriptive definition.”⁵¹ The General Comments spell out the elements of housing policy that States must address in the housing available to its citizens. General Comment No. 4., on the Right to Adequate Housing, sets out in detail the elements of the States obligations in the areas of housing rights:

1. Legal security of tenure,
2. Availability of services, materials and infrastructure,
3. Affordable housing,
4. Habitable housing,
5. Accessible housing,
6. Location, and
7. Culturally adequate housing⁵²

46. See Leckie, *supra* note 33, at 8–15.

47. *Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1999/25*, U.N. ESCOR, 56th Sess., U.N. Doc. E/CN.4/2000/47 (1999). See also *Report of the Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights*, UN Doc. A/CONF.157/PC/73 (1993) [hereinafter *Report of the Seminar*].

48. *Id.*

49. See *The Right to the Highest Attainable Standard of Health*, U.N. ESCOR, 22d Sess., U.N. Doc. E/C.12/2000/4 (2000).

50. See P. Hunt, *Round Table on Benchmarks for the Realization of Economic, Social and Cultural Rights*, March 25, 1998. See also *Report of the Seminar, supra* note 47.

51. See *General Comment No. 4, supra* note 43.

52. *Id.* at ¶ 8 (the seven elements are set out in more detail in General Comment No. 4, and this brief reference does not do justice to these important principles). See also *Fact Sheet No.21, The Human Right to Adequate Housing, available at* <http://www.unhchr.ch/html/menu6/2/fs21.htm> (last visited Nov. 13, 2004).

Following from General Comment No. 4, and with increasing reports of forced evictions, the UNCESCR issued General Comment No. 7, *The Right to Adequate Housing*,⁵³ which states:

The term “forced evictions” as used throughout this General Comment 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.⁵⁴

Other UN international instruments that set out rights to housing include:⁵⁵

- The UN Convention on the Rights of the Child (1989),⁵⁶
- The UN Convention Relating to the Status of Refugees (1951),⁵⁷
- The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990),⁵⁸
- The Declaration on the Rights of Disabled Persons (1975),⁵⁹
- Convention on Elimination of all Forms of Discrimination Against Women (1979),⁶⁰
- The Vancouver Declaration on Human Settlements (1976),⁶¹
- The UN Global Strategy for Shelter to the Year 2000 (1988),⁶²

53. See *General Comment No. 7: The Right to Adequate Housing*, U.N. Committee on Economic, Social and Cultural Rights, 6th Sess., Annex IV, U.N. Doc. E/1998/22 (1997) [hereinafter *General Comment No. 7*].

54. See *id.* at ¶ 3.

55. A full list of international legal instruments pertaining to rights to housing is available at <http://www.unhchr.ch/housing/i2echou.htm#global> (last visited Nov. 15, 2004).

56. G.A. Res. 44/25, U.N. GAOR, 61st plen. mtg., Annex, U.N. Doc. A/RES/44/25 (1989), available at <http://www.un.org/documents/ga/res/44/a44r025.htm> (last visited Nov. 15, 2004).

57. *U.N. Convention Relating to the Status of Refugees (1951)*, available at http://www.unhchr.ch/html/menu3/b/o_c_ref.htm (last visited Nov. 15, 2004).

58. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, U.N. GAOR, 45th Sess., 69th plen. mtg., Supp. No. 49A, U.N. Doc. A/RES/45/158 (1990), available at <http://www.un.org/documents/ga/res/45/a45r158.htm> (last visited Nov. 15, 2004).

59. *Declaration on the Rights of Disabled Persons*, U.N. GAOR, 13th Sess., Supp. No. 34, at 88, U.N. Doc. A/RES/3447/XXX (1975), available at <http://www.unhchr.ch/html/menu3/b/72.htm> (last visited Nov. 15, 2004).

60. *Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), available at <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm> (last visited Nov. 15, 2004).

61. *Vancouver Declaration on Human Settlements*, available at <http://www.unhabitat.org/declarations/vancouver.asp> (last visited Nov. 15, 2004).

62. *Global Strategy for Shelter to the Year 2000*, G.A. Res. 43/181, U.N. GAOR, 43rd Sess., 83rd plen. mtg., U.N. Doc. A/RES/43/181 (1988), available at <http://www.un.org/documents/ga/res/43/a43r181.htm> (last visited Nov. 15, 2004).

