<table>
<thead>
<tr>
<th><strong>Title</strong></th>
<th>Can international housing rights based on public international law really impact on contemporary housing systems?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author(s)</strong></td>
<td>Kenna, Padraic</td>
</tr>
<tr>
<td><strong>Publication Date</strong></td>
<td>2010-12</td>
</tr>
<tr>
<td><strong>Publication Information</strong></td>
<td>Kenna, P. (2010). Can international housing rights based on public international law really impact on contemporary housing systems? In L. Fox O'Mahony &amp; J. Sweeney (Eds.), The idea of home in law: displacement and dispossession (pp. 133-164). Farnham: Ashgate.</td>
</tr>
<tr>
<td><strong>Publisher</strong></td>
<td>Ashgate</td>
</tr>
<tr>
<td><strong>Item record</strong></td>
<td><a href="http://hdl.handle.net/10379/1751">http://hdl.handle.net/10379/1751</a></td>
</tr>
</tbody>
</table>

Downloaded 2019-02-20T17:44:33Z

Some rights reserved. For more information, please see the item record link above.
Chapter 6

Can International Housing Rights Based on
Public International Law Really Impact on
Contemporary Housing Systems?

Padraic Kenna

(1) Introduction

The concept of home advances a new basis for evaluating housing rights, emphasising their human and personal benefits. Housing rights address, at a national, regional and global level, displacement and dispossession, as well as access to home for all. These rights are forging a new discourse and jurisprudence across the world, largely based on public international law instruments. However, the legal liberalist approach and framework of such housing rights discourse needs to engage with housing systems at the macro, meso and micro levels. There is a particular and urgent challenge in addressing the structural and institutional elements of housing systems, such as housing finance, infrastructure, ownership and exchange of housing and regulation of housing systems and sub-systems. Ultimately, this could ensure that the contemporary revival of global housing finance regulation can incorporate a housing rights perspective.

(2) The Concept of Home

The concept of home is widely viewed as central to housing and housing rights – a critical element of the basic physiological needs of food, clothing and shelter, established by Maslow, and in contemporary societies often relating to the safety, love/belonging, esteem and self-actualisation needs. Housing and home are connected to health, child development, poverty and opportunity in general. The emotional and symbolic significance of housing and home relate to the sense

of permanence and security, as well as fixing a person’s place in society and community. Of course, the idea of house is usually central in the legal treatment of home, but there is also a further set of factors which distinguishes the home from a physical structure providing shelter. Fox suggests that home needs to be conceptualised as house plus an ‘x factor’. This ‘x factor’ represents the social, psychological, and cultural values which a physical structure acquires through use as a home. Thus, ‘home’ can be seen as a physical structure, a territory implying security, control and rootedness, as identity, and as a social and cultural phenomenon or a base for relationships. It also acts as a geographical space from where a person or household can access other services, and amenities.

In a valuable and innovative examination of the way the home is treated in English common law Fox finds that it variously encompasses a physical space, an object of investment and ownership, a social and cultural unit, a ‘family home’, a ‘women’s place’, a place for children and a human right. While housing usually involves the provision of a physical structure, ‘home’ involves housing plus the experiential elements of home. These include: as a valued territory, as a signifier and constituent of self and social identity, as a part of the social and cultural environment associated with a person’s way of life and participation in society and as a base for family and children. Indeed, the concept of home has been widely researched in many disciplines, and there is hardly a more emotionally loaded word, since it epitomises situations of family, affection, love and other human experiences.

The women’s or feminist perspective on home is clearly absent from the English common-law contemporary conceptual framework, and indeed, most legal systems across the world. The home has been correlated with a site of hierarchical relations and a place of oppression for women, a base of domestic violence, a forced workplace for cooking cleaning, nurturing and childrearing, inherently denying women access to wider societal participation.

For some people, the notion of home as involving only a physical structure carries little or no significance. For nomads, children, some people with disabilities, many older people and others, the need and expectation for support, care communal assistance and trusting relationships usually surpasses the requirements of a distinct physical location. Unless there are proper safeguards in place, there is

---

a danger that even the most well-intended homes provided by organisations can become a ‘facility’ rather than a ‘real home.’ At another level, and drawing on the definitional shift in the concept in the US over the past 100 years, Retsinas traces the different but changing American image of home. Early immigrants to America saw home as an anchor in a safe harbour. The definition of home was more a state of mind rather than a physical structure. Retsinas describes the US and developed states phenomenon where the home has become a vehicle for enforced savings, a hedge against inflation and in more recent times a fungible investment, only to return to the ‘home as anchor’, in the current turbulent economic times. However, Retsinas also highlights the huge disparity in this concept between rich and poor in the US. Poor-to-middle-class Americans rarely owned, much less hoped to own, such homes. They could not afford them – banks wrote five-year loans and demanded 50 per cent down payments. The wealthy owned mansions, but a peripatetic class that summered in Newport, Rhode Island, wintered in Manhattan and toured Europe in between did not want anchors. Ironically, while replete with a number of houses the privileged of that era were ‘home-less’.

Contemporary common law, with its feudal and legal liberalist roots has been unable to relate to the variety of relations people have with home, which are complex and changing, positive and negative. Fox points out that:

Home provides the backdrop for our lives, and is often the scene or the subject of legal disputes...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.

Displacement from home constitutes a particular violation of housing rights. Displacement means compelling a person to leave their usual place of home, country etc, and possibly their replacement by others. Many are displaced within


1. The Commonwealth of Massachusetts, Department of Mental Retardation, sets out 14 points for consumers, families and staff striving towards building a proper and rich sense of ‘home’ for people with disabilities. The oppressive, institutionalisation of people with disabilities probably represents the greatest violations of housing rights today.


their own countries, and are known as internally displaced persons (IDPs), estimated to number over 35 million people.

The UN Guiding Principles on Internal Displacement points out that IDPs or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border.

Of course, the reasons behind such compulsion can be economic, with survival as the imperative. The term ‘forced migrant’, or internally displaced person, distinguishes this group of people from others who move across state borders, such as refugees. A refugee is defined in the Geneva Convention as a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

The UNDP Human Development Report 2009 points out that there are some 741 million internal migrants and 124 million international migrants, with migration within Asia accounting for nearly 20% of all migration.


