Conclusion

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The Conference on The European Contribution to the Right to Housing Standards, Litigation and Advocacy, organised by Abbé Pierre Foundation and FEANTSA Housing Rights Watch network in Brussels, in May 2022, created a valuable, historical and unique forum for housing and climate rights advocacy and expertise. The event and this publication provide a contemporary examination of European developments in these two areas. While there are many grounds for optimism, there were also some distressing observations.

In Europe, a particularly rich and developed continent, housing conditions are worsening in many respects. The costs of housing and the numbers of homeless and inadequately housed people are constantly increasing. The contributors to this publication unanimously highlight this reality. Marc Uhry and Noria Derdek point out that this situation affects all European countries.[1] The authors responsible for the study of specific national cases support them, whether in Germany,[2] France[3] or the United Kingdom.[4] Given the urgency and seriousness of this situation, the initiators of this collective project, the Abbé Pierre Foundation and Housing Rights Watch, have proposed a reflection on the guarantee of the right to housing as a human right. [5] In doing so, these organizations wanted to focus on the obligations that this right requires from States. In an even more specific way, they questioned the States' positive obligations, that is to say their obligations to act in favour of housing rights. Could such obligations, formulated by European and international treaties, constitute the driver by which all stakeholders, especially the European States, would be encouraged to radically improve the current situation?

In order to answer this fundamental question, several ideas and themes have been considered. First, the identification of positive obligations arising from the main international instruments binding European States: European Union law, the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), to which the International Covenant on Economic, Social and Cultural Rights (ICESCR) must be added. Then, the concrete instruments for implementing positive obligations, and for engaging the responsibility of public authorities were examined. In terms of strategy, the possibility of transposing the modus operandi of recent climate trials to the litigation of the right to housing was discussed. Finally, three more sectoral themes gave rise to

1. M. Uhry et N. Derdek, *In support of a control of housing policies based on international human rights law*, pp.95.

2. M. Althoff, *Discharge and rent control in Germany*, pp.81.

3. V. Toussain, *Social housing in France and European law*, pp.87.

4. L. Sunderland, *"Decent" housing standards as a strategy to alleviate energy poverty*, pp.115.

5. The European contribution to the right to housing: Standards, litigation and advocacy | Housing Rights Watch (abusivelending.org)

workshop discussions: the control of proportionality of home deprivations, the role of public authorities in controlling real estate markets against the drift of prices and fees, and standards and actions aimed at eradicating energy poverty.

This book brings together the thoughts of experts invited to answer these questions. Beyond their great competence, the contributors are remarkable for their diversity of functions, points of view and the different origins of their legitimacy: judges and European monitoring bodies, lawyers, academics, legal officers of national and international non-governmental organizations, housing project leaders, etc. I would like to share with you the modest reflections that the reading of these beautiful and stimulating contributions have inspired me to write. In my opinion, these reflections have a spirit: that of human rights (I), a substance: that of the positive obligations of States (II) and a form: that of the effective activation of these obligations (III).

I. The Spirit: Shifting the Paradigm with a Human Rights Approach

From a legal point of view, housing can be qualified as a property - or part of a property - inhabited by one or more persons. It is, however, a peculiar property that is understood in different ways. On the one hand, it comes under a market logic as a rare material good, having a pecuniary and appropriable value. On the other hand, because of its function, housing is an essential good for every human being, which implies that it must be understood in terms of human dignity and formulated as a human right.

Housing is thus at the crossroads of private economic interests and the adoption of public policies that constrain the free play of the market. The objectives of the political authorities can meet those of private interests (creation of wealth, renewal and modernization of the housing stock, etc.), but only in a partial way. Public authorities are still responsible for pursuing goals of general interest, such as ensuring access to decent housing for all. States therefore pursue policies of urban planning, construction of conventional and social housing, rent regulation, housing improvement, etc., which constrain economic actors. The balance between respect for private interests and the pursuit of the general interest depends on political choices that may vary according to the economic and structural situation, and to societal aspirations from one period to another.

The national representatives of the European States are well aware of the complexity of the housing issue, which may explain the reluctance to formally enshrine the right to housing as a human right, whether in their constitutions or through their international commitments. In this respect, as Judge Pinto de Albuquerque states, "*the right to housing falls into the category of social right*s".[6] Among human rights, social rights are those rights dedicated to the protection of workers and social welfare, including the rights of the most vulnerable groups.

