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HOUSING RIGHTS: POSITIVE DUTIES AND ENFORCEABLE RIGHTS AT THE
EUROPEAN COURT OF
HUMAN RIGHTS

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Legislation: European Convention on Human Rights 1950 Art.3, Art.6, Art.8

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Abstract: Discusses the European Court of Human Rights' development of a human rights perspective on positive obligations in the context of housing. Traces the move from traditional liberal concepts of negative rights, the influence of post-war welfare state models and the contemporary state since the 1980s. Examines, with emphasis on property rights, the jurisprudence of the European Court of Human Rights. Considers salient articles of the European Convention on Human Rights 1950, focusing on Art.3, Art.6 and Art.8 and the implied positive obligations.

*193 This article explores the role of positive obligations developed by the European Court of Human Rights in the context of housing. The author considers the context of this development, starting with traditional liberal notions of negative rights and post-war welfare state models, and then more modern approaches. The author then looks at different articles of the European Convention on Human Rights which the Court has established include positive obligations. The author concludes that the Court has much work to do in refining positive housing rights obligations, but might find valuable jurisprudence within the Council of Europe.

Introduction

The European Court of Human Rights (the Court) has developed a human rights perspective on positive obligations which transcends, to some extent, the classical liberal concepts of constitutional and human rights. These were principally concerned with the limitation of state actions, but may now need to be reviewed in the context of contemporary human rights approaches. [FN1] Legal, international and constitutional rights development now incorporates positive obligations on states to intervene and regulate private actors, national and international corporations. [FN2] While the growth of neo-liberal economic and social policies, worldwide, is pushing back the frontiers of

the state--to *194 use a Hayekian term--in relation to the welfare of citizens, the jurisprudence of the Strasbourg Court is emphasising that some positive obligations remain a key part of state responsibilities. Indeed, Keir Starmer states that:

"[P]ositive obligations are the hallmark of the European Convention on Human rights, and mark it out from other human rights instruments; particularly those drafted before the Second World War." [FN3]

Moving from negative rights in Europe

The traditional liberal notions of rights involved limiting state interference in property and capital accumulation, or more pertinently limiting the arbitrary appropriation powers of monarchs and feudal states. Freedom of speech, liberty to trade and own property, equality of citizens and rulers, freedom from arbitrary arrest, political organisation and protection of property were the cornerstones of civil and political rights. The protection of these rights required significant public expenditure by the state. Of course, it took a long time for universal suffrage to become legally recognised, and we know that formal equality can mask enormous social and economic inequality. Rights were seen initially as negative obligations on the state or regal power, and this view of rights continued even as states moved from monarchical or feudal types to more democratic forms. Indeed, it is remarkable that such views persist in relation to issues such as housing, despite the major changes in state functions over the past hundred years. Following the liberal property and constitutional rights, the development of the post-war welfare state and the recognition by no less a figure than Roosevelt that "true individual freedom cannot exist without economic security and independence" [FN4] shifted the definitions of rights, and indeed, moved "liberty" to notions of freedom from want and fear.

This welfare state approach represented a shift from the views of liberal individualism, which held that individuals were free to pursue their rational self interests in markets, without state interference, and that those who were unable to provide for themselves had only themselves to blame. There were, of course, the "deserving poor", such as widows and orphans, old people and those with disabilities, for whom many institutions, including a plethora of charitable institutions were established. But those who were the "undeserving poor" might receive punitive state "assistance" designed to force them to work. However, the 20th century development of socialist political parties, trade unions and others demonstrated that poverty and unemployment were primarily social and *195 economic problems rather than individual failures and that collective responsibilities could remedy these situations. [FN5] The state, as an expression of political democracy, could undertake obligations to provide such assistance. In some areas it could intervene in the liberal markets to ensure more equitable outcomes for people. Indeed, it became accepted that the state had positive obligations to contribute to individual welfare through social rights for citizens and others. Marshall's approach in "Citizenship and Social Class" [FN6] illustrates the notion of social rights where European citizens should be able to enjoy:

"... [T]he whole range, from a modicum of economic welfare and security to the right to share to the full the social heritage and to live the life of a civilized being according to the prevailing standards." [FN7]

Thus, social democracy had moved the notion of human rights from a negative obligation on the state preventing interference with property or capital ownership or accumulation,

to one where it was recognised that rights involved state positive obligations to ensure individual welfare for all citizens.