The UN Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 defines a refugee as a person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to return to it’. See http://www.unhchr.ch/html/menu3/b/o_c_ref.htm accessed 21 June 2009). This definition created problems for America in the aftermath of the Katrina hurricane when many thousands of black people, displaced and abandoned outside the State of Louisiana and afraid to return, were described as refugees. However, President Bush responded by saying ‘The people we’re talking about are not refugees – They are Americans, and they need the help and love and compassion of our fellow citizens.’ See Associated Press (7 September 2005) http://www.msnbc.msn.com/id/9232071/ (accessed 21 June 2009).
Displacement from home can take many forms: from the dramatic and media-exposed flight of residents of New Orleans in the face of Hurricane Katrina,\textsuperscript{13} to the less publicised homelessness of Bangladeshi flooded homes, displaced persons in Palestine, Zimbabwe and Darfur, to the estimated three million silent refugees of Pakistan. Migrants forced to abandon homes for reasons of fear or survival have become a global phenomenon. At local levels, displacement of minorities, such as ethnic groups being displaced from their home,\textsuperscript{14} women fleeing domestic violence, illegal evictions, people with disabilities being forcibly displaced to institutions and perpetual displacement through segregated housing, or indeed, lack of access to housing, all involve a denial of housing rights.

The case of \textit{Moldovan v. Romania} in 2005, describes a violent displacement from home in Europe:

As the fire engulfed the house, the brothers tried to flee but were caught by the mob who beat and kicked them with vineyard stakes and clubs. The two brothers died later that evening. Mireea Zoltan remained in the house, where he died in the fire. It appears that the police officers present did nothing to stop these attacks. The applicants alleged that, on the contrary, the police also called for and allowed the destruction of all Roma property in Hâdâreni...\textsuperscript{15}

The applicants submitted that, in general, following the events of September 1993, they had been forced to live in hen-houses, pigsties, windowless cellars or extremely cold and deplorable conditions: 16 people in one room with no heating; seven people in one room with a mud floor; families sleeping on mud or concrete floors without adequate clothing, heat or blankets; 15 people in a summer kitchen with a concrete floor (Melenuța, Moldova), etc. These conditions had lasted for several years and, in some cases, continue to the present day.\textsuperscript{16} Globalisation is also accelerating the movement of people across regions, states and continents and much of this could be described as displacement. Of course, some movements of people involve voluntary action, and are not necessarily a negative experience.\textsuperscript{17} However, Stuart Hall views contemporary enforced displacement into unfamiliar regions without housing assistance, or the means to return to their communities or reunite with their families. See J.K. Pierre and G.S. Stephenson, ‘After Katrina: A Critical Look at FEMA’s Failure to provide Housing for Victims of Natural Disasters’ (2008) 68 (2) \textit{Louisiana Law Review} 443, 495.

\textsuperscript{13} Some 200,000 people were displaced and evacuated from St Louis to distant, unfamiliar regions without housing assistance, or the means to return to their communities or reunite with their families. See J.K. Pierre and G.S. Stephenson, ‘After Katrina: A Critical Look at FEMA’s Failure to provide Housing for Victims of Natural Disasters’ (2008) 68 (2) \textit{Louisiana Law Review} 443, 495.

\textsuperscript{14} See \textit{Moldovan v. Romania} (App nos. 41138/98 and 64320/01) Judgment No. 2.

\textsuperscript{15} Ibid. para. 18.

\textsuperscript{16} Ibid. para. 69.

The Idea of Home in Law

1. migration as the joker in the globalisation pack and describes the experience of some contemporary migrants:

2. Seeking by whatever means – legal or illegal – to escape the consequences of globalization and the new world order, they move along uncharted routes, secrete themselves in the most inhospitable interstices, mortgage their worldly goods to the human traffickers, seal life-threatening contracts with gang-masters and pimps, and exploit their lateral family connections in order to subvert the physical barriers, legal constraints, and immigration regimes that metropolitan powers are vigorously putting in place. These are the overspill of the global system, the world’s surplus populations, the sans-papiers of the modern metropolis, who slip across borders at the dead of night or stow away in the backs of lorries or under trains and silently disappear into the hidden depths of the city. This is the human face of the new globalization ‘from below’. The global cities of the developed world are the sluice-gates of this new tidal movement.  

(4) Foreclosures

18. Among the most highly charged examples of displacement today are the foreclosures and repossessions from people who are unable to pay their mortgages. Since the 1990s the growth of international finance invested in housing has drawn millions of people into large-scale borrowing to access housing. Today, as economies internationally face recession and unemployment rises, many face the prospect of losing their home. Home price growth accelerated in the US in the early 2000s, prompted by low interest rates, lax underwriting standards and demand for mortgage-backed securities, which helped to flood the mortgage market with liquidity. The IMF stated in 2009 that by various estimates, eight to 12 million homeowners are currently in negative equity, totalling about US$600 billion. As home prices continue sliding, these numbers will climb. It is estimated that US foreclosures will probably total 6.4 million by mid 2011, and inventories of foreclosed homes awaiting sale will probably have peaked in mid 2010 at about two million properties.

The UN Special Rapporteur has pointed out that the biggest bubble in history which developed from the sub-prime lending on housing affected minorities...
1 disproportionate. African Americans were five times more likely to receive a sub-prime loan than whites, even when they qualified for a loan at lower, prime rates. The proportion of sub-prime home loans by race was 52.44 per cent for African American families, 40.66 per cent for Hispanic families and 22.20 per cent for white non-Hispanic families. In the majority of cases, foreclosure has meant the loss of the unique home of a household, often resulting in homelessness or inadequate living conditions. The rise of ‘tent cities’ and encampments has been reported in some cases, apparently as a direct result of foreclosures. Rolnik points out that it is important to understand the impact of foreclosure – or eviction – on a household. It pushes people into more difficult situations and inadequate living conditions and impacts their ability to cope with further hardship, particularly where it results in homelessness.

It is much more difficult to maintain employment while having difficulty in accessing water and sanitation and basic services. A lot of effort is required to cope with weather changes and administrative demands, relocating belongings and maintaining an address where one can be reached. In some cases, not having a permanent address leads to exclusion from certain types of aid, or results in denial of civil and political rights, including the right to vote. Following foreclosure, many families have no savings left, which makes them unable to afford a rental security deposit. Even if they can afford the security deposit, they are considered as less able to meet debt obligations or mortgage payment, and thus they are not eligible for a new rental contract.

The UN Special Rapporteur states that the impact of eviction and homelessness on women and children can be particularly devastating, as is the reality of living in constant fear of being evicted. Homelessness has a particularly negative impact on both groups.

The discrimination faced by women can lead to a potentially higher impact on them from eviction and homelessness. The former Special Rapporteur conducted several studies on women and adequate housing and he concluded that women require more effort to maintain employment while having difficulty in accessing water and sanitation and basic services. A lot of effort is required to cope with weather changes and administrative demands, relocating belongings and maintaining an address where one can be reached. In some cases, not having a permanent address leads to exclusion from certain types of aid, or results in denial of civil and political rights, including the right to vote.

Following foreclosure, many families have no savings left, which makes them unable to afford a rental security deposit. Even if they can afford the security deposit, they are considered as less able to meet debt obligations or mortgage payment, and thus they are not eligible for a new rental contract.

