

In support of a control of housing policies based on international human rights law

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Housing policy budgets are significant but subject to close examination. Each country, each region, each city relies on good practices, benchmarking, and evaluations to maximise the impact of their housing interventions. But signs of the contemporary crisis in housing access and affordability are deepening everywhere, and governments are experiencing similar challenges in overcoming these.

The astonishing contrast between the State action of public authorities and the evolution of housing conditions

Poor housing conditions are a reality throughout Europe, even if the difficulties are not reflected everywhere or always in the same way. In the last ten years, even before the health crisis and energy price inflation, the number of homeless people has soared across Europe (except in Finland).¹ Housing costs and the share of household expenditure on housing are at an all-time high. Some 17% of the European population lives in overcrowded housing,² some 9.4% live in overpriced housing (35% among low-income households)³. Housing has become a driver of social and geographical segregation, with home ownership becoming increasingly confined to higher income groups. European housing markets are being disrupted both by the emergence of corporate financial giants, such as Blackstone, and by the spread of the so-called “*collaborative economy*”, which is making ordinary rental supply scarcer.⁴

However, housing is subject to significant regulation and public expenditure in all European countries.⁵ The right to housing is recognised by all, sometimes even in their Constitution. Every coun-

1. Report - *7th Overview of Housing Exclusion in Europe*, Feantsa and Foundation Abbé Pierre, 2022. <https://www.feantsa.org/fr/report/2022/06/30/the-7th-overview-of-housing-exclusion-in-europe-2022>

2. Source: Eurostat, 2019. A dwelling is considered over-occupied when the number of inhabitants exceeds the number of rooms (given that one third of European households are composed of only one person and that the average is 2.3 persons per household, in reality one family in five is concerned by over-occupation).

3. Households that spend more than 40% of their income on housing.

4. Feantsa and Abbé Pierre Foundation, *How to Regulate Airbnb in the Face of a Housing Crisis*, November 2020. <https://www.feantsa.org/en/report/2020/11/18/the-city-is-ours-how-to-regulate-airbnb-in-the-face-of-a-housing-crisis>

5. The share of public expenditure on housing is variable, depending on fiscal strategies, the production of social rental housing and individual housing grants. It varies in particular according to the rate of owner-occupiers and the tension of urban markets. In the ten countries with the most tense housing markets, public housing expenditure is generally between 1.5% and 2.5% of gross domestic product. DREES, 2020..

try can rightly boast of a network of legal protections, systemic and curative policies, intended to guarantee - on paper and often at great expense - housing conditions and “*minimum housing*”.

In spite of this, public action seems to be increasingly subject to the whims of chaotic markets. This is due to the growing share entrusted to the free market in all European countries and to the privatisation of social housing in the former communist European countries, in England and Germany, and more extensive elsewhere.⁶ The entanglement of housing policies with other policy objectives often blurs the priorities, which, in fact, are primarily supporting real estate construction - which provides many employment opportunities, banking activity - which allows investment, and reinforcing towns attractiveness, etc. Thus, a housing market that is painfully costly for citizens can, at the same time, be perceived as “*healthy*” from an economic perspective, and as part of a “*healthy competition*” between territories.

The consequence of having more and more people deprived of their right to decent housing in a mainly private sector dominated by markets, which make public intervention increasingly expensive (rents, land, energy, construction and renovation materials, etc.), results in less and less universal benefits and assistance. It also leads to the exclusion from the scope of ordinary law of some groups (young, foreign, disabled and sick people), for which dedicated social residual policies have been created, but today whose main characteristic is that they are not sufficient to provide the quality of life that they claim to guarantee.

In France, for example, emergency accommodation is provided for as non-conditional according to the law.⁷ When the state does not provide this, homeless people can take the matter to court to compel it to do so. On 10 February 2012,⁸ the “*State Council*”⁹ recognised this right as a fundamental freedom, thus opening up a new remedy, particularly well suited to the situation of homeless persons, as it aimed at compelling the State to provide shelter within 48 hours.¹⁰ On this occasion, the French State Council also decided to weigh up the means used by the administration, its diligence, and the applicant’s situation (age, family situation, state of health).

