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Expert Workshop

"HOUSING RIGHTS: POSITIVE DUTIES AND ENFORCEABLE RIGHTS"

Organised by the Council of Europe Commissioner for Human Rights,
Mr. Thomas Hammarberg

Budapest, 24-25 September 2007

Report and Conclusions

The workshop was convened by Mr Thomas Hammarberg, Council of Europe, Commissioner for Human Rights and followed up the Conference on housing rights organised under the Finnish EU presidency in Helsinki on 18-19 September 2006.[1]. It set out to examine how the positive duty of states to ensure housing rights without discrimination can be realised in practice. Participants attended from a wide range of organizations across Europe and the UN.

The Keynote Address by Mr Miloon Kothari, UN Special Rapporteur on adequate housing emphasised that housing rights, and indeed the mandate of the Special Rapporteur, are based on international instruments accepted by States. In his many reports he has maintained that the right to housing is an integral part of the realization of all human rights. A broad interpretation is required to include land rights, women's right to access to housing and land, equality and non-discrimination. Mr Kothari referred to the impact of globalisation in this area, where the dominance of the home-owner model, with markets as the solution to housing problems, is becoming an obstacle to many valuable housing rights measures.

Dr. Padraic Kenna described the jurisprudence of the European Court of Human Rights (ECtHR) in relation to positive obligations and their potential value to advancing housing rights. The Court has endorsed positive obligations on States in terms of guaranteeing the rights inherent in the Convention, and in some Articles, to a greater degree. Human rights have traditionally reflected the negative rights approach based on the classical liberal distrust of the State, particularly in relation to interference with property and accumulation. Welfare State approaches represented a shift towards positive obligations on States in relation to individual welfare. In relation to Articles 3 and 8, as well as Article 1 of Protocol 1, positive obligations in relation to prevention of inhuman and degrading treatment, as well as respect for privacy, family and home have been established, including rights of tenants to purchase the freehold. The definition of possessions now includes entitlements to social security, but also the right of a landlord to derive profit from rented property (i.e. income not derived from services) as part of tenants rent payments. It was noted that some 90% of cases found inadmissible concern socio-economic rights and that the Court addresses housing rights in an oblique fashion.

Mr. Regis Brillat of the Council of Europe outlined the recent developments in the jurisprudence of the Committee on Social Rights (CSR) under the Social Charter, and the beneficial impact of Collective Complaints, such as *FEANTSA v. France*. When a national law, policy or practice contains principles contrary to the Charter the Charter is infringed. He emphasized that the CSR is a quasi-judicial body which develops its own case law. The question of enforcement of decisions of the CSR and ECtHR remains an issue to be addressed.

Professor Tom Mullen of the University of Glasgow described housing rights in Scots law, including the operation of the Scottish legislation which grants housing rights. While Scotland adopts a dualist approach to international housing rights, the barriers to universal provision, such as intentionality and priority need are gradually being removed legislatively, being abolished by 2012. He addressed rights in terms of access, security of tenure, standards and financial support for housing costs. Professor Mullen stated that this universal housing entitlement backed by legislation required that sufficient social housing stock was available.

[1] The conference papers are available at website: http://www.ymparisto.fi/default.asp?contentid=200440&lan=en. See also Fredriksson, P. & Patari, J. (eds.) (2006) *Right to Housing in Europe – Need for a Comprehensive Strategy.* Finland: Ministry of the Environment.

Mr. Mark Uhry, Legal Advisor ALPIL, outlined the situation concerning the new housing rights law in France and how it will be implemented. He traced the development of this legislation to Scotland, the Social Charter Article 31 and the work of FEANTSA, among others. While Natalie Boccadoro pointed that much French legislation can be aspirational, it was accepted that there is great scope for a universal rights approach within this legislation.

Mr. Jan Erik Helenelund described that positive duty of State agencies in Finland in relation to housing rights. Section 19.1. of the Finnish Constitution of 2000 grants a right to housing "if life or health is in danger without arranged accommodation". Section 19(4) states that "The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing." Section 22 states that public authorities shall guarantee the observance of basic rights, the courts must accept these Constitutional provisions as the higher authority.