Judge Rossi agreed that the Charter of Fundamental Rights of the European Union (hereafter the Charter) does not guarantee such a right per se, even if its article 34§3 refers to the "*right to housing assistance*", which is only one element of the right to housing. This provision alone cannot provide a demanding and enforceable protection in terms of access to housing. Its normative scope is very limited for various reasons. The first reason is that the Charter is only applicable within the scope of European Union law, and is therefore inseparable from existing Union law, "*just as the*

6. P. Pinto de Albuquerque, *State obligations in relation to housing rights - views of the ECHR*, pp.29.

shadow of an object follows its form".[7] Indeed, the EU does not have a competence to adopt common housing standards (in the strict sense of defining a public housing policy). [8] In other words, housing policy, as such, remains the sole responsibility of the Member States. We can therefore understand the meaning of the second restriction that results from the formula in Article 34§3 of the Charter indicating that respect for this right must follow "*the rules laid down by Union law and national laws and practices*", i.e. according to the law in force, which is essentially defined at national level. It is in the light of these clarifications that Principle No. 19 of the 2017 European Pillar of Social Rights relating to housing and assistance to the homeless[9] should also be read as not granting the EU any competence in this area. Last but not least, Article 34§3 only contains a principle that does not create any direct subjective right for individuals. [10] Member States are only required to observe this principle when implementing a European standard. Thus, as Judge Rossi points out, Article 34§3 was used by the CJEU in the *Kamberaj* and *Land Oberösterreich v KV* judgments, but on each occasion with a view to interpreting a European directive relating to the access of third-country nationals who are long-term residents to social benefits. [11]

Similarly, the ECHR and related case law do not enshrine a right to housing. [12] As Judge Pinto de Albuquerque points out, this would require a "*social reading of the Convention*" which, although in line with the case of *Airey v Ireland*, has never led to the adoption of a "*clear and simple position*" by the Strasbourg judges.[13] Nevertheless, the Convention does provide indirect and partial protection of certain housing-related guarantees, mainly through Article 8 of the ECHR, with its right to respect for private and family life and the home. However, this protection remains incomplete insofar as the Court often confines itself to a limited review. It inevitably leaves a wide margin of appreciation to States in matters of economic and social policy, which reflects a liberal vision of State action.[14] Moreover, there is little hope of strengthening this protection in the current context of increasing contestation of the role and legitimacy of European judges. [15]

On the other hand, the right to housing is formally recognised in the treaties enshrining social rights. This is the case, first of all, of the revised European Social Charter of 1996, which now recognises a right to housing through Article 31.[16] However, the remarkable nature of this provi-

7. L. S. Rossi, *Member States' obligations in relation to housing rights - views of the CJEU*, pp.23, citing the president of the court K. Lenaerts.

8. It does have competence to combat social exclusion by virtue of Article 153 of the Treaty on the Functioning of the European Union, but this is only a supporting competence that can only support and supplement the action of the Member States in this area.

9. "*a. Access to social housing or housing assistance of good quality shall be provided for those in need.*
b. Vulnerable people have the right to appropriate assistance and protection against forced eviction.
c. Adequate shelter and services shall be provided to the homeless in order to promote their social inclusion."

10. In fact, everything indicates that Article 34§3 is among the "principles" enshrined in the Charter in Title IV on solidarity, and not "fundamental rights" as they appear in Title II of the Charter (although Article 7 on the right to respect for the home is part of Title II). Indeed, the Charter itself distinguishes among its provisions between those which constitute subjective rights directly benefiting individuals, and those which only formulate principles, which must be implemented by legislative acts and can only be invoked before a court for the interpretation of these acts.

11. Moreover, according to the Court, when Member States determine the benefits available under the European directive, they must "respect the rights and observe the principles (...) set out in Article 34" of the Charter.

12. Cf CEDH, *Faulkner v Ireland*, 31 mars 2022, n° 30391/18 and case law cited, see P. Kenna et Maria José Aldanas, *Proportionality and Evictions*, pp.65.

13. P. Pinto de Albuquerque, *State obligations in relation to housing rights - views of the ECHR*, pp.29.

14. P. Kenna et Maria José Aldanas, *Proportionality and Evictions*, pp.65.

15. P. Pinto de Albuquerque, *State obligations in relation to housing rights - views of the ECHR*, pp.29.

16. "*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*".

sion must be put into perspective by the fact that, as Giuseppe Palmisano reminds us, only 15 of the 46 States Parties to the Council of Europe have accepted this article, and 4 of which are only committed to one or two of its paragraphs. Secondly, while the Universal Declaration of Human Rights (1948) adopted by all countries in the world, was the first international treaty to recognise the right to housing as part of the right to an adequate standard of living, the ICESCR (1966) developed these obligations in more detail, and used the same wording in Article 11§1 which guarantees "*the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing*". This provision and its interpretation by the UN Committee on Economic, Social and Cultural Rights (UNCESCR), which contains specific obligations, are valuable sources of inspiration for European and national law. Here again, it should be emphasised that the drafters of the ICESCR wished to restrict the normative content of their undertaking by providing only for an obligation of progressive implementation, to the maximum of their available resources. [17]

In the end, European states recognise the right to housing as a human right, but have tended to reduce the normative scope of this right, both in their international and European commitments and in their respective constitutions.[18] They consider that its implementation implies the adoption of a public policy which must be a matter for their sovereign decision-making in economic and social matters. They clearly do not wish to be constrained in their choices by supranational obligations. And if, in order to ensure suitable housing conditions, they have to decide between interests that may seem contradictory (support for the economy and employment in the construction sector versus access to housing for the most disadvantaged), the choice of increasing the free market and privatising the housing sector prevails, to the detriment of the public interest.