Marshall posited this development in the context expanded citizenship involving three phases of citizenship rights. First, civil rights encompassing individual freedom, property ownership, and legal justice. Secondly, political rights involved the rights inherent in democratic societies. Thirdly, social rights of a socio-economic nature, and including the right to economic welfare, security, the right to share in the wealth of society and to live the life of a civilised being according to the standards prevailing in society. [FN8] For Marshall, social rights are obligations of the state towards society as a whole, rather than a series of justiciable individual rights. Thus, in market societies, the obligation of the state is to ensure that citizens are enabled or assisted to find housing in the market through voluntary transactions. This was achieved within the "universal" access to rights by state organised correctives to the market, but also in large scale direct provision in housing, education, healthcare, social assistance and pensions. This European "social" state or latterly the European Social Model has been described by Bauman:

"The 'social state', that crowning glory of the long history of European democracy and until recently its dominant form, is today in retreat. The social state based its legitimacy and rested its demands for the loyalty and obedience of its citizens on the promise to defend them and insure against redundancy, exclusion and rejection as well as against random blows of fate--against being consigned to 'human waste' because of individual inadequacies or misfortunes; in short, on the promise to insert certainty and security into lives in which chaos and contingency would otherwise rule. If hapless individuals stumbled and fell, there would be someone around ready to hold their hands and help them to their feet again." [FN9]

*196 But it is also important to examine whether individual rights-based approaches really created universal provision. Edgeworth describes it thus:

"This extension of universal legal rights to health, education and welfare radically transforms the relationship between the citizen and the state: the state becomes subject to novel legal obligations, and the citizen is the bearer of a whole new set of rights in the form, not of rights to participate in economic and political activity as was the case with the advances of the modern package of citizenship rights, but to a universal right to a minimum level of security. The new package of rights replaces the privileges and restrained discretion inherent in the fitful and haphazard practices of charities, family and community in the alleviation of poverty. Equally, because these rights were geared to the elimination of harms that affect all or large numbers of citizens, not merely individuals, they were collective rather than individual in character ... The Government was thus managing risks rather than vindicating individual rights." [FN10]

The contemporary state

Since the 1980s, neo-liberal approaches have sought the rolling back of the state, reductions and privatisation of welfare services and a hollowing out of the state in key areas across Western Europe and in the United States. [FN11] The notion of self-reliance and individual responsibility for housing and welfare provision has made a comeback.

"A parallel development is the selectively decreasing level of welfare provision and progressive transfer to the private sector of the traditional welfare functions of the state. This general trend can also be seen at work in the progressive withdrawal of the state's

monopoly of provision in various welfare fields, and the correlative assumption of control by the various segments of civil society, predominantly the market, though also to significant degrees, voluntary agencies, charities, and religious organisations. Also, individuals are increasingly cut adrift from universal entitlements to benefits in place of user-pays principles." [FN12]

The new Third Way approaches in relation to welfare rights with responsibilities on welfare recipients to seek work or training are gaining widespread currency. "No rights without responsibilities" is a common statement, [FN13] often leading to conditional welfare benefits, rather than increased responsibilities on property owners. This "civic republicanism" approach emphasises "participation" as a right and a duty, although such participation can amount to compulsory work in low paid and poor quality *197 employment, such as work-fare type schemes. [FN14] Civic republicanism criticises the welfare state as generating passive recipients of benefits and seeks to foster personal responsibility and "empowerment".

Yet, there remains some commitment to social rights as a benefit to the community as a whole, as a productive factor and as a means to avoid social exclusion. [FN15] This informs much EU social policy, as set out in the Lisbon Agenda and has important implications for positive rights approaches. [FN16] However, of the 18 indicators for social exclusion developed in 2001, there are none specific to housing or homelessness. [FN17]

Bengtsson, in his study of Swedish housing corporatism, identifies a phased increase in housing provision culminating in the privatisation or "retrenchment" phase from the 1990s. He claims that the right to housing must be addressed in the market context, with rights prompting intervention, regulation and state provision. [FN18] This approach of Bengtsson, following that of Marshall, is that in the context of a universal welfare state, the law has only a limited role in defining and enforcing social rights. Policy and practice rather than the law remain the primary drivers for access to housing in this universal social rights approach. [FN19] Indeed, arrays of private law housing rights already exist in relation to property, equality in access, consumer protection, family law, succession law, and housing standards. This, of course, belies the claim that courts cannot enforce socio-economic rights for reasons of imprecision and vagueness, requirements of positive action, incompetence of the judiciary, budgetary constraints, separation of powers doctrines, encroachment of executive territory, and judicial unaccountability. [FN20]

The Convention and positive rights

It is against this background that the question of enforcing positive obligations on states to implement the rights contained in the Convention arises. The European Convention *198 on Human Rights contains many negative rights from the liberal tradition, protecting property owners and others from state interference, but since 1979 the Court has recognised the relation between the two sets of rights. [FN21] In *Airey v Ireland* the European Court of Human Rights held:

"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 ... 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." [FN22]

These "implications of a social and economic nature" can be seen regularly in relation to cases on Art.1 of Protocol No.1 on the appropriation of possessions. [FN23] Indeed, the majority of cases in this area relate to restitution of property appropriated by states or payment of appropriate compensation in lieu. However, the positive obligation to protect property rights is also being translated into a limited positive obligation to prevent destruction of homes and other matters, as widespread home ownership is recognised.