The discrimination faced by women can lead to a potentially higher impact on them from eviction and homelessness. The former Special Rapporteur conducted several studies on women and adequate housing and he concluded that women require more effort to maintain employment while having difficulty in accessing water and sanitation and basic services. A lot of effort is required to cope with weather changes and administrative demands, relocating belongings and maintaining an address where one can be reached. In some cases, not having a permanent address leads to exclusion from certain types of aid, or results in denial of civil and political rights, including the right to vote.


Center for Responsible Lending, ‘Updated Projections of Subprime Foreclosures in the United States and Their Impact on Home Values and Communities’ CRL issue brief (Washington DC August 2008).

CBS News has reported tent cities in Seattle, Portland, Fresno, Columbus and Chattanooga. There were also reports of encampments in Seattle, San Diego, Columbus, Ohio and Santa Barbara and Fresno California in 2009. See http://www.msnbc.msn.com/id/26776283/ (accessed 26 June 2009).

bear the brunt of evictions as they often lead people to live in distant places and
in inadequate conditions, without security of tenure, basic services, access to
schools, health services and employment. When families are moved to places with
no source of livelihood, men tend to migrate and leave women to fend for the
family. As another result of forced evictions women are frequently left in more
difficult situations than before in caring for their families.

In evictions, possessions are often destroyed, family stability jeopardised and
livelihoods and schooling threatened. Affected children describe the violence, panic
and confusion of the evictions and the painful experience of sleeping and managing
their lives out in the open. They also face the challenge of re-establishing a stable
life and dealing with frequent breakdowns in family relations as a consequence of
the stress and economic challenges that are the result of homelessness.

In addition to the physical and psychological trauma of eviction and
homelessness, households, especially women and children, lose the support
systems they were used to and their relations with a community. The breaking of
these social ties and the loss of stability lead to many other problems.

(5) Displacement and Housing Rights

Housing rights address displacement and dispossession. Indeed, many cases
involving displacement and dispossession have led to the development of the
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
26
27
Ibid.

The UN Guiding Principles on Internal Displacement sets out a number of

The case of Residents of Joe Slovo Community v. Thubelisha Homes, Minister for
Housing and others, Western Cape Constitutional Court of ZA. Case CCT 22/08 [2009]
ZACC 16 amplified South African constitutional housing rights, where 20,000 residents
of a large informal housing settlement were being displaced to make way for a housing
development. The court held that the evicted people should be provided with temporary
serviced housing and be allocated 70 per cent of the homes built on the site. In Government
of South Africa and others v. Grootboom and others, CCT 11/00 2001 (1) SA 46 (CC),
4 October 2000, 2000 (11) BCLR 1169 (CC) the court required the public authorities to
consider the needs of people being displaced from temporary accommodation on a site
being redeveloped for housing. See also: Jaftha & Another v. Van Rooyen & Another,
Constitutional Court of South Africa, 2004 Case No. CCT 74/03; Port Elizabeth Municipality
v. Various Occupiers, 2005 (1) SA 217 (CC), Case No. CCT 53/03; Occupiers of 51 Olivia
Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and
Others (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) (19 February 2008); see van der
Walt in this volume.
Can International Housing Rights Impact on Housing Systems?

Principle 14
1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.
2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

Principle 18
1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
   (a) Essential food and potable water;
   (b) Basic shelter and housing;
   (c) Appropriate clothing; and
   (d) Essential medical services and sanitation.
3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

Principle 21
1. No one shall be arbitrarily deprived of property and possessions.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
   (a) Pillage;
   (b) Direct or indiscriminate attacks or other acts of violence;
   (c) Being used to shield military operations or objectives;
   (d) Being made the object of reprisal; and
   (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.28

General Comment 7 on Forced Evictions of the UN Committee on Economic, Social and Cultural Rights points out that:

The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the

---

person, the right to non-interference with privacy, family and home and the right
to the peaceful enjoyment of possessions (para. 4). The UN Committee
on this issue emphasised the procedural safeguards in the eviction process. International human rights law does not propose countering evictions through redistribution of property or housing rights. Indeed, many international housing rights cases now revolve around protecting property rights from appropriation by the state for a public purpose.

In its 1997 General Comment the Committee explained that the procedural protections it considers should be applied in relation to forced evictions include:

(a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts. (para. 15)


The majority of cases relating to housing at that European Court of Human Rights involve claims for compensation arising from former redistribution policies of states.

Can International Housing Rights Impact on Housing Systems?

The Council of Europe Committee on Social Rights has defined forced eviction as ‘deprivation of housing which a person occupied on account of insolvency or wrongful occupation’. Legal protection for persons threatened by eviction must include, in particular, an obligation to consult the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction. The law must also prohibit evictions carried out at night or during the winter period and provide legal remedies and offer legal aid to those who are in need so they may seek redress from the courts. Procedural safeguards are important. Compensation for illegal evictions must also be provided. Even when an eviction is justified, authorities must adopt measures to re-house or financially assist the persons concerned.

The concept of ‘unlawful occupier’ or ‘wrongful occupier’ implicit in this approach signifies the overriding legal priority of property ownership.

1 Housing rights can act as a barrier to displacement, but can they deliver adequate safe and secure homes? It is widely accepted that housing rights are forging a new international human rights instruments have led to a legal discourse based on human dignity and jurisprudence across the world. At an international level public international human rights instruments have led to a legal discourse based on human dignity and other universal values where states mutually agree to offer certain guarantees of minimum standards, in areas of public and private life, individual freedom and socio-economic rights, such as housing.

For example, Article 25(1) of the Universal Declaration of Human Rights (1948) (UDHR) states that:


The European Committee on Social Rights has accepted that a two-months’ period after formal notice has been served before the actual eviction as sufficient to protect housing rights. See European Committee on Social Rights FEANTSA v. France, Complaint No 39/2006, Decision on the Merits of 5 December 2007, § 88 and 89.


1 The Council of Europe Committee on Social Rights has defined forced eviction as ‘deprivation of housing which a person occupied on account of insolvency or wrongful occupation’. Legal protection for persons threatened by eviction must include, in particular, an obligation to consult the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction. The law must also prohibit evictions carried out at night or during the winter period and provide legal remedies and offer legal aid to those who are in need so they may seek redress from the courts. Procedural safeguards are important. Compensation for illegal evictions must also be provided. Even when an eviction is justified, authorities must adopt measures to re-house or financially assist the persons concerned.

1 Housing rights can act as a barrier to displacement, but can they deliver adequate safe and secure homes? It is widely accepted that housing rights are forging a new international human rights instruments have led to a legal discourse based on human dignity and other universal values where states mutually agree to offer certain guarantees of minimum standards, in areas of public and private life, individual freedom and socio-economic rights, such as housing.