However, the liberalism of the housing market (which gives precedence to economic interests and the protection of private property) must be largely regulated because housing is not a good like any other. Indeed, like other goods such as food, water or energy, housing is, in many respects, necessary for human existence and can be compared to common goods, which require specific protection.

Nevertheless, the authors of this book are unanimous in their observation that the deterioration of housing conditions and the increase in the number of poorly housed people is due to the inadequacy of public authority action and the prevalence of the commodification of housing. They consider that only an understanding of the right to housing as a human right in itself and a reorientation of public policies in order to guarantee this right effectively, could contribute to improving the situation. Such a project would imply putting the fundamental nature of the right to housing back at the heart of political decision-making, which would give more power and legitimacy to public authorities in their function of regulating and supervising the market, private actors and economic operators. It would ultimately be a matter of assigning a "social function" to property ownership and to the economic activities surrounding it, which would certainly imply re-founding the "social pact" around the issue of housing.

17. Cf. Article 2§1 CESCR. "*1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures*".

18. For example, the right to housing is not recognized in the French Constitution and the Constitutional Council has only recognized "*the possibility of having decent housing*" as an objective of constitutional value and not as a right (CC, Decision n° 94-359 DC du 19 January 1995, *Law on housing diversity*).

The positive obligations of the European States, which stem from their international commitments, are the first steps towards this potential paradigm shift.

II. The substance: which are the positive obligations under the right to housing?

Some obligations relating to housing have been more easily accepted, including on the basis of the European Convention on Human Rights, insofar as they do not require the State to respect and protect a right to access or maintain housing. Others are more ambitious in that they require the effective implementation of the right to housing. This requires the adoption of public policies and/or state interventionism that is more complex for individuals to demand, and for judges to review. The latter obligations have mainly been formulated by the supervisory bodies of social rights treaties such as the European Social Charter and the ICESCR.

A. The obligation not to discriminate in access to housing and housing benefits

The principle of non-discrimination is a fundamental right that is effectively guaranteed by all European States at both constitutional and supranational levels.

As this principle is at the basis of Community integration, it is not surprising to find this requirement at the basis of European Union law, including with regard to access to housing and the right to benefit from housing assistance provided by national law. Thus, as Judge Rossi points out, certain rules of European Union law provide "*indirect protection*" of the right to housing by requiring Member States to treat nationals and certain other legal categories equally: European workers, who enjoy full equality of treatment, and all European citizens with a right of residence[19], third country nationals who are long-term residents (of more than five years of legal residence), including with regard to housing benefits.[20] Finally, the EU regulations on the standards of reception of asylum applicants stipulates that Member States shall provide them with accommodation while their asylum application is being examined. The logic of fundamental rights requires Member States to ensure that these especially vulnerable persons do not find themselves in such a state of destitution that it would undermine their human dignity, which must be guaranteed to all persons in all circumstances[21].

In order to comply with the principle of non-discrimination, the State must take positive measures, particularly regarding specific groups of beneficiaries. The ECSR has thus developed a rich jurisprudence on the right to housing of Travellers and Roma migrants, thanks to the complaints brought by FEANTSA and the International Movement ATD Fourth World, among others. For these people with their specific way of life, equal treatment implies that the States adopt specific adapted measures[22].

19. Even if, for the latter, the State can impose a condition of stay of 3 months in order to benefit from social housing aids (cf. Directive 2004/38/CE du 29 April 2004).

20. Directive 2003/109 du 25 November 2003, read in the light of Article 34 of the Charter of Fundamental Rights of the European Union; CJEU, 10 June 2021, *Land Oberösterreich (Aide au logement)*, C-94/20, in L. S. ROSSI, *Member States' obligations in relation to housing rights - views of the CJEU*, pp.23.

21. This requirement stems from the case law of the CJEU, the ECtHR and the ECSR.

22. Voir C. Nivard, *Le droit au logement combiné avec le principe de non-discrimination [The right to housing combined with the principle of non-discrimination]*, in Dossier "Droit au logement et droit(s) européen(s)" ["Right to housing and European law(s)"], *RDSS*, n°2/2015, pp. 241-249.

B. Obligations in cases of deprivation of domicile

As Padraic Kenna and Maria José Aldanas[23] point out, although the European Convention on Human Rights and Fundamental Freedoms does not guarantee a right to housing, it does protect the housing of individuals on the basis of the right to respect for one's home guaranteed by Article 8 ECHR.