[FN24] In any case, a huge proportion of cases rendered inadmissible involve socio-economic rights, and of course, the possibilities of access to any courts at all, much less at European level, by litigants whose socio-economic rights are violated remains an overwhelming limitation on using the Court to develop such rights.

It is important, however, to remember that the classic property rights case, *James v United Kingdom* [FN25] upheld the expropriation of absolute title of a private owner in favour of legislatively backed rights to obtain full ownership by tenants at below-market prices. Thus, the Convention is indeed permeable to housing rights if interpreted in a dynamic and constructive manner. [FN26] The definition of possessions now also includes entitlements to social security, [FN27] 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 *199 payments. [FN28] The recent decision in *Hutten-Czapska v Poland* [FN29] and others symbolises a development of the Court's jurisprudence in favour of greater rights for owners, trumping post-war European tenants' rights to security of tenure and regulated rents.

There are a number of interesting developments in the jurisprudence regarding positive obligations, although the Court remains cautious in this area. [FN30] The doctrine of positive obligations requires Member States to protect individual persons from threats to their Convention rights or to assist them to achieve full enjoyment of those rights. Its legal basis can be either explicit or implied in the Convention. The Court has refined express positive duties on states to ensure due process guarantees, under Arts 5 and 6. In contrast, the Court has inferred specific implied positive obligations under Arts 8-11 and 14, and a duty of effective investigations under Arts 2, 3, 5 and 13. In order to rationalise introduction of such implied duties, the Court has invoked two general principles: first, the general obligation on Member States under Art.1 to secure rights for all individuals within its jurisdiction; and secondly, the principle of effective interpretation that requires the rights of the Convention to be given practical, broad and full meaning. The latter principle finds an alternative expression that the Convention rights must be guaranteed not in a theoretical or illusory but a practical and effective manner. [FN31] Thus, the Court has established that there are implied positive obligations on states in relation to Arts 2, 3, 5, 6, 8, 9, 10, 11, 13 and 14. [FN32] These are most pronounced when the state has full control over the individual's situation, or in relation to individuals who cannot assert Convention rights for themselves. [FN33]

Article 6

Housing rights are largely interpreted as civil or property rights by the Court. Thus, the deprivation of a home requires a fair and public hearing and the other procedural requirements which have developed from the jurisprudence of Art.6 ECHR. [FN34] The

absence of any opportunity to defend summary possession proceedings in relation to the home was considered in *Connors v United Kingdom* in 2004. [FN35] In that case, the European Court of Human Rights found that the eviction of the applicant was not *200 attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights. [FN36] The Court held that the existence of procedural safeguards is of crucial importance in assessing the proportionality of the interference. The necessity for a statutory scheme of summary eviction and the power to evict:

"[W]ithout the burden of giving reasons liable to be examined as their merits by an independent tribunal has not been convincingly shown to respond to any specific goal." [FN37]

In relation to Art.6, the Court held that "there was no equality of arms and he was denied any effective access to Court against the very serious interference with his home and family". [FN38]

Article 8

Article 8(1) protects the right of individuals to "respect" for their private life, family life and "home". There is a right to access to, occupation of, and peaceful enjoyment of the home. Yet, Fox points out that while the authenticity of home as a social, psychological, cultural and emotional phenomenon has been recognised in other disciplines, it has not penetrated the legal domain, where the proposition that home can encapsulate meanings beyond the physical structure of the house, or the capital value it represents, continues to present conceptual difficulties. [FN38a] "Home" is an autonomous concept, which does not depend for classification under domestic law. [FN39] The concept of a home is not confined to dwellings or land, which are lawfully occupied or owned. [FN40] All proceedings for possession of a home engage Art.8. [FN41] Although the Article may be engaged, Art.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.

In *Connors v United Kingdom*, [FN42] the Court held that an interference with the home in the context of Art.8 will be considered "necessary in a democratic society", for a legitimate aim, only if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued. [FN43] In this regard, the "margin of appreciation" is left to the national authorities, which are better placed than an international court to evaluate local needs and conditions. However, where intimate or key rights are concerned, such as respect for the home, the margin of appreciation is narrow:

*201 "This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, *Dudgeon v the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, §52; *Gillow v the United Kingdom*, judgment of 24 November 1986, Series A, no. 104, §55)." [FN44]

Finding a violation of Art.8, the Court held that the eviction of the applicant was not attended by the requisite procedural safeguards, namely the requirement to establish

proper justification for the serious interference with his rights. Consequently, it could not be regarded as justified by "pressing social need" or proportionate to the legitimate aim being pursued.