For example, Article 25(1) of the Universal Declaration of Human Rights (1948) (UDHR) states that:


The European Committee on Social Rights has accepted that a two-months’ period after formal notice has been served before the actual eviction as sufficient to protect housing rights. See European Committee on Social Rights FEANTSA v. France, Complaint No 39/2006, Decision on the Merits of 5 December 2007, § 88 and 89.


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

Housing rights within international human rights law have developed through the UN system, largely since 1945 and establishing a general hegemony of human rights principles throughout the world.\(^{38}\) Donnelly points out that this moral universality of human rights must be realised through the particularities of action at national level, in order to be effective. The rights are based on the inherent dignity and possessed by every human being, and provide a moral compass for the development of law and policy across the globe. Housing rights are viewed as an integral part of economic, social and cultural rights within the UN, European, Inter-American and African human rights instruments. These include the Universal Declaration of Human Rights (1948) Article 25(1), the International Covenant on Economic, Social Cultural Rights (1966) Article 11, Convention on the Rights of the Child (1989) Articles 16.1 and 27.3, Convention on the Elimination of All Forms of Discrimination against Women (1979) Article 14.2 and the Convention on the Rights of Persons with Disabilities (2008),\(^{39}\) as well as many International Labour Organisation Conventions and Recommendations. The UN Committee on Economic, Social and Cultural Rights’ General Comment 4, issued in 1991, clarifies the international human rights obligations in relation to housing. It sets out the essential elements of housing rights as legal security of tenure, availability of services, materials and infrastructure, affordability, habitability, accessibility, suitable location and cultural adequacy.\(^{40}\)

International housing instruments translate to a requirement on a state to meet a minimum core obligation in terms of the rights concerned, without discrimination without sustainable access to safe drinking water and basic sanitation and, by 2015, to have achieved a significant improvement in the lives of at least 100 million slum dwellers.\(^{37}\) The housing provision is elaborated in the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) at Article 11, which states, ‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.’\(^{38}\)


Articles 2, 5.3., 9.1, 19, 22.1 and 28.

Can International Housing Rights Impact on Housing Systems?

1 – a minimum threshold approach, below which no person should have to endure. This minimum core obligation corresponds to a level of distributive justice assessing the evenness of the distribution of socially guaranteed minimal levels of certain goods and benefits among individual groups within a country. In terms of housing rights, the minimum core obligations of states would involve a guarantee that everyone enjoyed a right to adequate shelter and a minimum level of housing services, without discrimination. Indeed, these principles of minimum core obligation and progressive realisation form a major contribution to housing rights discourse. While the minimum standards or core obligations approach is well developed in housing law, the concept of progressive realisation, based on increasing normative standards is interpreted within housing systems as arising from increased development, and is widely incorporated into political and consumerist norms.

In Europe, the Council of Europe has developed a range of normative housing rights standards, although not directly corresponding to the minimum core obligations and progressive realisation models of the UN. The Social Charter contains important rights to social and medical assistance for those without adequate resources, establishing housing obligations in relation to physically and mentally disabled persons, migrant workers, children and young persons, and rights to social, legal and economic protection for families, those who are poor and socially excluded, homeless and those unable to afford accommodation; it includes a state obligation to provide family housing. Indeed, in 2009, clarifying further the actual extent of state obligations arising from its housing rights instruments, the Council of Europe Commissions for Human Rights has published Recommendation of the Commissioner for Human Rights on the Implementation of the Right to Housing.


42 This is not the same organisation as the European Union. See Council of Europe, About the Council of Europe (http://www.coe.int/aboutCoe/default.asp, accessed 19 September 2010), giving a brief summary of the Council, its history, and its aims. The European Social Charter and Revised Charter have been adopted to some degree by all 47 members states of the Council of Europe.


The European Union protects some fundamental rights which address housing and provides housing rights protection through its Charter of Fundamental Rights, as well as laws prohibiting discrimination in public or private access on grounds of migrant workers status, race or ethnicity and gender. The Organization of American States (OAS) Charter of the Organization of American States (1948) and the American Declaration on the Rights and Duties of Man (1948) recognize housing rights. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of the African Union reaffirms housing rights.

At national level housing rights are widely enshrined in constitutions, legislation and established case law. Approximately 40 percent of the world’s constitutions refer to housing or housing rights including:

- **Belgium (1994) Article 23(3):** Everyone has the right to enjoy a life in conformity with human dignity. Towards this end, the law, the decree or rules established under Article 134 guarantee, taking into account the corresponding obligations, economic, social and cultural rights of which they determine the conditions for their implementation. These rights include, in particular, the right to adequate housing.


49 Article 16 on the Right to Adequate Housing states: ‘Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing’.
h housing. No one may be arbitrarily deprived of housing. South Africa (1997) Section 26(1): Everyone has the right to have access to adequate housing. Section 26(2): The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 26(3): No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. Section 28(1)(c): Every child has the right to basic nutrition, shelter, basic healthcare services and social services.

Many countries have introduced legislation granting specifically enforceable housing rights. The Housing (Scotland) Act 1987 (as amended) provides a right to accommodation for homeless persons, including a right to temporary accommodation for all homeless persons, and a right to long-term accommodation for broadly defined categories, encompassing the majority of homeless applicants. By 2012, the right to long-term accommodation will be extended to all. This right is enforceable in the civil courts and courts may order in appropriate cases that accommodation be provided to homeless persons. In France, an enforceable right to housing has also been established through the DALO Act of 5 March 2007, which provides for a two-tier remedial mechanism with regional mediation committees and the possibility to take a case before administrative courts. The use of planning law to achieve integration of social/affordable and private housing, control of land use and quality of infrastructure and amenities is now becoming widely recognised as a somewhat lateral, but practical, means of realising housing rights. Courts across the world have developed housing rights in such areas as security of tenure, respect for home, non-discrimination, decent physical standards and fair procedures in evictions. A legacy of judicial activism has led to a corpus of jurisprudence in many countries which has established housing rights, even within common law principles.

The Housing Code of the Russian Federation (29 December 2004, entered into force 1 March 2005) offers some of the best definitions of minimum core obligations in relation to housing with standards of not less than five square metres of living space per each person.

See COHRE, Legal Resources for Housing Rights (COHRE, Geneva 2000).


See Juli Ponce-Sole (ed.), Land Use Law, Housing and Social and Territorial Cohesion (Rocky Mountain Institute, Denver 2006).