The ECtHR considers deprivation of home (evictions, seizures, etc.) as an interference with the respect of this right, which is only in conformity with the Convention if it is provided for by law, pursues an objective of general interest and is "*necessary in a democratic society*", i.e. proportionate. The authors note, however, that the proportionality test normally applies only to evictions from public buildings or land owned by the State. The public interest pursued must be of particular importance for the interference to be justified, and the individual concerned must benefit from certain guarantees such as effective access to a court of law as well as alternative accommodation in certain cases.

On the other hand, when the interest of a tenant conflicts with that of a private owner, the State must only ensure that the deprivation of the home takes place after a court decision on the legality of the situation. As the ECtHR is not competent to control the respect of the Convention by private individuals in a horizontal dispute (between two "private" parties rather than between a State and "private" party), it takes a step back here, reducing the States' obligation to the strict minimum. This creates a difference in treatment between tenants and owners and between tenants of public housing and tenants of private property, which has no justification with regard to the right to housing.

In contrast, recent UNCESCR decisions against Spain, under the new individual complaint's procedure provided for by the Optional Protocol, criticise national courts for failing to check the proportionality between the legitimate aim of an expulsion and its consequences for the person concerned. The UNCESCR applies the ICESCR in a horizontal situation by holding the State responsible for its national courts, as one of its components. Padraic Kenna and Maria José Aldanas conclude that the ECHR should be guided by this case law in interpreting the Convention in a way that is more favourable to the right to housing of, in particular, vulnerable and socially disadvantaged persons.

It should be noted that the ESC provides equivalent guarantees on the basis of Article 31§2 of the Charter, which commits States Parties to prevent and reduce homelessness with a view to its progressive elimination. The European Committee of Social Rights has specified that States must ensure that in the event of an eviction - including of privately rented accommodation - there is a consultation of those concerned with a view to seeking alternatives to eviction, and that a reasonable period of notice is given before the date of the eviction. The right to an effective remedy for evicted tenants must also be ensured. Finally, "*even where eviction is justified, the authorities must ensure that the persons concerned are rehoused or financially assisted*".[24]

23. P. Kenna et Maria José Aldanas, *Proportionality and Evictions*, pp.65.

24. See not. ECSR, *FEANSTA v France*, complaint n° 39/2006, decision on the merits of December 5, 2007.

C. The obligation to ensure access to housing of an adequate standard: the example of fuel poverty

The notion of "*housing of an adequate standard*" has been clarified by the practice of the Committee on Economic, Social and Cultural Rights and the European Committee of Social Rights. The latter considers that it is a dwelling provided with "*all the essential services (such as heating and electricity)*", which must be sanitary and "*have the essential amenities, but also to a dwelling of suitable size for considering the composition of the family in residence*".[25] Sufficient or decent housing therefore includes access to energy for heating, lighting and the operation of common electrical appliances. This requires significant infrastructure, which is lacking in many countries.

The exhaustion of non-renewable resources and the environmental risks raise more global challenges. In a context of scarcity and risk of shortages, the problem of energy costs is becoming increasingly pressing for European States. In particular, they are confronted with growing situations of energy poverty affecting specifically the most disadvantaged categories of people[26]. Marlies Hesselman argues for a human rights approach to energy poverty[27]. She recalls that obligations exist under Article 11 of the ICESCR which guarantees the right to adequate housing and which includes among its criteria "*the availability of services, materials, facilities and infrastructure*" (availability) including "*sustainable access to natural and common resources*" such as "*energy for cooking, heating and lighting*".[28] In addition, affordability and habitability require that housing costs are not disproportionate to income and that those who cannot afford them are provided with housing subsidies to ensure their protection and safety. On this basis, the UNCESCR has specified a set of obligations for Member States to ensure that all housing units, including that of the most disadvantaged, include adequate access to energy.

Marlies Hesselman considers that these international standards of human rights guarantees should be integrated into the policies of the European Union and its Member States. Indeed, the European Union has recently adopted standards to combat energy poverty in the framework of its competences in the field of environmental[29] and energy[30] policy. For the author, the effectiveness of these policy measures would be strengthened by being embedded in a "*human rights*" perspective. Indeed, according to her, human rights "*are both a legal and a conceptual tool to fight against existing (structural) inequalities and to demand a better satisfaction of needs recognised as fundamental*".[31]

25. ECSR, *FIDH v Irlande*, complaint n° 110/2014, decision on the merits of May 12, 2017, see G. Palmisano, *State obligations in relation to housing rights - views from the ECSR*, pp.33.

26. Defined as the inability of households to access an adequate level of energy services at an affordable cost (definition cited by L. Sunderland, *"Decent" housing standards as a strategy to alleviate energy poverty*, pp.115).

27. M. Hesselman, *Legal standards for addressing energy poverty under the right to housing: Towards a new right to energy?,* pp.107.