- The UN World Conference on Environment and Development (UNCED) of Rio de Janeiro in 1992, which adopted Agenda 21, and⁶³
- The 1961 ILO Recommendation No. 115 on Worker's Housing.⁶⁴

The 1986 Limburg Principles⁶⁵ and the Maastricht Guidelines⁶⁶ have provided clarification on States obligations and set out the definitions of what constitutes a violation of the rights awarded in the international instruments. These set out a range of remedies that States could make available for breaches and violations. The UNCESCR, through its periodic monitoring of States parties, is establishing a set of historical jurisprudential principles in relation to the implementation of the ICESCR and the right to housing. On a number of occasions, the UNCESCR has concluded that violations of the ICESCR had taken place, and subsequently urged States parties to desist from any further infringements of the rights in question.⁶⁷ In 1996, the UNCESCR proposed an optional draft protocol⁶⁸ for individual complaints under the ICESCR to be made to the UNCESCR.⁶⁹ This would allow any individual to make a complaint directly to the UNCESCR in relation to an area of socio-economic rights violation (including housing), similar to the system now being developed under the Inter-American Human Rights system established under the San Salvador Protocol.⁷⁰

V. Housing Rights Development Within the EU

While the 1957 Treaty of Rome⁷¹ and subsequent European Union treaties do not refer directly to a right to housing, much of the social policy of the EU has a bearing on housing rights and housing policy. While

63. *Agenda 21*, available at <http://www.nssd.net/references/KeyDocs/IIEDa7.htm> (last visited Nov. 15, 2004).

64. International Labour Organisation, *Recommendation No. 115: Worker's Housing Recommendation*, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R115> (last visited Nov. 15, 2004).

65. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 122 (1987) (reprinting U.N. Doc. E/CN.4/1987/17 (1987)).

66. *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998).

67. U.N. Doc. E/C.12/1994/20 (regarding the Dominican Republic).

68. U.N. Doc. E/C.12/1996/SR (Paragraphs 44–49 and 54).

69. *Status of the International Covenants on Human Rights: Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, 53d Sess., Annex, Agenda Item 14, U.N. Doc. E/CN.4/1997/105 (1996).

70. See MELISH, *supra* note 6.

71. Treaty of Rome, Mar. 25, 1957, at <http://www.hri.org/docs/Rome57/> (last visited Nov. 15, 2004) (treaty establishing European Community as amended by subsequent treaties).

there are no Europe-wide directives or measures in relation to housing rights, there are some areas where housing is affected by other sets of rights laid down by the EU. Indeed, the diversity of measures that impact housing is becoming increasingly difficult to predict, from consumer protection, race relations, standards, and even competition policy.⁷²

Social rights, including housing, for migrant workers and their families have followed the EU internal market project. “While market rationale required the extension of free movement rights to ever-larger categories of Community nationals, social rights followed suit to allow, as well as encourage, greater mobility. The main principle was to ensure the social protection of the mover in a non-discriminatory way.”⁷³

EU Regulations in the 1960s and 1970s ensured that non-national workers and their dependents were entitled to the same social benefits, including access to housing, as nationals of Member States, on the principle of nondiscrimination.⁷⁴ Article 9 of Regulation 1612/68⁷⁵ recognizes the significance of access to such services for European migrant workers in the context of nondiscrimination.⁷⁶

The recent enlargement of the EU has now led to some changes in the manner of implementation of these regulations. This has major consequences for the protection of housing rights for migrant workers and their families in the newly expanded European Union.

The EU Charter of Fundamental Rights was “jointly and solemnly proclaimed” at Nice, France, by the Presidents of the European Parliament, the Council and the Commission in December 2000.⁷⁷ While the charter does not include a specific right to housing, Article 34 on social security and social assistance states:

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and *housing assistance* so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.⁷⁸

72. For an overview of these, see <http://www.cecodhas.org/> (last visited Nov. 15, 2004) (website of the European Liaison Committee for Social Housing) [hereinafter CECODHAS].

73. JUTTA POMOELL, EUROPEAN UNION CITIZENSHIP IN FOCUS: THE LEGAL POSITION OF THE INDIVIDUAL IN EC LAW 50 (2000) (citations omitted).

74. See CECODHAS, *supra* note 72.

75. Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community, 1968 O.J. (L 257) (as last amended by Reg. No. 2434/92, 1992 O.J. (L 25)).