However, the State Council held that the steady increase in the number of emergency accommodation places was proof of significant and sufficient State efforts, regardless of the the higher increase of the number of people who were homeless and being refused shelter. The argument allows the judge to conclude until recently:

*“(...) despite the increase in emergency accommodation capacity in the Bouches-du-Rhône county (department) in 2022, more than 70% of the requests submitted by households with children in the week from October 31st to November 6th 2022 could not be met. Although the applicants point to the presence of their minor daughter, aged ten, and the state of health of Mr. C..., who suffers from several pathologies, including type 2 diabetes, the information they provide is not such as to establish a degree of vulnerability such that they should be considered as having priority over other families waiting for accommodation.”*¹¹

6. The small-scale financialisation of social and intermediate housing in France, Weak signals, controversies and perspectives, Gimat, Guiromet et Halbert, SciencesPo, Chair Cities, Housing, Real Estate, Working Paper n°1/2022.

7. L. 345-2-2 of the Social Action and Family Law Code.

8. Council of State, 10 February 2012, n°356456, Fofana.

9. “*Conseil d’État*”, France’s supreme court in the area of public and administrative law.

10. Instead of several weeks in the other emergency procedures available in administrative law.

11. Council of State, Judge of summary proceedings, 10 November 2022, 468570.

However, this analysis of the “*efforts*” by the public authorities is clearly different from the one held by the court in the 2015 case of *Tchokontio Happi*:

“50. *In the present case the Court notes that the authorities’ failure to act, which, in the Government’s submission, was due to the shortage of available housing, is not based on any valid justification within the meaning of the case-law. The Court reiterates that, according to its settled case-law, it is not open to a State authority to cite the lack of funds or other resources as an excuse for not honouring, for instance, a judgment debt.*”¹²

In the 2020 case of *NH and Others*, the European Court of Human Rights held that:

“182. *The Court would first note that it is mindful of the continuous rise in the number of asylumseekers which began in 2007 and of the fact that this incrementally pushed the National Reception Scheme to capacity. The Court observes that the events in this case were part of a gradual upward trend and hence did not take place against the backdrop of a humanitarian emergency prompted by a major migration crisis describable as exceptional and giving rise to considerable objective difficulties of an organisational, logistical or structural nature (see Khlaifia and Others, cited above, §§ 178185). The Court notes the efforts undertaken by the French authorities to add further accommodation capacity and shorten asylum processing times (see paragraphs 125–126 above). However, those circumstances do not rule out the possibility that asylumseekers were placed in a situation capable of engaging Article 3 of the Convention.*”¹³

Good will, increasing resources, etc., cannot be invoked indefinitely as an exoneration for States. As long as fundamental rights are not effective, there is default in the implementation of the law.¹⁴ The paradigm of “*good practices*” and ideological paralogsms mean that housing policies – and the national courts that issue rulings – lack a compass,¹⁵ which nevertheless exists in European and international case law.

Towards a system of quality indicators for public policies, based on respect for fundamental rights

The main function and purpose of courts in public law are certainly not to organise public action, but when deciding on a case that involves the State administration, to highlight the latter’s excesses and shortcomings, at the level of the decision being examined, in order to provide corrections and compensation. At the international level, this produces more: a corpus of positive

12. ECHR, *Tchokontio Happi v France*, n°65829/12, 9 avril 2015.

13. ECHR, 2 juillet 2020, *N. H and others v France*, n°28820/15.

14. In this case, the emergency accommodation system is becoming overcrowded because the right to housing is not being respected. One aspect of the situation is, for example, that the people housed do not leave the shelters because another policy, *Housing First*, is not being implemented: it focuses on access to social housing that is closed to people who do not meet the required conditions of regularity and permanence of residence; only 6.32% of the 400,000 annual allocations will go to homeless people in 2021, and a quarter of the applicants are successful each year. The construction of social housing is insufficient and the latter are produced at increasingly high rents (because they are more profitable for financially weakened social landlords), although the gap with private market rents remains immense. This is an overview that the judge does not take into account.

15. O. De Schutter, “*The human rights approach and the reduction of multi-dimensional inequalities. A combination to achieve the 2030 Agenda*”, *Papiers de recherche* n°260, AFD, October 2022. “*Human rights are a compass, and they are locks: it is precisely through the constraints they impose that they force us to imagine a different future*”. <https://www.afd.fr/fr/ressources/lapproche-fondee-sur-les-droits-humains-et-la-reduction-des-inegalites-multidimensionnelles-une-combinaison-indissociable-la-realisation-de-lagenda-2030>

obligations to the States, a classification of required State actions, objectives to reach, and steps to take to guarantee the effectiveness of the right to housing.

These State positive obligations do not all relate directly to the right to housing but highlight the extent to which the right to housing is at the crossroads and core of many other rights: the right to information, to legal protection, to a healthy environment, to respect for the home, to property and to respect for lifestyles, to a minimum standard of living or simply to life.