28. CESCR, *general comment no. 4: the right to adequate housing (Article 11§1 du Pacte)*, 9 December 1991, E/1992/23, § 8. https://www.ohchr.org/en/documents/general-comments-and-recommendations/committee-economic-social-and-cultural-rights

29. Article 192 TFEU.

30. Article 194 TFEU.

31. M. Hesselman, *Legal standards for addressing energy poverty under the right to housing: Towards a new right to energy?*, pp.107.

D. The obligation to make the cost of housing accessible [in particular] to those without sufficient resources

States may seek to make housing accessible to people on low incomes by regulating the private market on the one hand (1) or by building social housing and granting social housing subsidies on the other (2).

1. Regulation of the housing market

In its general comment on the right to adequate housing guaranteed by Article 11§1 ICESCR, the UNCESCR considered that "*in accordance with the principle of affordability, tenants should be protected by appropriate measures against unreasonable rent levels or rent increases*".[32]

Indeed, housing policies in all European countries include regulation of private housing markets, in particular to protect the rights of tenants in the event of eviction, whether legal or illegal, or against excessive rents. For the latter, the State can play a regulatory role by controlling rents as well as a social assistance role by providing housing benefits to tenants.

The example of German law presented by Max Althoff is particularly interesting in this respect. Legislation there has always been especially protective of tenants in a country where the proportion of tenants is in the majority. However, the situation of tenants has become more and more complicated since the real estate market, which is poorly regulated, has become an attractive place for financial investments. Rents have risen sharply, especially in cities with a tight property market, such as Berlin. The legal regulations are no longer sufficient to halt the continuous growth of rents and the consequent increasing numbers of tenants who are forced to move out of the major cities concerned. Max Althoff highlights the deleterious role of German national or federal jurisprudence, which is generally unfavourable to tenants and renders certain legal guarantees ineffective. He also points out the difficulties of certain Länder in having more protective legislation adopted at federal level. We understand how much this regulation must come from a strong political choice, which is the only way to stop the market game that is systematically detrimental to the poorest people.

Given this observation, Noria Derdek and Marc Uhry propose that international human rights law be used to assess, and possibly condemn, public housing policies. In particular, they question the responsibility of States, with regard to human rights, in response to the increasing liberalisation of the real estate market and the commodification of housing, which is proving distressing for citizens, particularly the most vulnerable. The State may face a dilemma when the objective of the economic health of the market is antagonistic to that of better protection of citizen-tenants. For Noria Derdek and Marc Uhry, this dilemma does not have to be a dilemma: it is essential to "*prioritise the concerns and relegate to a subordinate level the issues of the economic health of the real estate sector, which are only a means and not an end*".

This reorientation must be led and supported by States, which are the duty bearers under international human rights law. Amongst their obligations is the obligation to control the behaviour of private persons infringing the right to adequate housing. In this sense, the recommendations presented in 2022 by Leilani Farha, former UN Special Rapporteur on Housing, "*The Shift Direc-*

32. CESCR, *general comment no. 4: the right to adequate housing (Article 11§1 du Pacte)*, 9 December 1991, E/1992/23, § 8.

tives. From Financialized to Human Rights-based Housing" are particularly relevant. In this document, Leilani Farha proposes a sort of "*revolution*" in the mercantile logic of the housing sector by demanding that States subordinate the economic and financial activities of private actors to the objective of fulfilling the human right to housing. This call for greater State intervention in the housing and real estate market would be the only way to remedy the inequalities of access and exclusion of many people from the right to enjoy decent housing.

2. Social housing

Among the obligations that arise from the right of people without resources to benefit from housing, the obligation of States to provide sufficient public or social housing is essential, even if it is particularly complex to implement. Indeed, compliance with such an obligation implies a significant political and economic investment, to which some states object on the grounds of limited financial resources. The courts and supervisory bodies are therefore content to exercise limited control over what they consider to be an obligation of means and, above all, political arbitration (wide margin of appreciation before the European Court of Human Rights, consideration of alleged state efforts before the Council of State,[33] etc.).

In this respect, the caselaw of the ECSR,[34] inspired by the interpretative work of the UNCESCR, turns out to be very valuable in setting out a possible effective control by the courts of such a complex positive obligation. Indeed, the ECSR has specified, with regard to the right to housing, that "*when the achievement of one of the [Charter's] rights is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources*". This obligation of means, which could be described as "*reinforced*", requires the State to justify its actions and/or progress in order to meet its international obligations.