In relation to Art.8, the positive obligations on the state to guarantee the applicant's right to respect for home and private life has been highlighted in a number of recent cases. In *Hatton v United Kingdom* [FN45] noise pollution from night flights was judged as an interference with these rights, although justified for the economic well-being of the country. In *Lopez-Ostra v Spain* [FN46] and *Guerra v Italy* [FN47] the positive obligation on local authorities to control nuisance and risk from a waste treatment plant close to tanneries, and direct effect of toxic emissions emanating from a chemical factory, respectively, constituted a failure of the state to fulfil its positive obligations to ensure respect for private and family life under Art.8. The Court stated in *Lopez-Ostra v Spain*:

"Whether the question is analysed in terms of a positive duty on the State--to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 ... or in terms of 'an interference by a public authority' to be justified under paragraph 2 ... the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in any case the State enjoys a margin of appreciation." [FN48]

In *Moreno-Gomez v Spain* [FN49] the failure by the state to tackle night-time noise disturbances caused by nightclubs breached the positive obligations to guarantee the applicant's right to respect for her home as guaranteed by Art.8. In the case of *Fadeyeva v Russia*, [FN50] a violation of a Russian woman's rights under Art.8 was found where the Government had failed to prevent or adequately regulate the environmental pollution from a steel plant which adversely affected her quality of life and made her more vulnerable to disease.

In the case of *Zehnalova v Czech Republic* [FN51] the positive obligations on a local authority under Art.8 were again considered. The local authority did not comply with local *202 technical requirements, which would have made public buildings and buildings open to the public accessible for people with impaired mobility. The Court outlined the positive obligations on local authorities arising from its duty to enforce the law. In this case Art.8 required the authority to ensure that people with impaired mobility enjoyed adequate access to and use of public buildings. But a breach of the Article would only be found where there was a special link between the lack of access and the particular needs of the individuals claiming a breach in their private life. It would apply when the failure to carry out a positive obligation interfered with the complainant's right to personal development and to establish and maintain relationships with the outside world. [FN52]

The landmark case under Art.8, *Botta v Italy*, [FN53] (where the applicant in fact failed), established that a state had a positive obligation to people with disabilities to enable them to enjoy, so far as possible, a normal private and family life:

"Private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see, *mutatis mutandis*, the *Niemietz v Germany* judgment of 16 December 1992, Series A no. 251-B, p. 33, §29). [FN54]

In the instant case the applicant complained in substance not of action but of a lack of action by the State. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see the *X and Y v the Netherlands* judgment of 26 March 1985, Series A no. 91, p. 11, §23, and the *Stjerna v Finland* judgment of 25 November 1994, Series A no. 299-B, p. 61, §38). However, the concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation." [FN55]

Article 8 does not require states to provide a home for everyone, but there are circumstances when the positive obligations of the Convention will suggest this. In *Marzari v Italy*, [FN56] a severely disabled applicant considered an allocated apartment to be inadequate for his needs, and ceased to pay rent while requesting that certain works be carried out to make it suitable for him. However, it was held that while Art.8 does not offer a guarantee to have one's housing problems solved by the state, a refusal by the authorities to provide assistance to an individual suffering from a severe disability *203 might in certain circumstances raise an issue under Art.8, because of the impact of such refusal on the private life of the individual. [FN57]

"The Court considers that, although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the state to abstain from such interference: in addition, to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the latter's private life." [FN58]

However, in relation to homelessness, the Court has shied away from discerning a right to housing in Art.8. In *Chapman v United Kingdom* [FN59] the Court held that Art.8 did not give a right to be provided with a home, and this was a matter for political and not judicial decision.

In *Codona v United Kingdom* [FN60] the applicant--a gypsy family--had occupied a site in breach of planning regulations. The mother contended that evicting her without providing any alternative site (she was offered a house) would breach Arts 8 and 14, interfering with her travelling way of life. The Court found that there could be a positive obligation to facilitate the gypsy way of life under Art.8, but that obligation could only arise when there was suitable accommodation available, and the authority was refusing to provide it. The Council, therefore, was not under a positive obligation to provide the applicant with "non-bricks and mortar" accommodation, where there was none available.