See for example the development of housing rights using local and state provisions and common-law principles in the US in Beth Harris, Defending the Right to a Home (Ashgate Publishing, Aldershot 2004). See also the historic decision in England of R v Sec of State ex parte Adam and Others [2005] UKHL 66, where the highest appeal court in
All of this suggests that there now exists a matrix of housing rights on implementing such across the world, drawing on a variety of precedents, legislation, constitutions, ratifications of international instruments and measures from other law applying indirectly to housing rights. The internationally accepted UN minimum core obligations and progressive realisation obligations on ratifying states, as well as the obligations to recognize, to respect, to protect and to fulfil these obligations are influencing new lawmaking. UN General Comments have clarified obligations, while many national and local laws and cases have defined standards and rights at local level. Consumer and other national private and public laws grant further housing rights in relation to housing provided by markets. Yet, without diminishing the significance of democratic participation as a means of implementing housing rights, much remains to be done in properly defining these concepts in actual contemporary housing law and policy terms.

(7) Transposing International Housing Rights

International public law instruments are voluntary agreements between states which undertake to perform certain obligations. In relation to housing rights, appropriate policies and laws must underpin the minimum core obligations, without discrimination, progressive realisation of rights and the requirement to England had to define what level of abject destitution such homeless 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 ECHR, prompting positive state action under the Convention.
Can International Housing Rights Impact on Housing Systems?

1 recognise, respect, protect, promote and fulfil the required obligations.57 This
2 ‘transmission belt’ model of international human rights (see Figure 6.1), where
3 states accept certain obligations at international level, and transpose these to
4 national law, guaranteeing rights to individuals, faces a number of obstacles.
5 Ideally, these rights must integrate the norms, standards and principles of
6 the international human rights system into the laws, policies, budgets and
7 administration of the state, based on principles of equality, accountability,
8 empowerment, participation and attention to vulnerable groups.
9 Effective implementation of housing rights through this ‘transmission
10 belt’ approaches raises issues of dualism/monism in national legal systems,
11 the specificity, clarity58 and contextual definition of rights terminology,59 as
12 well as the relationship between human rights law and the systems it seeks to
13 address.60 Indeed, there is a major question as to whether such human rights can
14 be incorporated at all into liberal economic systems.61 At UN level there has
15 been extensive analysis of transposing legally defined standards for housing
16 rights on to national housing systems and standards, through indicators and
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44

57 UN ECOSOC (Committee on Economic, Social and Cultural Rights), The Right
to Adequate Housing (Art.11.1): Forced Evictions: CESCR General Comment 4. (General
Comments) (13/12/91) UN Doc. E/C.12/1771/4.
58 Much work has been carried out on defining the specific rights contained in the
Covenant especially by the UN Committee on Economic, Social and Cultural Rights in
its Conclusions and Reports. See generally Office of the High Commissioner for Human
menu2/6/cescr.htm (listing examples of Committee on Economic, Social and Cultural
Rights documents).
59 See Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of
Human Rights’ (2008) 19 (4) EJIL 655, 724. See also P. Carozza, ‘Human Dignity and
60 For a discussion on the role of law viv-à-vis other systems see Niklaus Luhmann,
Law as a Social System (Oxford University Press, Oxford 2004); Gunther Teubner,
61 See Paul O’Connell, ‘On Reconciling Irreconcilables: Neo-liberal Globalisation
benchmarks. Yet, many UN monitoring processes can amount to little more than reports illustrating mere creative compliance by recalcitrant states. At the level of progressive realisation of rights, Robertson has pointed out that such words as ‘maximum’ in relation to the level of resources to be devoted to realising rights, form the sword of human rights rhetoric, while words like ‘available’ facilitate ‘wriggle room’ for the state. Hunt has highlighted the variable and elusive nature of such terms as ‘progressive realisation’, and ‘maximum of their available resources’. These imply that some state obligations could vary over time: ‘[T]hese variable elements of States parties’ obligations under ICESCR contribute to the sense of uncertainty which remain a feature of international economic, social and cultural rights.’ Jheelan has highlighted the imprecision and vagueness, aspirational nature and ultimately reliance on a ‘reasonableness’ curial test which acts a delimitation on the effectiveness of universal minimum core obligations. Other limitations on the legal liberalist ‘transmission belt’ approach are highlighted in legal realism, critical legal studies and feminist analyses, as well as the myopic treatment of formal over substantive equality. Indeed, legal liberal models of individually enforceable rights may act to displace, restructure or...
Can International Housing Rights Impact on Housing Systems?

1 reprioritise innovative or radical programmatic approaches to state provision. 1
Many acclaimed housing rights cases involve only the prioritisation of access 2
to new homes, or more responsive ‘decanting’ procedures, ultimately leading 3
to no increase in or improvement in housing. Housing rights cases, corralled 4
within the legal liberalist discourse, often only differentiate socio-economic 5
rights from civil and political rights, or reduce legal arguments to juxtaposing 6
the role of politicians and courts in allocating resources in society. Indeed, the 7
esoteric, exclusive and often intimidating language of law, combined with the 8
costs and lack of universal access to courts, as well as the alienation of many of 9
those in housing need from state institutions, all act to diminish the impact of 10
enforcement of legally based housing rights. In any case, there is no effective 11
enforcement of penalties for housing rights violations at international level, 12
despite some very valuable principles and guidelines in this area. 13
While the ‘transmission belt’ approach also proposes that rights be 14
incorporated into policies and administration, this leaves a wide area of discretion 15
in policy making and interpretation of obligations. Despite the development of 16
the Human Rights Based Approach (HRBA), and National Action Plans, the 17
language of human rights can easily be incorporated into public administration 18
and management systems of consultation, participation and strategies for service 19
delivery, often acting to buttress existing policies and processes. Effective 20
implementation of housing rights requires a deconstruction of the elaborate 21
context within which these rights are being advanced. Implementation can 22
involve a complex process or sub-process. Indeed, ‘[T]he longer the chain of 23

68 See the Limburg Principles on the Implementation of the International Covenant 24
on Economic, Social and Cultural Rights (June 1986) UN Doc E/CN.4/1987/17; Maastricht 25
Guidelines on Violations of Economic, Social and Cultural Rights (January 1997) 26
HRQ 691, 705. See also Housing and Land Rights Network, (Habitat International Coalition) 27
Housing Violations database at http://www.hlrn.org/english/home.asp . 28
69 Five interconnected principles have been internationally recognised as forming 29
the core of HRBA: express application of the international human rights framework; 30
empowerment; participation; non-discrimination and prioritisation of vulnerable groups; 31
and accountability. See J. Kirkemann Boesen and T. Martin, Applying a Rights Based 32
Approach: An Inspirational Guide for Civil Society (The Danish Institute of Human Rights, 33
Copenhagen 2007); André Frankovits, UNESCO Strategy on Human Rights, The Human 34
unesco.org/web/programmes/LS/unesco-precourse-material/12_UNESCO%20HRA%2 36
0and%20Evaluation.pdf, accessed 18 September 2010). 37
70 This framework developed from the Office of the High Commission for Human 38
10.
71 For a critique of rights-based approaches generally, see Duncan Kennedy, ‘The 41
Critique of Rights in Critical Legal Studies’ in W. Brown and J Hally (eds), Left Legalism/ 42
The Idea of Home in Law

causality, the more numerous the reciprocal relationships among the links and the more complex implementation becomes’. Comparing what is achieved and what was expected can lead to the observation of an ‘implementation gap’.