This assessment of the respect of the right to housing, carried out by the ECSR on the basis of "*quality indicators of public policies*", could be usefully taken up at national level according to Noria Derdek and Marc Uhry. This "scoring of housing policies" would have the advantage of questioning the objectives, effectiveness and efficiency of public policy choices and therefore of forcing public authorities to account for the implementation of the right to housing. This method of control makes it possible to preserve the political authority's discretionary power without absolving it of all responsibility.[35]

Social housing policy in France and its apprehension by European Union law are the subject of a study by Virginie Toussain.[36] She highlights the ambiguous position of the EU, namely, both as an activator and as an impediment to national policies in the field of social housing. Indeed, the construction and management of social housing, as economic activities, are normally subject to the European rules relating to freedom of movement and free competition. Therefore, in order to defend the specific economic functioning of French low-cost housing organisations, France had to

33. Cf. Voir entre autres, CE, Juge des référés, 10 November 2022, n° 468570, cited by Noria Derdek et Marc Uhry.

34. CESCR, *general comment no. 4: the right to adequate housing (Article 11§1 du Pacte)*, 9 December 1991, E/1992/23.

35. Thus, France's social housing policy and practice have been denounced before the ECSR because of its manifest insufficiency of supply, the dysfunctions of its allocation procedure and the discriminatory nature of its conditions of access. ECSR, *Mouvement ATD Quart-Monde v France*, complaint n° 33/2006, decision on the merits of the 5 December 2007; ECSR, *FEANTSA v France*, complaint n° 39/2006, decision on the merits of the 5 décembre 2007.

36. V. Toussain, *Social housing in France and European law*, pp.87.

invoke the derogation allowed by the Treaties in competition law for undertakings entrusted with a service of general economic interest (SGEI), as well as an overriding reason of general interest to avoid the controls on State Aid and EU competition law rules.

However, it is in the area of economic governance that the European Union's position is the most equivocal. Indeed, in the context of the European Semester, the European Commission's reports on France have criticised both excessive public spending on housing policy and assistance, and the inefficiency of the procedures for access to social housing. Virginie Toussain notes that these reports have led to the adoption of reforms in France that have drastically reduced the budget allocated to housing policy and the construction of social housing. However, since the introduction of social indicators in the evaluation of the European Semester following the adoption of the European Pillar of Social Rights, the European Commission has been highlighting the risk that the lack of social housing and the disproportionate cost of housing in household budgets pose to France's financial stability, particularly for the most disadvantaged. But the latest 2022 reports continue to target housing policy as a sector where savings of public money are welcome.

That being said, the author notes that the EU plays a parallel role as an activator of public policies thanks to the significant financial support it provides to Member States for the energy renovation of buildings, particularly social housing buildings, through the European Structural Funds and the European Investment Bank.

At the end of this overview of the positive obligations that can be imposed on States on the basis of the human right to adequate housing, it is clear that the most ambitious and comprehensive obligations have been identified by the UNCESCR and the ECSR. Their jurisprudence should be better known and applied. In particular, it should be considered by the ECtHR and the CJEU, whose decisions are much more cautious, notably because they cannot rely on a legal text that formally recognises the right of people to decent housing. Indeed, while the rulings of these two European Courts are binding, the decisions of the ECSR and UNCESCR are considered to be soft law, with no immediate binding effect on the States Parties (even if their commitment to the treaties implies that they consider them to be binding). So how can we ensure that these international obligations are translated into binding obligations in domestic law? At the very least, how can States be encouraged to respect them?

III. The form: the effective activation of positive obligations

A. Strategic litigation in the light of recent developments in environmental litigation

The interview with Delphine Misonne and Marine Izquierdo[37] as well as the chapter by Nicolas Bernard and Koldo Casla[38] open up encouraging and innovative perspectives for thinking about the effective activation of State obligations in regard to housing rights. Indeed, the idea is to consider the possibility of transposing recent successes in the field of climate justice to housing rights. Reference is made in particular to the three major trials, *Urgenda* (Netherlands),[39] *l'Affaire*

37. D. Misonne et M. Yzquierdo, pp.45.

38. N. Bernard et K. Casla, *Lessons from strategic human rights litigation: From climate change to adequate housing*, pp.51.

39. The Hague Tribunal, 24 June 2015, *Foundation Urgenda v the Netherlands*, C/09/456689/HA.

du siècle (France)[40] and *Klimaatzaak* (Belgium),[41] in which public authorities were held accountable for their insufficient action to combat global warming.

These lawsuits can be qualified as strategic litigation "*understood as litigation that pursues objectives or is concerned with interests broader than those of the parties*".[42] Indeed, Marine Izquierdo describes these lawsuits as aiming "*not so much to obtain compensation as to reinforce the existing law or change its interpretation*" as well as "*tools for social mobilisation*" used by civil society with a view to "obtaining a societal change".[43]

The interest of these types of case lies in their high profile, which makes them "*the business of citizens who hold their respective States to account*".[44] They encourage judges to position themselves as judges of "*the credibility of public action*" and to hold the State accountable for its responsibilities and commitments by condemning its inaction, by compensating for the damage suffered, and even by using its power of injunction. They give rise to a kind of virtuous circle of strengthening climate action initiated by legal actions followed by legislative actions, potentially followed by other legal actions in case of insufficient political action, and so on.

