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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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