(8) Macro, Meso, Micro

A fundamental weakness in the implementation of housing rights instruments is the failure to appreciate that in market societies, access to basic and higher standard housing is initially more dependent on a person’s labour market position than the prevalence of state obligations. There is often a tendency to equate housing rights with shelter and social housing, alongside a perception that housing rights involve creating an obligation on the state to provide a minimum level of shelter and housing for all. Equally, there can be a tendency to shun the structures and dynamics of the housing systems, in favour of more complex definitions and descriptions of failures of housing rights implementation. Housing rights must be directed to the whole of housing systems, rather than merely social housing entitlements. Of course, the basic right to shelter will always remain a minimum core requirement of the implementation of housing rights. But housing rights must involve more than this minimalist proposition. Effective implementation of international housing rights requires their integration into the macro, meso, micro framework of housing systems.

________

74 See Schlomo Angel, Housing Policy Matters; A Global Analysis (Oxford University Press, New York 2000) at 74, where he points out that ‘there is little merit in a housing policy that’s solely focuses on the poor, hoping against hope that “the market” will take care of the rest, without paying any attention to whether the market is functioning properly. When the market is not functioning properly, the poor are squeezed as well.’
75 There is a process referred to as ‘mainstreaming’ within the language of New Public Management, where new policies and perspectives, laws and obligations are integrated into policy documents and are intended to be incorporated into service delivery etc. However, here we are referring to a greater impact on states, power, large-scale institution reform, changing and inventing new social practice. See Pierre Bourdieu, Outline of a Theory of Practice (Cambridge University Press, Cambridge 1977). Bourdieu’s ‘habitus’ is the ideological unconscious practice which creates a ‘common-sense’, world, and has the ability to create and engender practices whose limits are set by historically determined conditions of its production.
76 The analytic framework and terminology of macro, meso, micro are widely used to denote different of society or systems. See for instance K. Dopfer, J. Foster and J. Potts, ‘Micro-meso-macro’ (2004) 14 Journal of Evolutionary Economics 263, 279. This is an area


Can International Housing Rights Impact on Housing Systems?

Housing rights must be engaged at all three levels – the micro (the level of individual aspirations, interactions and micro political struggles), the meso (including the housing systems, its sub-systems and institutional contexts) and the macro (broadly the national, regional and international context within which housing systems interact with other systems (see Figure 6.2).

Housing rights must be engaged at all three levels – the micro (the level of individual aspirations, interactions and micro political struggles), the meso (including the housing systems, its sub-systems and institutional contexts) and the macro (broadly the national, regional and international context within which housing systems interact with other systems (see Figure 6.2).

Macro Level

Integrating housing rights at macro level of housing systems requires a focus on national and international economic, social and political measures impacting on housing systems. Indeed, this also requires an understanding that states have entered where there is a dearth of research and where there is great potential for an interdisciplinary approach.

While many national macro housing system measures, such as housing rights legislation, may actually address housing rights and home, these may be coincidental or unrelated to international human rights law.
an era when the processes of government have been transformed into ‘governance’. Simple hierarchical concepts of command and control, involving the establishment and implementation of laws and policies, have given way to the involvement of a broader range of ‘actors’ in the implementation process. The idea of governance was described by the World Bank as the ‘process by which authority is exercised in the management of a country’s economic and social resources for development, and the capacity of governments to design, formulate and implement policies and discharge functions.’ In reality, it involves taking a perspective from outside the state, to effectively observe and evaluate progress. Governance ‘describes the hybridity of legal interferences within a society’. It accepts a fusion of public and private institutions, and brings an approach to public institutions primarily oriented towards efficiency and output in achieving goals. These goals, which largely relate to profit and capital enhancement, are already widely described in neo-liberal economic literature and seldom include the realisation of housing rights.

In many ways this model of supra national governance, evaluating the outcomes of institutions, laws and other measures of states in terms of results can be appropriated to the monitoring and development of housing rights. The template for this approach, being results oriented, is less concerned with actual laws and measures, but how they ensure that the objectives of housing rights are achieved. An obligation of results, rather than obligation of conduct in the implementation of housing rights is required. Of course, the UN monitoring systems, especially the UN Committee on Economic, Social and Cultural Rights, regularly examine and evaluate broader outcomes, alongside legislative

78 For an examination of the many uses of the term see M. Hill and P.L. Hupe, Implementing Public Policy (2nd edn Sage, London 2009) 13, 14. Some new approaches such as the Open Method of Coordination of the EU have sought to overcome this problem, where internationally accepted guidelines are consolidated into agreed national plans, in areas of employment, pensions and social inclusion. See http://ec.europa.eu/social/main.jsp?catId=753&langId=en, accessed 18 September 2010.

79 See World Bank, Governance: The World Bank’s Experience (Washington, World Bank 1994) XIV. The concept was first used in World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth (Washington, World Bank 1989). The bank’s Worldwide Governance Indicators (WGI) project reports aggregate and individual governance indicators for 212 countries and territories over the period 1996–2007, for six dimensions of governance: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law and control of corruption. Its current definition of governance is: ‘Governance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.’ See http://info.worldbank.org/governance/wgi/index.asp, accessed 18 September 2010.

provisions in its regular monitoring of states.\textsuperscript{81} Indeed, the national level and future individual level monitoring systems of this UN Committee are ideally placed to address housing rights at the macro level, although resource constraints have inhibited this to date.\textsuperscript{82} The recent approach of the European Committee of Social Rights, applying the European Social Charter, in the \textit{FEANTSA v. France}\textsuperscript{83} collective complaint is advancing this approach in relation to laws, policies and measures applying to all aspects of housing systems and outcomes arising from other systems.

There is a powerful interdependency between rights and regulation.\textsuperscript{84} Regulation and governance measures and the reform of the international financial institutions offer the potential to integrate housing rights into housing systems at macro level. Surprisingly, the language of ‘home’ often already appears at this level within international proposals. The new international regulation and governance approaches to global finance offer an opportunity for implementing housing rights at macro level. Indeed, the UN Special Rapporteur on Adequate Housing has proposed that housing rights are integrated at the international level in the regulation of financial markets:

> The Special Rapporteur believes that the current crisis represents also an opportunity for reflection and to consider how to improve housing systems, policies and programmes so as to ensure adequate housing for all. (para. 75)

States should ensure appropriate regulation of international financial activities in order to avoid future financial crises and their subsequent effect on human rights and adequate housing. (para. 89)\textsuperscript{85}

\textsuperscript{81} Detailed reports on monitoring of the implementation of the ICESCR by the UN Committee on Economic, Social and Cultural Rights may be found at http://www2.ohchr.org/english/bodies/cescr/, accessed 18 September 2010.