Indeed, the cases mentioned have led to tangible effects. For example, the sanction of the German "*climate law*" by the Constitutional Court led to the adoption of a more ambitious law by the legislator, and the *Urgenda* case to the adoption of a three billion euro action plan to sufficiently reduce carbon emissions, as Marine Yzquierdo notes. As for the *L'Affaire du siècle* case, it is likely that the French Conseil d'Etat will order the State to pay financial penalties, for non-compliance with the injunctions made by the court to adopt, by 31 December 2022, the measures necessary to achieve the trajectory of reduction of greenhouse gas emissions by 2030.[45] France has already been subject to record fines for failing to meet EU air pollution standards.[46]

Is a transposition possible in view of the similarities and specificities of the right to housing compared to environmental rights? Nicolas Bernard and Koldo Casla first identified certain points of divergence between environmental rights and housing rights.[47]

Housing litigation is largely about tenants against private landlords in order to obtain a more immediate solution to an individual problem rather than to engage the responsibility of public authorities on their structural causes. Furthermore, tenants tend to seek out-of-court solutions in order to avoid the long, costly and risky process of litigation. On the other hand, since the environmental issue is of a global nature, it is regulated by sources of international public law and, at the domestic level, by rules of special administrative law. Stakeholders therefore often turn to the courts to challenge public authorities, who are primarily responsible for political action to combat global warming and control polluting activities. Finally, it would seem easier to identi-

40. Administrative Court of Paris, 14 October 2021, N^{os} 1904967, 1904968, 1904972, 1904976/4-1.

41. Court of First Instance of Brussels, 17 June 2021, *Affaire Climat ASBL*, n° 2015/4585/A.

42. H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact*, Hart, 2018, cité par N. Bernard et K. Casla, *Lessons from strategic human rights litigation: From climate change to adequate housing*, pp.51.

43. D. Misonne et M. Yzquierdo, pp.45.

44. *Ibid.*

45. https://notreaffaireatous.org/cp-au-31-decembre-2022-laction-climatique-de-letat-aura-ete-insuffisante-les-associations-demanderont-une-astreinte-financiere-en-2023/

46. CE, 10 juillet 2020, *Les amis de la Terre et al.*, n° 428409.

47. N. Bernard et K. Casla, *Lessons from strategic human rights litigation: From climate change to adequate housing*, pp.51.

fy the wrongful behaviour of States in environmental matters insofar as they are committed to quantified objectives based on scientific studies, particularly since the 2015 Paris Agreement. On the other hand, this responsibility seems more difficult to define in terms of the right to housing, as several policy options can be used to achieve it. Consequently, it appears that the right to the environment implies an obligation of result, whereas the right to housing would only require an obligation of means.

Despite these differences, the two authors develop points of convergence that make it possible to consider transposing the method and reasoning used in environmental cases to housing rights.

Firstly, the right to housing is also likely to give rise to specific obligations or obligations of result, as a result of the interpretative work of the courts[48] or the will of the legislator.[49] Secondly, with the increase in rent and energy prices, housing has become as urgent an issue as the environmental issue, as the risk of a major social crisis seems imminent. The ecological crisis and the housing crisis feed each other by subjecting the most precarious to the deterioration of their environment and living conditions. Thirdly, the right to the environment and the right to housing are largely intertwined. It is therefore not surprising that the ECHR's jurisprudence on the right to a healthy environment is based primarily on Article 8, which enshrines the right to respect for private and family life and the home. The authors then note the key role of activists and non-governmental organisations in both cases, as illustrated throughout the book. Furthermore, they note that both climate and housing require the contribution of all, not only States but also private actors, both collective and individual. Finally, they each specifically affect vulnerable groups of people, who are the first to be harmed.

Forming strategic remedies that highlight the State's failure to act, combined with a human rights approach, could take the housing issue out of an inter-individual perspective as well as out of the market logic – both of which can give the impression that the structuring and cost of housing and real estate is a state of affairs that "*can't be helped*", or that the poorly housed are responsible for their situation. The submerged part of the iceberg of the systemic dysfunction of housing policy should be exposed in court, beyond the emerging part of the many individual disputes. In short, it should be made "*everyone's business*". Certain argumentative strategies can contribute to this result, such as the demand for housing as a human right, the link between the environment and housing, or the cost of poor housing for the economy and society as a whole, which has already been evaluated.[50]

B. Mobilisation beyond central governments

A common point noted above between the right to housing and the right to the environment lies in the multiplicity of international/domestic, national/local, public/private, collective/individual actors on whom the full implementation of such rights depends. Everything cannot rest on the

48. As mentioned above concerning the determination of positive obligations at the European level. The national judge also contributes to this "*embodiment*", as illustrated by the decision of the Constitutional Council, which derived the prohibition on cutting off water in the event of non-payment from the constitutional objective of "*the possibility for all persons to have decent housing*" (Decision n° 2015-470 QPC du 29 May 2015, *Société SAUR SAS*.