These State obligations concern the general legal framework (a protective legal framework, effective means of recourse, reliable data on social realities, etc.), the fight against discrimination and segregation, the size and quality of housing available, access to basic amenities such as water, electricity and other networks, protection of privacy, protection from pollution and a dangerous environment, the conditions for eviction from the home, protection of family life, housing adapted to a diversity of lifestyles, reasonable access to social housing, etc.¹⁶ These are based on seven key factors: affordability, security of tenure, the existence of equipment and infrastructure, habitability, accessibility, location and cultural appropriateness.¹⁷

This jurisprudence reveals a constant: housing is a material condition of dignity and a pivotal point for access to other essential rights (school, social services, transfer income, access to work, etc.).

Its implementation is a responsibility that is a core function of the public authority. This implies an obligation to provide legal protection to housing, to produce a sufficient stock of accessible and decent housing and a range of services targeted at the most vulnerable categories of the population (e.g. mental distress) or of housing types (“*non-standard*”, ephemeral, mobile, etc.), including associated support or participation services, or minority needs that ordinary law might either not protect, exclude, or even repress if they were not specifically taken into account.¹⁸

These positive obligations form the backbone of the necessary public policies, the legal terms of reference for public action. In this respect, they can also constitute a relevant analysis framework, for domestic courts as well as for the European Union. Indeed, these positive obligations resulting from case law provide a matrix that can be used as a measuring index to assess the quality of public policies.

There is no room for complacency anymore. Public policies that have been sieved through these positive obligations have seen their compliance validated by the result they did achieve. These policies will not tell us whether the resources allocated are the most efficient, because each context imposes a strategy that is difficult to compare with others, and that is not fully reproducible. But they will allow us to validate the progress made.¹⁹

16. Housing Rights Obligations of States through European Case Law, Housing Rights Watch, Feantsa, June 2020.

17. General Comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing.

18. Council of Europe, European Committee of Social Rights, *ATD Quart-Monde v France*, n°33/2006, on the violations inappropriate solutions offered to a family group of Travellers.

19. If we take the key example of the “Housing First” strategy, which makes housing a means of social integration and no longer the end of a social integration pathway, the practical forms of its implementation have differed from one country to another, but the various evaluations have all shown the performance of this paradigm, compared to systems of specific care in dedicated forms of accommodation.

But how do we define the criteria for how such an evaluation can be carried out and conclude whether or not States are indeed meeting their obligations? And where does one place the threshold for expected outcomes?

The Council of Europe's Committee on Social Rights provides the answer to this question. It gives meaning of the obligation, to make "*continuous and measurable progress*"²⁰ based on specific targets, which we propose here to define as indicators. These are the evolution of the number of homeless people; the level of substandard housing; the number of households living in non-standard housing and without statutory protection; the ratio between households with special needs and the production of housing corresponding to their needs; the delays in accessing social housing; the share of household income spent on housing, particularly among low-income households; exposure to pollution; access to water and energy; the number of evictions and guarantees of rehousing.

The evolution of all these indicators can provide the rating of housing policies in different countries and the unified framework for a "*technical control*" of public policies grounded on fundamental rights. On this basis they make it possible to define a sufficient level of state compliance and to identify convergences and necessary interferences between related or competing public policies. Observation today focuses to a great extent on the object (housing production, tax measures, energy efficiency, etc.), and less on the objectives pursued: whether we are getting closer to them, whether we are allocating the best resources to achieve them as quickly as possible and whether other competing objectives are detrimental to them.

Any public policy or measure, taken alone or in combination with others, promotes, limits or reduces the effectiveness of the right to housing. This is what needs to be checked against the criteria identified through the positive obligations, and adjustments and even reversals must be clearly examined. If the renovation of the housing stock reduces substandard housing, but contributes to a rise in prices, then regulation (rents and sales) coupled with sufficient financial aid to fulfil these obligations, is necessary.

Positive obligations are therefore also instrumental for measuring the complementarity of norms: a flagship measure is often insufficient in itself and is not equivalent to compliance with the obligation to which it attempts to respond; it may contribute to the fulfilment of several obligations but is not sufficient to fulfil them all; an obligation requires a complementarity of measures, all of which are indispensable to be fully complied with.

An application: containing private investment within the limits of human rights

Leïlani Farha, former UN Special Rapporteur on Housing, advocates a monitoring system designed to ensure that public policies are going in the right direction. Her recommendations, "*from financialised housing to rights-based housing*",²¹ produce a coherent system, structured around the definition of the right to housing in international law and related jurisprudence, which makes it possible to measure the contribution of private actors or their obstruction to its effectiveness.