Can International Housing Rights Impact on Housing Systems?
The Global Plan for Recovery and Reform Global Plan, which failed to mention housing, issued by the G20 leaders in April 2009, states:

We have today also issued a Declaration, *Strengthening the Financial System.*

In particular we agree:

- to establish a new Financial Stability Board (FSB) with a strengthened mandate, as a successor to the Financial Stability Forum (FSF), including all G20 countries, FSF members, Spain, and the European Commission;
- to reshape our regulatory systems so that our authorities are able to identify and take account of macro-prudential risks;
- to extend regulation and oversight to all systemically important financial institutions, instruments and markets. This will include, for the first time, systemically important hedge funds;
- to take action, once recovery is assured, to improve the quality, quantity, and international consistency of capital in the banking system. In future, regulation must prevent excessive leverage and require buffers of resources to be built up in good times…

The G20 statement pointed out that it accepts that the current crisis has a disproportionate impact on the vulnerable in the poorest countries and recognise our collective responsibility to mitigate the social impact of the crisis to minimise long-lasting damage to global potential. To this end:

- we reaffirm our historic commitment to meeting the Millennium Development Goals and to achieving our respective ODA pledges, including commitments on Aid for Trade; debt relief, and the Gleneagles commitments, especially to sub-Saharan Africa…
- we call on the UN, working with other global institutions, to establish an effective mechanism to monitor the impact of the crisis on the poorest and most vulnerable.

*Meso Level – Housing System and Institutions*

Even the most elaborate and comprehensive national housing rights legislation and policies do not always result in the anticipated level of international housing rights implementation. Many explanations have been given for this, such as the dichotomy of symbolic versus instrumental laws, bureaucratic inertia, problems


87 Ibid. See also US measures such as Hope for Homeowners Act 2008 and Helping Families Save Their Homes Act of 2009.
of interpretation and deference to the state in the courts etc. Indeed, the weakness of the human rights model is illustrated in its failure to recognise that access to housing and increased enjoyment of socio-economic rights is almost always directly related to income and labour market position. A fundamental structural requirement for the effective implementation of such measures is that the systems on which they rely are addressed appropriately. Thus measures which rely simply on lawmaking or policy can fail to realise the outcome intended. There is a requirement to understand the system through which housing rights will have to permeate. This requires and understanding of the meso level of the housing system, positioned between the macro level and micro level. It requires an examination of the institutional elements and behaviour of the actors within those institutions. It must also be recognised that the legal aspects of housing systems, and the protection of property rights, constitute a significant of the workload and income of lawyers worldwide, in all capitalist countries.

Housing systems around the world today are predominantly organised around the market system or enablement approach. One influential international writer identifies the components of the contemporary ‘enabling policy’ model of housing markets systems as encompassing five essential elements, sub-systems or regimes:

- property rights regime
- housing finance regime
- residential infrastructure regime
- regulatory regime
- housing subsidies/public housing regime.

The establishment of individual and enforceable property rights in land and housing are seen as the cornerstone of this enabling housing policy regime.

A functional and effective property rights regime must evolve a set of transparent, predictable, non-discriminatory and stable rules that preserve the rights of individuals to use, invest, maintain, rent, mortgage and sell their land. Kemeny argues that genuine market competition can be fostered by encouraging cost rental housing to compete directly with profit renting, thereby dampening rents, raising housing standards and increasing security of tenure. Segregating cost renting into a state-run public rental (or social housing) sector shelters private renting from competition from the costs rented or social housing sector. See J. Kemeny, From Public Renting to the Social Market: Rental Policy Strategies in Comparative Perspective (Routledge, London 1995).
and housing properties without hindrance and with the full protection against arbitrary action by the authorities.\textsuperscript{89}

Housing is by far the most widely distributed form of private wealth, and investment in housing requires law facilitating certainty, exclusivity, transferability and constitutional protection. Complex legal ownership arrangements involving family law systems, with rules on ownership and division of property on marriage, separation, divorce, death and co-habitation are required. Innovative legal mechanisms have also been developed to deal with unregistered land, transfer and conveyancing procedures, disputes and the regulation of actors involved in housing markets.

The housing finance regime requires the creation and maintenance of an effective, enforceable lending and regulatory regime for housing finance, as well as the development of housing finance institutions and sustainable mortgage markets.\textsuperscript{90} This regime involves legal measures relating to mortgages, equity release, charges, consumer credit legislation and regulation of lenders, as well as market liberalisation and competition. The third requirement for the enabling market approach is an effective residential infrastructure regime. This requires legislation and regulation in relation to zoning, planning, public health, control of nuisance and sanitation measures, and planning controls on urban land development and supply. Detailed legislation and case law have developed in relation to roads and walkways, water, sewage, drainage, transport, public facilities and other services, which contribute to housing quality. The fourth and most important element of this approach for industrialised countries is the regulatory regime for quality in housing systems.\textsuperscript{91} Building control measures exercised by the state are critical elements in the development of housing markets. Indeed, these markets actually require a legal and regulatory framework that only governments can provide.\textsuperscript{92}

Housing subsidies are a central element of housing enablement policies.\textsuperscript{93} The presence or absence of housing subsidies (and tax incentives) cannot be understood outside the broader framework of overall fiscal policy. The largesse of the state in enhancing land values through planning and zoning decisions, and the contemporary ‘capitalisation’ or subsidies to banks involved in reckless mortgage,
Can International Housing Rights Impact on Housing Systems?

are rarely compared with the lesser costs involved in politically resisted minimum core obligations of housing rights. Similarly, investment of capital in housing is part of overall government investment policy (percentage of GDP). Other state legal measures include control of interest rates, curbs on public expenditure, and stimulation of demand through public spending on housing, tax reliefs, etc. These can be either supply side (subsidising producers) or demand side (supporting purchasers), such as through grants for new homes. Social housing is part of a market support system and an integral part of political largesse.

At a meso level, regulatory norms that establish minimum standards and equality of access to goods and services are widespread, although more often based on historical public health legislation than international human rights. In relation to housing, there are detailed legal regulations and regulatory systems on land use, housing occupancy and maintenance, building standards, housing costs, eviction procedures, facilities and equipment, and almost all have legally enforceable sanctions for violations, and compensation for breaches. This regulation machinery seeks to protect, preserve and promote the physical and mental health and social well-being of people, control nuisances, prevent and control communicable diseases and regulate privately and publicly owned dwellings in order to maintain adequate sanitation and public health. Indeed, in some circumstances, it can go so far as delimit and deny property rights, such as granting extended rights of occupancy for tenants which override the legal owners powers to sell. McCrudden has outlined the extent of measures and regulatory mechanisms across the contemporary world which act to achieve socially desirable outcomes, and in many cases override civil and property rights.