76. For cases on this regulation, see http://curia.eu.int/en/content/juris/index_form.htm (last visited Nov. 15, 2004).

77. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364).

78. *Id.* (emphasis added).

Significantly, the Draft Constitution for Europe contains a replica of the Charter of Fundamental Rights, and, in the event of the adoption of the Constitution, will become a significant part of the corpus of European Union and European human rights law.⁷⁹

EU Council Directive 2000/43/EC of June 2000⁸⁰ promotes the implementation of the principle of equal treatment between persons, irrespective of racial or ethnic origin, and specifically, “shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to . . . (h) access to and supply of goods and services which are available to the public, including *housing*.”⁸¹ In order to comply with the Directive, Member States shall take the necessary measures to ensure that:

- Any laws, regulations, and administrative provisions contrary to the principle of equal treatment are abolished.⁸²
- Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003.⁸³
- Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.⁸⁴

In December 2000, the Nice European Council decided to launch a new approach in the field of combating poverty and social exclusion based on national action plans.⁸⁵ The Commission recently examined the second round of these State National Action Plans (NAPs/incl) for 2003–05.⁸⁶

In its section on housing and basic services, the EU Commission Report states that:

79. Draft Treaty establishing a Constitution for Europe, 2003 O.J. (C 169) 26 (submitted to the European Council Meeting in Thessaloniki June 20, 2003). On June 18, 2004, the Inter-Governmental Committee adopted the Draft Treaty establishing the Constitution for Europe in Dublin, but it now awaits ratification by referendum and Parliament in Member States.

80. Council Directive 2000/43/EC, 2000 O.J. (L 180) 22.

81. *Id.* at 24 (emphasis added).

82. *Id.* (citing article 14).

83. *Id.* (citing article 16).

84. *Id.* (citing article 17).

85. The Treaty of Nice amended Article 144 of the EC Treaty in order to formalize the Social Protection Committee established by the Council on the basis of the conclusions of the Lisbon European Council. This Committee, which has advisory status, is designed to promote cooperation on social protection policies between Member States and the Commission.

86. *See Communication from the Commission to the Council*, *supra* note 16.

The 2003–2005 NAPs/incl all agree that decent housing, at an affordable price for households and in a safe, dynamic environment offering appropriate social support and an environment where children can grow up in good conditions, is a central plank in the fight against poverty and social exclusion. The social and economic cost of the absence of decent housing, though not yet evaluated at European level as the absence of social protection has been, appears to seriously compromise the dynamism of a country or region.⁸⁷

However, it would appear that dealing with homelessness or housing rights does not figure largely in the European social inclusion strategy, except as related to some other measures. There appears to be little coordination between the policy approaches in relation to rights as set out in the EU Charter of Fundamental Rights and the social inclusion approaches of the EU Commission.

Courts have recently applied the EU Unfair Contract Terms Directive⁸⁸ in housing law cases, including the striking out of terms of a standard building contract used by developers.⁸⁹ In one UK case, homeless persons who rejected particular accommodations offered to them by the defendant housing authority successfully brought a claim under the Regulations transposed into UK law from the Directive.⁹⁰ The court of appeal heard testimony from a local authority that its policy on requiring homeless persons to accept or decline accommodation were within the national Regulations arising from the EU Directive, because the applicants were consumers and the authority was judged to be a supplier and within the terms of the Regulations.⁹¹

The recent comprehensive UK Law Commission Report on rented housing has adopted the *consumer approach* to housing, with proposals that the consumer protection provisions of European law form a central plank of housing law.⁹² This approach to treating people in housing need, as consumers, opens up a new vista of housing rights arising from EU measures.

87. *Id.* at 57.

88. Council Directive 93/13/EEC, 1993 O.J. (L 95).

89. See *House Contract Terms Unfair, Says Judge*, IRISH TIMES, Dec. 6, 2001, at 4; In the Matter of an Application Pursuant to Regulation 8(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, at http://www.odca.ie/cfmdocs/b_query/unfair1.cfm (last visited Nov. 15, 2004). “Justice Kearns directed that 15 terms in building agreements were to be prohibited in future contracts because they were unfair.” *Id.*

90. *Khatun v. London Borough of Newham*, 2003 Q.B. 2326.