Mr Freek Spinnewijn of FEANTSA pointed out that great political courage was needed to create such housing rights in these three countries. Mr Miloon Kothari pointed out that legal measures alone do not always ensure housing rights and much neo-liberal thinking had seeped into national housing and legal systems. The question remains how we can utilise the housing rights approach to constrain the excesses of the housing market system. Mr Thomas Hammarberg, Commissioner for Human Rights pointed out that in the European Union market approach it is now almost taboo to suggest intervention in the market, to secure social objectives.

Mr Regis Brillat presented a paper by Professor Matti Mikkola of Helsinki University on developing the jurisprudence of Article 31 of Social Charter in relation to access, quantity of social housing, standards, quality and price. He outlined some potential links between the Article 31 and the Convention. Mr Brillat again emphasised the value of Collective Complaints in developing the jurisprudence of Article 31.

Mr Freek Spinnewijn Director of FEANTSA explained the FEANTSA belief in the housing rights approach as an effective tool to combat homelessness and housing exclusion. Focussing on homelessness allows a pragmatic use of housing rights, offers a soft way of introducing the rights approach and is ethical, in that housing rights addresses the needs of the worst off. He outlined the definition of homelessness developed by FEANTSA – *European Typology on Homelessness and Housing Exclusion (ETHOS)*, which includes persons who are roofless or homeless as well as those living in insecure or inadequate housing. He accepted that there is an ongoing discussion between a vertical approach, concentrating on homelessness among particular groups, and the horizontal approach, emphasising universal responses.

Mr Malcolm Langford of COHRE outlined some detailed breaches of housing rights in Ireland, Hungary, Slovakia and Croatia and described types of litigation in relation to protecting rights of secure tenure, as well as laws such as Statute of the City in Brazil. Secure tenure is largely a product of three factors; law, poverty and exclusion. Mr Langford described the actions which governments need to take to ensure secure tenure rights in the areas of law, poverty and affordability and non-discrimination and social inclusion.

There followed a discussion which highlighted the necessity of these three elements, and on the effectiveness of legal methods alone in preventing evictions. The example of South Africa was raised, where, despite very good legislation and case law, illegal evictions occur regularly.

Ms Savelina Danova, Programmes Coordinator of the Europe Roma Rights Centre outlined the international human rights standards in relation to forced evictions, and described the gap between legal norms and practice in relation to forced evictions. She described how Roma are

most seriously affected by this dichotomy. Anti-discrimination law does not assist if based only on negative prohibition of discrimination. It needs to incorporate positive duties to end segregation. She pointed out that the renewal of obligations to provide alternative sites on evictions had evaporated after 1989.

Mr. Claude Cahn, Head of Advocacy at COHRE outlined the ECtHR jurisprudence in relation discrimination in housing under Article 14 of the Convention, as well as the CSR jurisprudence in relation to the Social Charter within Collective Complaints. Remarkably, the ECtHR had made no finding of racial discrimination under Convention Article 14 until 2004. He also outlined five elements of discrimination under EU law, including direct and indirect discrimination, harassment, instructions to discriminate and victimisation. The potential conflicts between anti-segregation initiatives and non-discrimination are reflected in slum clearance, restitution and upgrading programmes.

Mr Regis Brillat raised the issue of Protocol 12 of the Convention and queried how it could be used to advance rights.

Ms. Daniela Mihailova of the Equal Opportunities Initiative described housing discrimination against Roma in Bulgaria, despite the existence of international human rights provisions, Article 33(1) of the Bulgarian Constitution guaranteeing that the "the home shall be inviolable", and a national legal and policy framework. She pointed out that discrimination exists in all spheres, including housing, health care, employment and political participation.

Ms Tamara Fajs and Mr Jure Debevec described the situation of sitting tenants in Central and Eastern Europe, ie. tenants, who, acquired occupancy/civil rights in their housing before 1990. These comprise 10 – 35% of the population in Poland, Czech Republic, Latvia and former Yugoslavia. Before 1990 occupancy rights were permanent and inheritable, with regulated rents and exchanging of flats between occupants who decided on the household composition themselves. Since the 1990s the shift to the "enabling housing system" has resulted in a lack of building land, and lack of effective planning, financial, tax and legal instruments to ensure security and housing rights. Privatisation of social housing followed by legislative changes reducing tenant security and subsequent court decisions and State policies have led to enormous rent increases, evictions and growing vulnerability of people. Together with the denial of tenants rights in various restitution schemes, these measures have led to vulnerable tenants comprising 2.5 million households or 7 million people across Central and Eastern Europe who housing rights have been jeopardised. The relative discrimination in favour of property owners rights versus tenants rights in relation to eviction, regulation of rent and other issues are justified as being in the public interest!