The integration of international housing rights norms and jurisprudence into national housing regulatory systems represents the next step in the realisation of these rights. Thus, all draft legislation on housing systems can be housing rights proofed. House planning and building regulatory agencies, such as local authority and institutional housing finance regulators, can incorporate housing rights objectives into their regulatory systems. Equally, all development plans and zoning approvals could be required to demonstrate how they address housing rights criteria. Regulatory agencies could refer violations, as set out in the Limburg Principles and Maastricht Guidelines, to the courts to be adjudicated and appropriate sanctions enforced for violations of housing rights across all elements of housing systems.

Some legal measures can involve controls on prices or rents, deemed necessary when the market fails to meet a social norm and the state should intervene. Statutory provision of social and affordable housing, with elaborate legal precedents and

---

legislation on allocation, management, control, sale and inheritance, also play a significant role. However, the neo-liberalist inspired contemporary ‘enabling housing subsidy regime’ involves a retreat from public housing production, towards privatisation of such stock and abolition of subsidies.\textsuperscript{97} Therein lies a major challenge to contemporary housing rights advocates, who have yet to tailor housing rights standards to the nuances and dynamics of housing market systems.

Micro Level

One of the key issues in ensuring the effective enjoyment of housing rights is justiciability. Contrary to what is sometimes suggested, neither the far-reaching nature of housing rights obligations, or their character as social or economic rights, presents a major obstacle to conferring justiciable housing rights on persons within national legal systems. Courts have regularly enforced housing rights derived from case law, legislation and constitutional provisions. Indeed, a significant overlap exists between international housing rights and rights conferred by national private and public constitutional, legislative and case law.\textsuperscript{98} However, there are many areas where national laws do not provide the equivalent protection to that set out within international legal instruments, although there is an established international consensus on the adoption of housing rights and the internalisation of associated supranational standards into domestic law and policy.

The Council of Europe Recommendations of the Commissioner for Human Rights on the Implementation of the Right to Housing strongly proposes that housing rights be made individually justiciable at local level and highlights the benefits of this approach:

- specific legislation is more likely to clarify who precisely (i.e. which government agencies or private parties) is/are responsible for implementing international obligations;
- specific legislation is more likely to result in the creation of effective remedies for violations of housing rights;
- national judicial institutions are more likely to treat questions relating to housing rights as justiciable when given the task of interpreting specific legislation rather than the more broadly stated provisions of treaty obligations or constitutional guarantees;
- the process of enacting legislation focuses the attention of the political authorities on the conditions needed to ensure effective realisation of rights in practice, e.g. the resources required and allocation of responsibilities;

\textsuperscript{97} P. Cammack, ‘Attacking the Poor’ (2002) 13 New Left Review 125.
\textsuperscript{98} See Centre on Housing Rights and Evictions, Sources No. 4: Legal Resources for Housing Rights: International and National Standards (COHRE, Geneva 2000).
Hammarberg points out that housing rights can be made justiciable in a variety of ways, but there are important issues to be considered:

- administrative bodies may have limited resources for monitoring and detecting violations and for taking enforcement action;
- individual and group/NGO enforcement broadens the range of those engaged in enforcement, allows people to take the initiative in protecting their own rights, and harnesses the resources of civil society;
- the possibility of individual enforcement increases the likelihood that violations will be detected and remedies sought;
- the greater frequency with which remedies for violation are sought will feed through into greater incentives for both public bodies and private parties to respect housing rights.¹⁰⁰

To facilitate instrumental rather than formal or symbolic implementation of housing rights at national level the Human Rights Commissioner proposed a number of measures in 2009, addressing the 47 States of the Council of Europe. In implementing the right to housing member states should:

- Enact specific legislation which clarifies how the housing rights guaranteed by international law are to be made effective in a national jurisdiction without discrimination. National laws should spell out housing rights, identify those who are responsible for their implementation at different levels, and provide for effective remedies when they are violated…
- Include housing rights in the scope of general non-discrimination legislation both in the public and private sectors and specify that positive measures

---

¹⁰⁰ Ibid.
are justified in order to promote full and effective equality provided that there is an objective and reasonable justification for such measures. Those countries which have not yet done so should ratify Protocol No. 12 on the general prohibition of discrimination to the European Convention on Human Rights.

- Establish minimum standards in all areas of housing provision for accessibility, adequacy and affordability in accordance with the European standards developed by the European Committee of Social Rights and the European Court of Human Rights.

- Prevent and reduce homelessness through general and targeted policy measures designed to promote access to housing. Such measures include legal protection of tenants against unfair and disproportionate contractual conditions, indiscriminate termination of contracts and forced eviction, as well as the availability of a sufficient stock of rental housing and temporary shelters to provide housing for disadvantaged and vulnerable groups.

- Adopt and implement a national housing strategy which incorporates targets to be achieved for the realisation of housing rights to an extent consistent with the maximum use of available resources. A national housing strategy should also apply a gender perspective, identify disadvantaged and vulnerable groups and include positive measures for ensuring their effective enjoyment of the right to housing.

- Enable the individual enforcement of the right to housing. The individual enforcement of housing rights should be accompanied by other measures aimed at providing sufficient accommodation to meet the demand from persons classified as homeless.\(^{101}\)

Other methods of making housing rights applicable at local level transcend the transmission belt approach, and rely on the HRBA, where ‘rights holders’ are involved in the development of policies which affect them, advanced within an international human rights framework, where they are empowered and effectively participate in the process, which is non-discriminatory, prioritises vulnerable groups and is publicly accountable.

**(9) Conclusion**

The concept of home and displacement from home offer powerful justifications for the strengthening of housing rights protection. In modern societies housing rights jurisprudence is growing in its content, relevance and sophistication, reflecting new principles of personal and social development, as well as the influences of public international human rights law. State action is transcending traditional civil and political rights guarantees towards giving effect to contemporary expectations, \(^{101}\) Ibid.
Can International Housing Rights Impact on Housing Systems?  

through legal and other intervention in housing systems.\textsuperscript{102} However, there are limitations to the international human rights approach in enforcing rights within contemporary housing systems. Housing rights now need to be integrated, not just into political policies and laws, with their traditional emphasis on social housing solutions, but into the macro, meso and micro frameworks of the housing field, involving all these elements of housing systems. This may yet provide an appropriate basis for the evolution of an effective international and national governance model for the advancement of these rights.

\textsuperscript{102} The Vienna Declaration (1993) states that both civil and political rights and socio-economic rights, such as housing rights are ‘universal, indivisible, interdependent and interrelated’. See The Secretary-General, \textit{Report of the Secretary General on the Vienna Declaration Programme of Action} (13 October 1993) UN Doc A/CONF 157/24 (Part I).