91. The Unfair Terms in consumer Contracts (Amendment) Regulations 2001 (2001) SI 2001/1186.

92. GREAT BRITAIN LAW COMMISSION, RENTING HOMES: REPORT ON A REFERENCE UNDER SECTION 3(1)(E) OF THE LAW COMMISSIONS ACT 1965, at 29 (2003), available at <http://www.lawcom.gov.uk/files/lc284.pdf> (last visited Nov. 15, 2004).

VI. The Council of Europe's Approach to Housing Rights

The European Convention on Fundamental Rights and Freedoms (ECHR)⁹³ of the Council of Europe contains a number of Articles utilized in the promotion of housing rights.

The court applied Article 3 of the ECHR, on inhuman and degrading treatment, in *Marzari v. Italy*,⁹⁴ to place an obligation on public authorities to provide assistance to an individual suffering from a severe disease because of the impact of such refusal on the private life of the individual.⁹⁵ A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the applicant's private life. In the case of *Limbuella v. Secretary of State*,⁹⁶ the court considered the duty of the State to provide support for asylum seekers who had no housing available, to meet the obligations under Article 3 in relation to inhuman and degrading treatment. The applicant had slept in a park, "had no money and no means of finding anywhere to provide him with food."⁹⁷ The court found that where a person could establish that he would be reduced to sleeping on the streets, that there was no charitable support available to him, and that he had only irregular access to food and washing facilities, then for the State to refuse assistance would amount to degrading treatment under Article 3.⁹⁸

Article 8 of the ECHR, regarding respect for private and family life, home, and correspondence, has particular significance in relation to the homeless. The State is required to take on a more positive and active role in relation to respect and protection of home, which clearly involves duties to homeless people, and especially in the prevention of evictions. However, courts may find justification for interference with the right to respect for one's home on the ground that it is "in accordance with the law,"⁹⁹ or necessary in a democratic society and proportionate to the aim sought.¹⁰⁰ All proceedings for possession of a

93. *Convention for Protection of Human Rights and Fundamental Freedoms*, Council of Europe, Rome (1950), available at <http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited Nov. 16, 2004) [hereinafter ECHR].

94. *Marzari v. Italy*, (1999) 28 EUR. CT. H.R. 175.

95. *Id.* at 179–80.

96. *R. (on the application of Limbuella) v. Sec'y of State*, [2004] E.W.H.C. 219 (Admin) (U.K. 2004).

97. *Id.* at ¶ 3.

98. *Id.* at ¶ 36–41.

99. See ECHR, *supra* note 93, at Art. 8(2).

100. See, e.g., *Buckley v. U.K.*, (1996) 23 EUR. CT. H.R. 101; *Chapman v. U.K.*, (2001) 33 EUR. CT. H.R. 399; *Beard v. U.K.*, (2001) 33 EUR. CT. H.R. 442.

home engage Article 8.¹⁰¹ However, although the Article is engaged, Article 8(2) in relation to lawful interference is satisfied wherever the law affords an unqualified right to possession by an owner on proof of termination of tenancy.¹⁰²

There is a margin of appreciation to interpret and apply the law.¹⁰³ In some housing-related cases, courts have found interference with the privacy of the home to be justified on grounds of legitimate social and economic policies. This included the implementation of social justice in Italy, where evictions orders were suspended and rents frozen to avoid a housing crisis.¹⁰⁴

In a recent milestone case, *R. (on the application of Bernard) v. Enfield L.B.C.*,¹⁰⁵ damages were awarded under the UK Human Rights Act (HRA) 1998¹⁰⁶ against a local authority in relation to the failure to act on the provision of adequate housing. The court found that the authority had acted unlawfully and incompatibly with Article 8 in failing for over two years to provide suitable accommodation for a family.¹⁰⁷ The mother was severely disabled and wheelchair bound and was housed in temporary accommodation by the authority, which meant that she was confined to the lounge room.¹⁰⁸ The conduct of the authority not only engaged, but breached the Article 8 obligations, since it condemned the claimants to living conditions that made it virtually impossible to have any meaningful private or family life.¹⁰⁹ The claim for breach of Article 3 in relation to inhuman and degrading treatment failed on the ground that the authority's "corporate neglect" did not intend deliberate infliction of such suffering.¹¹⁰ The judgment relied on the *Botta*¹¹¹ case and reasoned:

Respect for private and family life does not require the state to provide every one of its citizens with a house. . . . However, those entitled to care under section 21 [of a UK Act] are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life. . . . The Council's failure to act . . . showed a singular lack of respect for the claimants' private and family life. It condemned the claimants

101. *Lambeth v. Howard*, [2001] E.W.C.A. Civ. 468 (U.K. 2001).