Mr Sergey Mirsky, Deputy of the Latvian Parliament outlined the situation in Latvia in relation to the erosion of housing rights. The government has demonstrated extreme indifference and tenants of denationalised houses pay 10 to 100 times higher rents than tenants of municipal houses. In one case a 70 year old woman was walled up in her privatised apartment and neither the police or the public prosecutor would intervene. Between 1995 and 2004, some 21,959 families or 65,877 persons were evicted on to the streets with court orders stating "evict from apartment without providing other dwelling". He described the impact of these adverse changes on the lives of individuals creating insecurity and vulnerability. For the resellers of the privatised flats, the heirs of the original owners, the driving force is profit and not social justice.

Ms Barbara McCallin of the Norwegian Refugee Council described the housing rights regression in Croatia and the position of displaced persons in Bosnia and Croatia. Again, the problems created by the privatisation of housing, removal of tenancy rights, unfair restitution policies and lack of political support of housing rights was emphasised as a common theme across the region.

Mr Nuno Oliveira of the Fundamental Rights Agency outlined the extent of discrimination against migrants in housing across Europe. In relation to research, data collection and legal effectiveness he described the low numbers of complaints of housing discrimination in most countries. Surveys of "experienced discrimination" show that much "discrimination" remains unreported, i.e. the gap between perceived discrimination and complaints remains wide. He questioned whether there was too much optimism in relation to the Race Directive 2000/43, considering that fourteen States faced sanctions for non implementation.

Dr. Maria Stuttaford of University of Maastricht examined the whole area of monitoring housing rights, raising the issues of who carries out such monitoring, why is it carried out, and how is the data used. She gave examples from the UK of how such data can be used to develop policy and programmes and analyse or critique government performance. Data can also be used as evidence in order to provide redress for those who suffer violations and to mobilise advocacy and civil society campaigns. There remain challenges in developing impact assessment tools and benchmarks that can inform effectively inform implementation and practice.

Altogether many important issues were raised in the expert workshop. Peter Fredriksson raised the question as to why housing rights do not incorporate consumer rights when housing is largely provided through markets and sub-markets throughout Europe.

Finally, Padraic Kenna mentioned that effective implementation of housing rights requires that they relate, impact and become an integral part of housing systems, rather than becoming one of many external factors influencing (or not) the systems as whole. Housing systems have many similar characteristics and stakeholders, but with particular national characteristics. These dynamics are constantly changing, as we have seen with the sub-prime crisis and privatization programmes. However, the dynamics within the market system can act to block rights development. For instance, increases in social housing have an effect on demand and reduce rents in private rented housing, as well as reducing demand for purchase, subsequently reducing demand for mortgage finance. Thus, developing housing rights can cause major changes in the dynamics of housing systems, and it is important to identify and address potential opposition of the stakeholders who will be affected. Housing rights measures need to address the system as a whole, such as promoting an EU Directive which prevents any evictions as a result of mortgage arrears.

In conclusion, Mr Miloon Kothari pointed out that the role of markets, REITS, multinational corporations and other major players needs to be examined in detail in the context of rights. The relative ineffectiveness of the legalistic approach and associated institutions to counter market forces in Europe can be contrasted with the effectiveness of civil society organizations outside Europe in this area, often in areas where no such human rights institutions exist. There is a need for more public outrage in the face of violations such as those taking place in central and eastern Europe. More resources are needed for human rights education in this area, for example, planners, economists, etc, working on housing policies, should be aware of the international housing rights instruments ratified by their States.

As a follow-up to the workshop, the Commissioner will publish an issue paper on housing rights. He also intends to prepare guidelines to member States on the implementation of housing rights. Moreover, Mr Kothari and Mr Hammarberg are to issue a joint statement on the housing situation of the Roma in Europe.