Yet, the actions of state officials must respect the positive obligations of the Convention rights. In *Moldovan v Romania*, [FN61] 13 Roma houses belonging to the applicants were destroyed and they alleged the involvement of state officials. In invoking Arts 3 and 8 ECHR, the applicants complained that, after the destruction of their houses, they could no longer enjoy the use of their homes and had to live in poor, cramped conditions. They claimed that the Romanian Government had a positive obligation under Arts 3 and 8 to provide sufficient compensation to restore them to their previous living conditions. They contended that the Government's failure in respect of their positive obligations had resulted in families with small children and elderly members being forced to live in cellars, hen houses, stables, burnt-out shells, or to move in with friends and relatives in such overcrowded conditions that illness frequently occurred. In outlining the general principles applicable, the Court stated:

*204 "The Court has consistently held that, although the object of art 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. There may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life and the home. These obligations may involve the adoption of measures designed to secure respect for these rights even in the sphere of relations between individuals ..." [FN62]

Later the Court stated:

"Whatever analytical approach is adopted--positive duty or interference--the applicable principles regarding justification under Article 8.2 are broadly similar ... In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to ensure compliance with the Convention ... Furthermore, even in relation to the positive obligations flowing from Article 8.1, in striking the required balance, the aims mentioned in Article 8.2 may be of relevance." [FN63]

In applying the principles to the facts of Mr Moldovan's case and the other applicants the court found that there had been a violation of Art.3. There also had been a serious violation of Art.8 of a continuing nature in the hindrance by, and repeated failure of, the authorities to put a stop to the breaches of the applicants' rights. On the issue of living conditions, the Court stated:

"It furthermore considers that the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.

The Court has consistently held that, although the object of art 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. There may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life and the home. These obligations may involve the adoption of

measures designed to secure respect for these rights even in the sphere of relations between individuals ..." [FN64]

The future development of the protections under Art.8 in relation to respect for the privacy of the home may encompass many new situations. Harris points out that:

*205 "The [European Court of Human Rights] is notoriously unwilling to elaborate general statements of rights. In relation to Article 8, this has had an advantage as well as the usual drawback of making it difficult for an account of the case-law to rise above the single instances before the Court. The advantage is that the Court has been able to develop the interests protected to take into account changing circumstances and understandings without being confined by an established theoretical framework ..." [FN65]

There appears, however, to be some reluctance by the Court to draw on the developed jurisprudence of the European Social Charter, which has, through its European Committee on Social Rights examined many housing rights interpretations and legal definitions.

Article 3

The positive obligations of Art.3 obliging states to prevent inhuman and degrading treatment are being interpreted in relation to homelessness and the duties of the state.

The House of Lords in England in the milestone Limbuela case considered the state's positive obligations to destitute and failed asylum-seekers under Art.3. [FN66] The question was when the duty of the state to act to prevent inhuman and degrading treatment arose. Lord Bingham stated that:

"The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation." [FN67]

Carnwarth L.J. in the Court of Appeal pointed out that:

"[The] question raised by the present appeals, in its starkest form, is to what level of abject destitution such individuals must sink before their suffering or humiliation reaches the 'minimum level of severity' to amount to 'inhuman or degrading treatment' under Article 3 of the European Convention of Human Rights." [FN68]

The positive obligations on states is stricter when its own policies are creating a breach of Convention rights.

*206 "So the exercise of judgment is required in order to determine whether in any given case the treatment or punishment has attained the necessary degree of severity. It is here that it is open to the court to consider whether, taking all the facts into account, this test has been satisfied. But it would be wrong to lend any encouragement to the idea that the test is more exacting where the treatment or punishment which would otherwise be found to be inhuman or degrading is the result of what Laws LJ refers to as legitimate government policy. That would be to introduce into the absolute prohibition, by the backdoor, considerations of proportionality. They are relevant when an obligation to do

something is implied into the Convention. In that case the obligation of the state is not absolute and unqualified. But proportionality, which gives a margin of appreciation to states, has no part to play when conduct for which it is directly responsible results in inhuman or degrading treatment or punishment. The obligation to refrain from such conduct is absolute." [FN69]

In a recent English case, there has been an award of damages under the UK Human Rights Act 1998 against a local authority in relation to the provision of inadequate housing. In *R. (on the application of Bernard) v Enfield LBC* [FN70] the High Court found that the authority had acted unlawfully and incompatibly with Art.8 in failing for over two years to provide suitable accommodation for a family. 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. The conduct of the authority not only engaged, but breached Art.8 obligations, since it condemned the claimants to living conditions which made it virtually impossible to have any meaningful private or family life in the sense of the Article. The claim for breach of Art.3 in relation to inhuman and degrading treatment failed on the grounds that the authority's "corporate neglect" was not intended to deliberately inflict such suffering. The judgment relied on *Botta* [FN71] 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 to living conditions which made it virtually impossible for them to have any meaningful private or family life for the purposes of Article 8."

Conclusion

There are opportunities to use the Convention to establish positive rights obligations. The question remains as to whether the bare minimum of rights can be protected and, in the huge and complex European housing system, how effective this approach is.