102. *See Harrow London Borough Council v. Qazi*, 1 A.C. 983 (U.K. 2003).

103. D. J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 290–301 (1995).

104. *Spadea & Scalabrino v. Italy*, (1995) 21 EUR. CT. H.R. 482.

105. [2003] U.K.H.R.R. 148.

106. The incorporation of the ECHR into UK law took place through the HRA 1998.

107. [2003] U.K.H.R.R. 148, 150.

108. *Id.*

109. *Id.* at 162.

110. *Id.* at 160.

111. *Botta v. Italy*, (1998) 26 EUR. CT. H.R. 241.

to living conditions which made it virtually impossible for them to have any meaningful private or family life for the purposes of Article 8.¹¹²

The court held that just satisfaction for the failure required an award of compensation and ordered the payment of £10,000.¹¹³

Article 1 of Protocol 1,¹¹⁴ relating to protection of property and possessions, has been interpreted to include both real and personal property.¹¹⁵ Naturally, the term includes all property, chattels, and acquired rights, such as leasehold interests.¹¹⁶ The concept of possessions in ECHR law is not confined to ownership of physical goods, and has an autonomous meaning outside any definition in domestic law. The term “possessions” includes immovable and moveable property, contractual rights, leases, and all forms of legal interest in land and other rights to property, leases and tenancy agreements, licences to occupy, right to buy enjoyed by some tenants, and any other pre-existing right to be protected under national law.¹¹⁷ Deprivation of possessions in this area could include eviction or compulsory purchase, partial reduction in rights, challenges to rent controls, and legislation restricting recovery of possession or prohibiting eviction.¹¹⁸ One court has discerned possessions in the case law of the ECHR to include rights flowing from tenancies.¹¹⁹ Another court held the failure to honor an option to renew a lease by a local authority to be a breach of Article 1.¹²⁰

The concept of “new property” in welfare and social security entitlements also comes within the ambit of “possessions.” In *Feldbrugge v. The Netherlands*,¹²¹ the court held that a decision concerning a claim for sickness benefits engaged Article 6 of the Convention. Two recent cases have had the effect of extending Article 6 to disputes in connection with non-contributory welfare schemes.¹²² The critical feature of each case was that the claimant suffered an interference with their

112. [2003] U.K.H.R.R. 148 at 162.

113. *Id.* at 172.

114. See ECHR, *supra* note 93, at Art. 1.

115. *X v. Sweden*, (1986) 8 EUR. CT. H.R. 252; *Muller v. Austria*, (1975) 3 D.R. 25; *Gaygusuz v. Austria*, (1997) 23 EUR. CT. H.R. 364; *Salesi v. Italy* (1998) 26 EUR. CT. H.R. 187; *Mennitto v. Italy*, (2000) 34 EUR. CT. H.R. 1122; *Feldbrugge v. Netherlands*, (1986) 8 EUR. CT. H.R. 425.

116. See *James v. United Kingdom* (1986) 8 EUR. CT. H.R. 123.

117. DONNA GOMIEN, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Council of Europe 1998).

118. HARRIS, *supra* note 103.

119. *Mellacher v. Austria*, (1990) 12 EUR. CT. H.R. 391.

120. *Stretch v. UK*, App. No. 44277/08 (2002) (regarding the decision June 26, 2002).

121. (1986) 8 Eur. Ct. H.R. 425.

122. See *Salesi v. Italy* (1998) 26 EUR. CT. H.R. 187; *Mennitto v. Italy*, (2000) 34 EUR. CT. H.R. 1122.

123. *Begum v. Tower Hamlets L.B.C.*, [2003] H.R.L.R. 6, at ¶ 90 (quoting Lord Millett).

and (6) recognizes that a family reunion for migrant workers is not possible without access to adequate housing.¹³⁴

The rights of elderly persons to social protection are set out in Article 23.¹³⁵ States Parties should undertake to adopt or encourage appropriate measures designed to enable elderly persons to choose their lifestyle freely, and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of provision of housing suited to their needs and their state of health or of adequate support for adapting their housing.