49. For example, the French law n° 2007-290 of March 5, 2007 instituting the right to opposable housing and carrying various measures for social cohesion.

50. Pierre Madec, *Quelle mesure du coût économique et social du mal-logement ?* [*How to measure the economic and social cost of poor housing?*], OFCE, Sciences Po, *Revue de l'OFCE*, 146 (2016).

central State and on the control of the courts, which often restrain themselves, in the name of the principle of separation of powers, where economic and social issues are at stake.

It is true that European and international obligations are first and foremost binding on States and therefore on their central governments. Nevertheless, from the point of view of the international order, the responsibility of the State, considered as a unit, can be the responsibility of each of its emanations (agents, infra-State entity, independent public body or courts). It is the responsibility of the State to ensure that international obligations or the enjoyment of fundamental rights are effectively respected by all of its organs, just as it must protect any individual against the actions of private actors or other individuals who would infringe on one of his or her fundamental rights.

It is therefore not surprising that the legal recognition of the right to a healthy and sustainable environment is formulated in terms of rights but also duties. This is reflected in France's Constitutional Charter for the Environment, whose Article 2 states that "*Everyone has the duty to participate in the preservation and improvement of the environment*".[51]

The effective implementation of the right to housing thus requires the mobilisation of all stakeholders, through legal constraint and with pragmatism. In this context, Louise Sunderland usefully sheds light on a case study in the United Kingdom,[52] concerning a 2016 law imposing a minimum energy efficiency standard for private rented housing, with the aim, in particular, of reducing situations of energy poverty. The author finds that the impact of this law has been largely reduced by the lack of an associated implementation framework. The local authorities responsible for ensuring compliance have not been given sufficient financial and human resources to carry out effective monitoring, nor the data necessary to identify the dwellings concerned. In addition, there was originally no provision for tenant education to encourage landlords to bring their properties into compliance with the law. Louise Sunderland concludes that "*standards alone do not improve housing*", as their effectiveness depends on a comprehensive regulatory framework of support and enforcement. She further demonstrates how civil society actors involved in housing issues are demanding that effective support be included in future European standards.

Similarly, the effectiveness of monitoring compliance with the right to housing can only be verified by the existence of remedies. The tenants most affected by poor housing and/or energy poverty are often socially vulnerable people. For these people, it has long been recognised that their access to justice is obstructed by multiple factors, not only economic but also social and psychological. This phenomenon of non-recourse to rights[53] has been noted in particular with regard to the application of the DALO law.[54] The positive obligations of States are therefore not limited to establishing rights and providing the institutions and means for their implementation, but also require that the beneficiaries be supported so that they can effectively exercise their rights.

As mentioned in most of the contributions to the book, guaranteeing the right to housing requires that States regulate the housing market and impose certain constraints on private owners. This submission of the housing market to the respect of human rights must be the result of a clear

51. See also Article 3. Article 3: "*Every person must, under the conditions defined by law, prevent or, failing that, limit the damage that he or she may cause to the environment*" and Article 4: "*Every person must contribute to the repair of the damage that he or she causes to the environment, under the conditions defined by law*".

52. L. Sunderland, *'Decent' housing standards as a strategy to alleviate energy poverty*, pp.115.

53. Dossier "Ceux qui ne demandent rien" ["Those who do not ask for anything"], Vie sociale 2008/1 (N° 1).

54. Monitoring Committee for the Right to Housing, *Pour un plan national d'accès au droit et de lutte contre le non recours - Bilan Dalo hébergement 2008/2019*, novembre 2020.

political will. This paradigm shift will not come from judges alone, whether national or international, as European and international standards do not allow for such a "*revolution*". States can, however, make the choice to condition the economic freedom of the housing market and the full enjoyment of the right to property to the pursuit of the objective of guaranteeing decent housing for all. This would mean reviving the social function of property,[55] just as an environmental function of property has recently been identified.[56]

In conclusion of this very rich book, it appears that a human rights approach to the right to housing highlights the inequalities in access to housing experienced specifically by the most vulnerable, and aims to ensure the effective enjoyment of this right by all. These issues raise questions about the extent of the constraints that should be placed on the market, and about the modalities of redistribution within each society.

Therefore, the right to housing is resolutely a question of social justice, but it goes beyond the mere distribution of wealth and rewards. Access to decent housing is a basic fundamental right, necessary for the enjoyment of all other fundamental rights. What is at stake here is the right of every person to live with dignity among other human beings and, beyond that, the right of humanity to inhabit our planet in a sustainable manner.

55. Voir L. Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* [*General changes in private law since the Napoleonic Code*], Paris, F. Alcan, 1912 and N. Bernard, *Précis de droit des biens* [*Précis of property law*], Louvain-la-Neuve, Anthemis, 2014, pp. 130 et sq.

56. B. Grimonprez, *La fonction environnementale de la propriété*, Revue trimestrielle de droit civil, 2015, p. 539-550.