Across Europe, housing policy has become a facilitator and adjunct to the primary role of housing markets, which have been accorded that primary role in the production *207 and allocation of new and rented homes. This is supported by a range of government systems, from registration of titles, to mortgage finance systems, planning, standards and regulatory controls, as well as a range of tax incentives. Financial market liberalisation has developed a pattern across Europe, with abolition of interest rate ceilings, relaxation of credit controls and the ending of restrictions on entry into mortgage markets. [FN72] The total size of the EU housing finance market at the end of 2003 was more than ##4.2 trillion. This is twice the amount of 10 years ago and the average annual growth for the last 10 years has been about 8 per cent. It is an important part of the European economy, accounting for approximately 42 per cent of EU GDP. [FN73] Consumer protection fails to keep pace with the harmonisation of markets.

In addition to defining its minimum core content a positive rights approach to housing must address the integral components of the housing market, such as landowners' control of land, the power of financial corporations targeting housing equity markets across

Europe, developers' monopoly positions, compliance with standards and the role and relative power of other stakeholders in the housing market. Increasingly, in this market context (both free enterprise and social arenas), housing rights can also involve consumer protection rights, in terms of standards, mortgage finance, and unfair contracts terms in renting agreements and purchases. [FN74]

While the European Court of Human Rights has been developing some positive obligations related to housing rights for people, the Convention also "offers wideranging protection for business entities, such as companies, in addition to non-profit organizations and natural persons". [FN75] Emberland points out that the Court does not regard corporate litigation with suspicion, and in the area of housing the implications of cases such as *Hutten-Czapska v Poland* [FN76] will encourage further corporate litigation. [FN77]

Yet, there are still many groups of people who do not receive the minimum core housing rights protection across Europe, including Roma and gypsies, women who are victims of violence, [FN78] people with disabilities, refugees, immigrants, third-country nationals, asylum-seekers, migrants, national minorities and other discriminated groups, as well as people in the lowest parts of the labour market. Increasingly, however, states are pushing housing systems (including social and supported housing) into private sector, public/private partnerships or market-based approaches.

The question as to whether the ECHR human rights system with its positive obligations can interact or influence the housing systems in European states remains. The Court deals with housing rights in an oblique manner, almost indifferent to its sister *208 Council of Europe Committee on Social Rights which is developing the jurisprudence on state obligations in this area on a regular basis. [FN79] Passive non-interference by states where people's Convention rights are at stake is not sufficient to ensure that these rights are respected. The positive obligations owed to people must take priority over commercial interests. The European Court of Human Rights has much work to do in refining the positive housing rights obligations already outlined in existing case law, but it might find much useful jurisprudence in their sister judicial body the European Committee on Social Rights.

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FN1. See G.W. Anderson, *Constitutional Rights after Globalization* (Oxford: Hart, 2005).

FN2. The European Convention on Human Rights and Fundamental Freedoms places positive obligations on states to take positive action in a number of areas of rights, such as preventing inhuman and degrading treatment resulting from homelessness among failed asylum-seekers --see the UK House of Lords case of *R. (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 A.C. 604--and protection of home and family life--*Lopez-Ostra v Spain* (1995) 20 E.H.R.R. 277.

The UN international human rights instruments require states to respect, protect and fulfil their human rights obligations, encompassing both what are traditionally regarded as "negative" and "positive" rights. The obligation to respect requires states to refrain from interfering with the enjoyment of rights; to protect requires states to take action to

prevent violations by third parties; to fulfil requires states to take appropriate legislative, budgetary, judicial and other measures towards the full realisation of such rights. States' obligations translate to a requirement to meet a minimum core obligation in terms of the rights concerned, without discrimination, as well as a progressive realisation of these rights. See I.E. Koch, "Dichotomies, Trichotomies or Waves of Duties?" (2005) 5(1) Human Rights Law Review 81. See also UN Doc.A/CONF 157/24 (1993) Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna.

FN3. See K. Starmer, "Positive Obligations Under the Convention" in J. Jowell and J. Cooper (eds), *Understanding Human Rights Principles* (Oxford: Hart, 2001), p.159.

FN4. F.D. Roosevelt, 11th Annual Message to Congress (January 11, 1944), cited in H. Steiner and P. Alston, *International Human Rights in Context* (Oxford: OUP, 2000), p.243.

FN5. See M. Ishay, "The Socialist Contributions to Human Rights: An Overlooked Legacy" (2005) 9(22) *International Journal of Human Rights* 225.

FN6. T.H. Marshall, "Citizenship and Social Class" in T.H. Marshall and T. Bottomore (eds), *Citizenship and Social Class* (London: Pluto Press, 1992), p.7.

FN7. Marshall, "Citizenship and Social Class" (1992), p.7.

FN8. See G. Procacci, "Poor Citizens: Social Citizenship Versus Individualisation of Welfare" in C. Crouch, K. Eder and D. Tambini (eds), *Citizenship, Markets and the State* (Oxford: OUP, 2001).

FN9. See Bauman, *Wasted Lives, Modernity and its Outcasts*, (Cambridge: Polity Press, 2004), p.89.