Article 30,¹³⁶ regarding protection against poverty and social exclusion, adds a new set of social protection measures, which include an obligation on States Parties to promote effective access to a range of services, including housing:

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake (a.) to . . . promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, *housing*, training, education, culture and social and medical assistance.¹³⁷

The first round of Conclusions of the Council of Europe, Committee on Social Rights,¹³⁸ which examined Article 30 in the case of six countries, took place in 2003.¹³⁹ In relation to the housing and homelessness element of Article 30, the Conclusions of the Committee linked the obligations under the right to housing (Article 31) with the requirements to protect against poverty and social exclusion (Article 30):

By introducing into the Revised Charter a new Article 30, the Council of Europe member states considered that living in a situation of poverty and social exclusion

ROPEAN SOCIAL CHARTER: COMMITTEE OF INDEPENDENT EXPERTS: CONCLUSIONS XIV-1 193 (1998).

134. Craig Scott, *Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights,"* 21 HUM. RTS. Q. 633, 658 (1999).

135. RESC, *supra* note 124, at Art. 23.

136. RESC, *supra* note 124, at Art. 30.

137. *Id.* (emphasis added).

138. Monitoring Committee for the European Social Charter.

139. See 1 COUNCIL OF EUROPE, EUROPEAN SOCIAL CHARTER (REVISED): CONCLUSIONS 2003 (2003) (regarding Bulgaria, France, Italy), available at http://www.coe.int/T/E/Human%5FRights/Esc/4%5FReporting%5Fprocedure/2_Recent_Conclusions/2_By_year/Revised_Social_Charter/RSC_Conclusions_2003_Volume_1.pdf (last visited Nov. 19, 2004) [hereinafter COUNCIL OF EUROPE 2003, vol. 1]; 2 COUNCIL OF EUROPE, EUROPEAN SOCIAL CHARTER (REVISED): CONCLUSIONS 2003 (2003) (regarding Romania, Slovenia, Sweden), available at http://www.coe.int/T/E/Human%5FRights/Esc/4%5FReporting%5Fprocedure/2_Recent_Conclusions/2_By_year/Revised_Social_Charter/RSC_Conclusions_2003_Volume_2.pdf (last visited Nov. 19, 2004) [hereinafter COUNCIL OF EUROPE 2003, vol. 2]. The Council of Europe, European Committee on Social Rights acts as the monitoring body for the Charter, on the basis of regular State reports on the relevant Articles.

violates the dignity of human beings. With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion Article 30 requires States parties to adopt an overall and coordinated approach The measures taken in pursuance of the approach must promote access to social rights, in particular employment, *housing*, training, education, culture and social and medical assistance.¹⁴⁰

In relation to France, the Committee addressed the issue of housing under Article 30:

The report gives no details on measures taken in the other areas mentioned by Article 30: housing, training, education, culture, social and medical assistance. With respect to housing, including the issues of homelessness and evictions, the Committee refers to its comments in the conclusion under Article 31 of the Revised Charter. In the Committee's view housing is a critical policy area in fighting poverty and it is particularly interested to know what measures have been taken to ensure an appropriate spatial distribution of (social) housing so as to avoid "ghettoising" poverty and social exclusion.¹⁴¹

In relation to Sweden, the Committee again addressed the connection between housing rights and Article 30:

More particularly as regards housing, the Committee refers to its conclusion under Article 31 of the Revised Charter. In the Committee's view housing is a critical policy area in fighting poverty and it is particularly interested to know what measures have been taken to ensure an appropriate spatial distribution of (social) housing so as to avoid "ghettoising" poverty and social exclusion.¹⁴²

Clearly, the link between poverty, social exclusion, and housing need is becoming more connected within human rights monitoring at the Council of Europe.

Article 31¹⁴³ regarding the right to housing brings a major new development to housing rights:

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.¹⁴⁴

The monitoring process for the State Party involves a detailed questionnaire covering housing rights, policy measures, eligibility grounds, actions to reduce homelessness, and procedures for challenging unfavourable decisions.¹⁴⁵ A short example will illustrate the type of questions. From Article 31, paragraph 3:

140. COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139, at 214 (emphasis added).

141. *Id.* at 218.

142. COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139, at 648–49.

143. RESC, *supra* note 124, at Art. 31.

144. *Id.*

145. COUNCIL OF EUROPE, FORM FOR THE REPORTS TO BE SUBMITTED IN PURSUANCE OF THE REVISED EUROPEAN SOCIAL CHARTER, at http://www.coe.int/T/E/Human%5FRights/ESC/4%5FReporting%5Fprocedure/1_State_Reports/Form%20-%20Revised%20European%20Social%20Charter.pdf (last visited Nov. 19, 2004) (regarding the full questionnaire for reports to be submitted in pursuance of the revised European Social Charter adopted by the Committee of Ministers on January 17, 2001).

Question A

Please describe the measures taken in your country to make the price of housing accessible to those without adequate resources (housing benefit, reduced-rate loans, tenancy buy-out options, etc.). Please indicate the amounts of public funds reserved for this purpose.

Question B

Please indicate the criteria applied to persons without adequate resources.

Please indicate whether, where a person meets the criteria, they are entitled to assistance in accessing housing as a right. Please indicate whether they may challenge an unfavourable decision before the courts on both procedural and substantive grounds.

Please indicate the number of persons who apply for such assistance and the number who benefit.¹⁴⁶

The 2003 Conclusions of the Committee on Social Rights in relation to the States' obligations under Article 31 illustrate the application of a new set of benchmarks to national housing law and policy in the context of housing rights obligations. The Committee considered reports by France, Slovenia, and Sweden, and has clarified the obligations within Article 31.¹⁴⁷ Reproductions of these follow for ease of access to readers and because of their significance as a potential new set of benchmarks for national housing policies.

Paragraph 1—Adequate housing

Under Article 31 § 1 of the Charter, the Committee considers that the Parties shall guarantee to everyone the right to housing and to promote access to adequate housing.

In addition, Parties shall guarantee equal treatment with respect to housing on the grounds of Article E of the Revised Charter. Equal treatment must be assured to the different groups of vulnerable persons, particularly low-income persons, unemployed, single parent households, young persons, persons with disabilities including mental health problems, persons internally displaced due to wars or natural disasters etc. The principle of equality of treatment and nondiscrimination covers not only paragraph one but the rest of Article 31 as well.

The Committee considers that, for the purpose of Article 31 § 1, the Parties must define the notion of adequate housing in law. The Committee considers that "adequate housing" means a dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law.

This definition means that:

- a dwelling is safe from a sanitary and health point of view if it possesses all basic amenities, such as water, heating, waste disposal; sanitation facilities; electricity; etc. and if specific dangers such as, for example, the presence of lead or asbestos are under control.
- over-crowding means that the size of the dwelling is not suitable in light of the number of persons and the composition of the household in residence.

146. *Id.* at 92.

147. See COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139; COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139.

—security of tenure means protection from forced eviction and other threats, and it will be analysed in the context of Article 31 § 2.

According to the Committee, the standards of adequate housing shall be applied not only to new constructions, but also gradually, in the case of renovation to the existing housing stock. They shall also be applied to housing available for rent as well as to housing occupied by their owners.¹⁴⁸

...

Responsibility for adequate housing

The Committee considers that it is incumbent on the public authorities to ensure that housing is adequate through different measures such as, in particular, an inventory of the housing stock, injunctions against owners who disregard urban development rules and maintenance obligations for landlords. Public authorities must also guard against the interruption of essential services such as water, electricity and telephone.¹⁴⁹

...

Individual rights of the tenant

The Committee considers that effectiveness of the right to adequate housing implies its legal protection. This means that tenants or occupiers must have access to affordable and impartial judicial and other remedies.¹⁵⁰

...

Paragraph 2—Reduction of homelessness

With regards to homelessness, the Committee considers that, for the purpose of Article 31 § 2, Parties shall take reactive and preventive measures.

The Committee considers as homeless those individuals not legally having at their disposal a dwelling or other forms of adequate shelter. The temporary supply of shelter, even adequate, cannot be held as satisfactory by the Committee and the individuals living in such conditions and who wish so, shall be provided with adequate housing within a reasonable period.

Measures reacting to homelessness

The Committee considers that Article 31 § 2 obliges Parties to gradually reduce homelessness with a view to its elimination. Reducing homelessness implies the introduction of measures, such as provision of immediate shelter and care for the homeless and measures to help such people overcome their difficulties and prevent a return to homelessness.¹⁵¹

...