20. Council of Europe, European Committee of Social Rights, *Feantsa v France*, No. 39/2006, 5 December 2007, ATD Fourth World v France, No. 33/2006, 5 December 2007.

21. *The Shift Directives, from financialized to human rights-based housing*, 2022. <https://make-the-shift.org/directives/>

In addition to the UN Committee on Economic, Social and Cultural Rights' General Comments No. 4 on the right to adequate housing (1991) and No. 7 on forced evictions (1997), which detail the factors of adequate housing. This relies on General Comment No. 24 on States' obligations in the context of corporate activities (2017) to “*prevent and remedy adverse human rights impacts. It includes a positive obligation to regulate markets and mobilise resources*²² to fulfil its obligation”:

“18. States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance (...) by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all (...).”

“23. The obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment. Discharging such duties may require the mobilization of resources by the State, including by enforcing progressive taxation schemes. It may require seeking business cooperation and support to implement the Covenant rights and comply with other human rights standards and principles.”

The State is not the only entity that must contribute to the realisation of the right to housing: private actors must also contribute, especially those whose macro-economic activity shapes an economic model with a strong social impact on individuals, as is the case of housing, and which the latter can only influence to a very limited extent. It should not only encourage these actors to act in the direction of improving the effectiveness of the right to housing, but should not remunerate or compensate them for doing so (except in the case of a disproportionate or excessive burden). This obligation should be imposed on them as a “*normal*” economic operation. It is clear that states cannot - any longer - meet the needs of even minorities on their own, but this is not a call for help to be addressed to private actors. It is a matter of the public and private sectors working together in a common direction.

As such, Leilani Farha provides guidance to states in their relationship with financial actors and her guidelines include:

- The existence of a legal responsibility - neither lesser nor subsidiary - of private actors and investors towards the right to housing;
- Full transparency around housing: a public database (name and contact details of owners, successive sales and works, evolution of rents...); a human rights impact assessment prior to any purchase, sale or renovation of real estate by investors and accessible to residents; giving a voice to all users who might see their rights threatened and creating mechanisms of recourse in case of possible violation of the right to housing;

22. On the words “to the maximum of its available resources” in Article 2§1 of the ICESCR, see Section 2.2 in O. De Schutter, *The human rights approach and the reduction of multi-dimensional inequalities. A combination to achieve the 2030 Agenda*, *Papiers de recherche* n°260, AFD, octobre 2022. “In a more progressive reading, the “progressive realization” clause can instead be used more affirmatively, as the Committee on Economic, Social and Cultural Rights and national courts rely on it to examine the macroeconomic and budgetary choices of States parties in light of the requirements of the Covenant. The affirmative use of the “progressive realization” clause relates both (on the revenue side) to resource mobilization and (on the expenditure side) to the investment choices of the State.”

- Develop new financing models based on human rights principles and direct monetary and fiscal policies towards the realisation of the right to housing: reform any law or monetary and fiscal policy (national, European or international, institutional or banking) that favours institutional investors engaged in the financialisation of housing; do not participate in the financing of operations that lead to the displacement of population, encourage those that produce affordable housing (in the sense of international law) in perpetuity; take into account the accumulation of property by the same company (or person) in tax rates, such as use or non-use (vacancy tax); systematically allocate a proportion of real estate transactions to affordable rental housing (as defined by international law); support non-profit housing providers as a priority;
- Bring all forms of housing, even alternative forms, back into the fold of international standards: student housing, homes for the elderly and nursing homes, shelters for the homeless and migrants, prisons, etc., and protect these sectors from financialisation;
- Give communities the power to regulate, or even ban, practices that disrupt their housing markets and are detrimental to their residents, such as short-term rentals;
- Create or maintain strong tenant protection: limit rent or maintenance fees increases; prohibit no-fault evictions and evictions that result in homelessness, regardless of landlord and tenure status.²³

Refocusing housing policy objectives on human rights should prioritise areas of rights application, and relegate the economic health of the housing sector to a subordinate level, viewed only as a means to an end. Equally, the concentration of wealth or environmental risks should be considered in the context of their impact on the application of housing rights, allowing the evaluation of public policies to embrace more systemic issues and unfulfilled social objectives.

²³. The Shift Directives, from financialized to human rights-based housing, 2022. <https://make-the-shift.org/directives/>