FN10. B. Edgeworth, *Law, Modernity, Postmodernity* (Aldershot: Ashgate, 2003), p.90.

FN11. See Doherty et al., *The Changing Role of the State: State Intervention in Welfare and Housing* (Brussels: FEANTSA, 2003); S. Strange, "The Declining Authority of States" in *The Global Transformation Reader*, 2nd edn (Cambridge: Polity Press, 2003), Ch.11; P. Marcuse, *Neo-liberal Globalisation and National Housing Policy*, paper presented at the ENHR Conference in Vienna in 2002.

FN12. Edgeworth, *Law, Modernity, Postmodernity* (2003), p.56.

FN13. See A. Giddens, *The Third Way and its Critics* (London: Polity Press, 2000), p.65.

FN14. This debate is set out clearly in S. Fredman, "Human Rights Transformed: Positive Duties and Positive Rights" [2006] P.L. 498.

FN15. See European Commission, *Communication from the Commission to the Council*,

the European Parliament, the Economic and Social Committee and Committee of the Regions. Social Policy Agenda. Brussels, June 28, 2000 COM(2000) 379 final; European Commission, Concerning a consultation on action at EU level to promote the active inclusion of the people furthest from the labour market, COM(2006) 44 final.

FN16. See N. Bernard, "New Governance Approach to Economic, Social and Cultural Rights" in T. Hervey and J. Kenner, *Economic and Social Rights in the EU Charter of Fundamental Rights* (Oxford: Hart, 2003); S. Borrás and K. Jacobsson, "The open method of co-ordination and new governance patterns in the EU" (2004) 11(2) *Journal of European Public Policy* 185.

FN17. See Social Protection Committee, *Report on Indicators in the field of poverty and social exclusion* (October 2001), http://europa.eu.int/comm/employment_social/news/2002/jan/report_ind_en.pdf [Accessed February 24, 2008]. See also P. Kenna, *Housing Rights and Human Rights* (Brussels: FEANTSA, 2005), Ch.4.

FN18. B. Bengtsson, *Swedish Housing Corporatism--A Case of Path Dependence?*, Paper to ENHR Conference, July 2004, Cambridge, England.

FN19. See B. Goodchild, "Implementing the Right to Housing in France: Strengthening or Fragmenting the Welfare State?" (2003) 20(2) *Housing Theory and Society* 86.

FN20. See N. Jheelan, "The Enforceability of Socio-Economic Rights" [2007] *E.H.R.L.R.* 146.

FN21. Emberland claims that the text of the Convention is intimately informed by the core values of a capitalist system and the values system of the liberal state. See M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: OUP, 2006), p.42.

FN22. See *Airey v Ireland* (1979-80) 2 *E.H.R.R.* 305 at [26]. See also Council of Europe, *Overview of the case-law of European Court of Human Rights in social matters*. Working Group on Social Rights GT-DH-SOC (2005)001. Strasbourg, March 22, 2005.

FN23. See *James v United Kingdom* (1986) 8 *E.H.R.R.* 123; *Broniowski v Poland* (2005) 40 *E.H.R.R.* 21. See also Art.6 on right to a fair trial, Art.11 on freedom of assembly and association.

FN24. See *Oneryildiz v Turkey* [GC] (2005) 41 *E.H.R.R.* 20.

FN25. *James v United Kingdom* (1986) 8 *E.H.R.R.* 123.

FN26. See Council of Europe, *Overview of the case-law of European Court of Human Rights in social matters* (2005).

FN27. See *Gaygusuz v Austria* (1997) 23 *E.H.R.R.* 364. Here the right to emergency

assistance--insofar as provided for in applicable legislation--is a pecuniary right for the purposes of Art.1 of Protocol No.1.

FN28. See *Hutten-Czapska v Poland* (2006) 45 E.H.R.R. 4. The Grand Chamber distinguished this case from others where limiting the rights of landlords had been justified and proportionate such as *Spadea and Scalabrino v Italy* (1996) 21 E.H.R.R. 482 and *Mellacher v Austria* (1996) 12 E.H.R.R. 391 on the grounds that the landlord here had never entered a freely negotiated lease, had lost the right to terminate the lease and the rent levels set were below that required to cover necessary maintenance expenses.

FN29. *Hutten-Czapska v Poland* (2006) 45 E.H.R.R. 4.

FN30. See A. Mowbray, *Human Rights Law in Perspective: The Development of Positive Obligations under the European Convention on Human Rights* (London: Sweet & Maxwell, 2004), Ch.9.

FN31. See *Airey v Ireland* (1979-80) 2 E.H.R.R. 305.

FN32. See Mowbray, *Human Rights Law in Perspective* (2004).

FN33. See N. Mole, Book Review [2004] E.H.R.L.R. 601.