Measures aimed at providing housing and preventing the loss of housing

The Committee considers that the Parties must act to prevent categories of vulnerable people from becoming homeless. This implies that the States shall implement a housing policy for all disadvantaged groups of people to ensure access to social housing and housing allowances. It also requires that procedures be put in place to

148. COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139, at 221. *See also* COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139, at 554.

149. COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139, at 224. *See also* COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139, at 556.

150. COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139, at 224. *See also* COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139, at 556.

151. COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139, at 225–26. *See also* COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139, at 557.

limit the risk of evictions and to ensure that when these do take place, they are carried out under conditions which respect the dignity of the persons concerned.¹⁵²

...

Forced eviction

Forced eviction can be defined as the deprivation of housing which a person occupied due to insolvency or wrongful occupation. Legal protection for persons threatened by eviction must include, in particular an obligation to consult with the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction. The law must also prohibit evictions carried out at night or during winter and provide legal remedies and offer legal aid to those who are in need to seek redress from the courts. Compensation for illegal evictions must also be provided. When an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the persons concerned.¹⁵³

Paragraph 3—Affordable housing

The Committee considers that, for the purpose of Article 31 § 3, Parties shall ensure an adequate supply of affordable housing.

The Committee considers housing to be affordable when the household can afford to pay the initial costs (deposit, advance rent), the current rent and/or other costs (utility, maintenance and management charges) on a long-term basis and still be able to maintain a minimum standard of living, as defined by the society in which the household is located.

The Committee considers that, under Article 31§3, Parties are required, in order to increase the supply of social housing and make it financially accessible:

- to adopt appropriate measures for the construction of housing, in particular social housing, where their own direct involvement is complemented by that of other partners;
- to introduce housing benefits for the low-income and disadvantaged sectors of the population.¹⁵⁴

VIII. Conclusion

Ronald Dworkin directed his famous thesis of rights as “trumps” at administrative discretion.¹⁵⁵ However, in Europe these are often downgraded to “soft policies in favour of this or that social objective,”¹⁵⁶ or something which fit within existing public management approaches as “social rights.”¹⁵⁷

However, international human rights in the housing context can act as valuable benchmarks to evaluate policy initiatives, and can inspire

152. COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139, at 228. *See also* COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139, at 558.

153. COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139, at 231. *See also* COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139, at 560.

154. COUNCIL OF EUROPE 2003, vol. 1, *supra* note 139, at 232–33. *See also* COUNCIL OF EUROPE 2003, vol. 2, *supra* note 139, at 561.

155. DWORKIN *supra* note 3.

156. Martti Koskeniemi, *The Effect of Rights on Political Culture, in* THE EU AND HUMAN RIGHTS 99, 112–13 (Philip Alston ed., 1999).

157. *See* DALY, *supra* note 28.

programs “to create pathways for the marginalized back into public space.”¹⁵⁸ Rights approaches can become a heuristic device where campaigning groups conceptualize their demands in an acceptable and coherent way.¹⁵⁹

Some see the development of housing rights within the study of housing law and policy as a reflection of modernist, post-modernist, and individualist influences. However, it is clear from an examination of the international instruments that many operate at a programmatic level, albeit monitored from a human rights law perspective. There are, of necessity, some individualized housing rights, with remedies for violations, such as those set out in the ECHR. These are necessary in any civilized society to protect vulnerable people, prevent discrimination and ensure that States provide a minimum level of housing to respect human dignity. The development of the concept of housing rights as consumer rights is spilling over from the market sphere, and in this area, there have been enormous developments in recent times. Indeed, the development of housing rights and associated jurisprudence grows apace, springing from established, as well as hitherto unexpected, quarters. Housing policymakers would do well to see beyond the administrative and managerial level of these international legal developments.

Ultimately, the paradigm of housing rights offers a coherent set of benchmarks to challenge the orthodoxy of commodification and consumer driven discourses in the evaluation of housing law and policy. Housing rights as international human rights can effectively confront the New Public Management approaches, so often carefully disguised as intellectual discourses against rights.

158. Gerard Quinn, *The Human Rights of People with Disabilities under EU Law*, in *THE EU AND HUMAN RIGHTS* 281, 289 (Philip Alston ed., 1999).

159. See Barry Goodchild, *Implementing the Right to Housing in France: Strengthening or Fragmenting the Welfare State?*, 20 *HOUS. THEORY SOC'Y* 86–97 (2003).