FN34. Art.6 ECHR states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

FN35. *Connors v United Kingdom* (2004) 40 E.H.R.R. 9.

FN36. *Connors* (2004) 40 E.H.R.R. 9 at [95].

FN37. *Connors* (2004) 40 E.H.R.R. 9 at [94].

FN38. *Connors* (2004) 40 E.H.R.R. 9 at [102].

FN38a. See L. Fox, *Conceptualising Home*, (Oxford: Hart, 2007).

FN39. See *Chapman v United Kingdom* (2001) 33 E.H.R.R. 18.

FN40. See *Qazi v Harrow LBC* [2003] UKHL 43; [2004] 1 A.C. 983; *Sheffield City Council v Smart* [2002] EWCA Civ 4; [2002] H.L.R. 34; *Buckley v United Kingdom*(1996) 23 E.H.R.R. 101; *O'Rourke v United Kingdom* (App. No.39022/97), judgment of June 26, 2001.

FN41. *Lambeth LBC v Howard* [2001] EWCA Civ 468; [2001] 33 H.L.R. 58.

FN42. *Connors* (2004) 40 E.H.R.R. 9.

FN43. Connors (2004) 40 E.H.R.R. 9 at [81].

FN44. Connors (2004) 40 E.H.R.R. 9 at [81].

FN45. (2003) 34 E.H.R.R. 1.

FN46. (1994) 20 E.H.R.R. 277.

FN47. (1998) 26 E.H.R.R. 357.

FN48. (1994) 20 E.H.R.R. 27 at [51].

FN49. (2004) 41 E.H.R.R. 40.

FN50. (2005) 45 E.H.R.R. 10.

FN51. (App. No.38621/97), admissibility decision of May 14, 2002.

FN52. In this case the plaintiff did not establish such a link and the complaint was inadmissible.

FN53. (1998) 26 E.H.R.R. 241.

FN54. (1998) 26 E.H.R.R. 241 at [32].

FN55. (1998) 26 E.H.R.R. 241 at [33].

FN56. (2000) 30 E.H.R.R. CD218.

FN57. (1999) 28 E.H.R.R. CD175 at [179].

FN58. (1999) 28 E.H.R.R. CD175 at [179].

FN59. (2001) 33 E.H.R.R. 18.

FN60. (App. No.485/05), admissibility decision of February 7, 2006.

FN61. *Moldovan v Romania* (2005) 44 E.H.R.R. 16.

FN62. *Moldovan v Romania* (2005) 44 E.H.R.R. 16 at [93].

FN63. *Moldovan v Romania* (2005) 44 E.H.R.R. 16 at [97].

FN64. *Moldovan v Romania* (2005) 44 E.H.R.R. 16 at [110].

FN65. D.J. Harris et al., *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 353.

FN66. *R. (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 A.C. 396.

FN67. *R. (on the application of Limbuela)* [2005] UKHL 66; [2006] 1 A.C. 396 at [8].

FN68. *R. (on the application of Limbuela)* [2004] EWCA Civ 540; [2004] Q.B. 1440 at [84].

FN69. *R. (on the application of Limbuela)* [2004] EWCA Civ 540; [2004] Q.B. 1440 at [55].

FN70. [2002] EWHC Admin 2282; [2003] H.R.L.R. 4.

FN71. *Botta v Italy* (1998) 26 E.H.R.R. 241.

FN72. See *European Central Bank, Structural Factors in the EU Housing Markets* (Frankfurt: ECB, 2003), p.42.

FN73. *International Union for Housing Finance, World Congress 2004, Conference Report*, p.16.

FN74. See *Commission Communication, Consumer Policy Strategy 2000-2006*, COM(2002) 208 final [2002] OJ C137/2. See also *Directive 93/13 on unfair terms in consumer contracts* [1993] OJ L95/29 and <http://europa.eu.int.libgate.library.nuigalway.ie/clab>.

FN75. See *Emberland, The Human Rights of Companies* (2006), p.3.

FN76. (2006) 45 E.H.R.R. 4.

FN77. See A. Gear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights" (2007) 7(3) *Human Rights Law Review* 511.

FN78. See G. Paglione, "Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing" (2006) 28(1) *Human Rights Quarterly* 120.

FN79. See, *Council of Europe, European Committee on Social Rights, European Social Charter (revised) Conclusions 2003 - Volume 1 (Bulgaria, France, Italy)* (Strasbourg: Council of Europe Publishing, October 2003). *Council of Europe, European Committee on Social Rights, European Social Charter (revised) Conclusions 2003 - Volume 2 (Romania, Slovenia, Sweden)* (Strasbourg: Council of Europe Publishing, October 2003); See also *European Committee on Social Rights, Digest of Case Law, December 2006*. EHRLR 2008, 2, 193-208

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