

CONCEPTUALISING THE RIGHT TO HOUSING

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1 INTRODUCTION

This edited volume is a valuable addition to the existing knowledge on the right to adequate housing. The papers in this volume provide detailed descriptions of contemporary housing issues and case law related to the right to adequate housing. The authors' focus on countries often overlooked in the field of housing law scholarship is commendable. Moreover, the volume enriches our conceptual understanding of the right to adequate housing by expanding on the typology of access rights, occupancy rights, and exit rights to housing.

Several studies have described the right to adequate housing in particular treaties or countries. Even so, these descriptions often offer a limited understanding of the right's more conceptual and abstract meaning. While they help interpret the right to adequate housing in a specific national or treaty context, they do not provide a deeper insight into the overall understanding of the right to housing.

Some publications focus on the more abstract meaning of the right to housing.¹ Fitzpatrick and others, for example, distinguish between the right to adequate housing and housing rights. The former is for those who lack minimally adequate accommodation, while the latter refers to protection from eviction and harassment for those who already have housing. According to the authors, there are legal rights to housing that can be enforced by individuals in domestic courts. Additionally, a programmatic approach binds the state and public authorities to develop and implement social policies.²

1 See, among others, B. Bengtsson, 'Housing as a Social Right: Implications for Welfare State Theory', *Scandinavian Political Studies*, Vol. 24, No. 4, 2001, pp. 255-275; C.U. Schmid, 'The Right to Housing as a Right to Adequate Housing Options: Reviewing the Reasonableness of National Housing Policies in the Field of Alternative and Intermediate Tenures', *European Property Law Journal*, Vol. 9, No. 2-3, 2020, pp. 157-178.

2 S. Fitzpatrick, B. Bengtsson & B. Watts, 'Rights to Housing: Reviewing the Terrain and Exploring a Way Forward', *Housing, Theory and Society*, Vol. 31, No. 4, 2014, p. 453.

Hohmann also makes a distinction between the right to housing and housing rights. The former refers to a human right codified or implied in international and regional rights covenants and domestic constitutional orders. On the other hand, housing rights arise from non-constitutional domestic laws of states and may include tenancy regulations and social housing provisions.³ Hohmann argues that the right to housing is essential for fulfilling other needs and goods and may be protected by other rights such as privacy, freedom of expression, and property.⁴

In an abstract sense, the right to adequate housing could also be conceptualised as multiple interconnected housing rights, which can be classified into three types: access, occupancy, and exit rights.⁵ Traces of these *rights to housing* can be found in various articles in various treaties and constitutions. I will discuss this conceptualisation in more detail in the remainder of this paper.

2 ACCESS TO HOUSING RIGHTS

Access rights refer to an individual's right to enter or obtain (affordable) housing through ownership, rental, or other means. They are relevant when people want to enter, acquire, rent, or in any other way start using housing. The main concerns are obstacles to the enjoyment of access rights, which are (physical) barriers that prevent individuals from utilising housing and the lack of available, affordable, and adequate housing. Various human rights documents contain references to access rights. For example, Article 19 of the (non-binding) European Pillar of Social Rights stipulates that access to social housing or good-quality housing assistance needs to be provided for those in need.⁶ Another example is Article 31 of the Revised European Social Charter. This provision requires state parties to undertake measures designed to promote access to housing of an adequate standard and to make the price of housing accessible to those without sufficient resources.⁷

3 J.M. Hohmann, 'Housing as a Right', in K. Young & M. Langford (Eds.), *Oxford Handbook on Economic, Social and Cultural Rights*, Oxford, Oxford University Press, 2022, para. 2.

4 J.M. Hohmann, 'Property and the Right to Housing: Synergies and Tensions', in N. Graham, M. Davies & L. Godden (Eds.), *The Routledge Handbook of Property, Law and Society*, London, Routledge, 2022, p. 128.

5 See M. Vols, 'Het Recht Op Huisvesting En de Nederlandse Grondwet: Een Analyse van Artikel 22 Lid 2 Grondwet: Het Recht Op Voldoende Woongelegenheid', *NJCM Bulletin. Nederlands Tijdschrift Voor de Mensenrechten*, Vol. 47, No. 2, 2022, pp. 147-167.

6 See S. Garben, 'The European Pillar of Social Rights: An Assessment of Its Meaning and Significance', *Cambridge Yearbook of European Legal Studies*, Vol. 21, 2019, pp. 101-127.

7 E. Sweeney, L.M. Bruijn & M. Vols, 'Deconstructing the Eviction Protections under the Revised European Social Charter: A Systematic Content Analysis of the Interplay between the Right to Housing and the Right to Property', *Human Rights Law Review*, Vol. 23, No. 4, 2023, pp. 1-25.

In some cases, physical obstacles can hinder certain individuals from being able to live in a house. The inability to enter or move around a property freely can be a major obstacle to accessing suitable housing. These barriers may stem from the building's layout or the surrounding area. Articles 9 and 19 of the Convention on the Rights of Persons with Disabilities are highly relevant in this context.⁸

Individuals can face other obstacles when trying to access housing, some of which may be caused by others. While some of these human obstacles may be justifiable, such as a resident blocking other residents from entering their homes without permission, others may not be.⁹ For instance, landlords may refuse to lease a property to tenants because of their gender, sexual orientation, religious beliefs, or criminal background.¹⁰ This form of discrimination violates human rights law and has been extensively studied in housing literature.¹¹

Of course, discrimination in the housing system can be systemic, too.¹² These and other systemic obstacles may hinder access to housing significantly. Systemic obstacles in the housing system relate to property rights and registration, housing finance, residential infrastructure, regulation, and housing subsidies.¹³ A market-based approach to housing can exclude those who cannot afford it. Governments may intervene and provide free or affordable housing to the population to address market failures and excesses. A considerable number of national constitutions oblige governments to do so. This challenges the free market approach, where the state is only responsible for ensuring property and contract law rights.¹⁴

8 O. Lewis & G. Richardson, 'The Right to Live Independently and Be Included in the Community', *International Journal of Law and Psychiatry*, Vol. 69, 2020.

9 See, for example, ECtHR 14 March 2017, no. 66610/10 (*Yevgeniy Zakharov v. Russia*); ECtHR 8 September 2022, no. 1434/14 (*Jansons v. Latvia*).

10 See, for example, J.H.S van Tongeren, 'Housing Ex-Offenders in the Netherlands: Balancing Neighbourhood Safety and Human Rights', *European Journal on Criminal Policy and Research*, Vol. 28, No. 1, 2022, pp. 57-77; I.R. Aliu, 'Gender, Ethnicity and Residential Discrimination: Interpreting Implicit Discriminations in Lagos Rental Housing Market', *Journal of Housing and the Built Environment*, Vol. 39, 2024, pp. 77-102.

11 J.C Benito Sanchez, *Applying International and European Anti-Discrimination Law to the Housing Context*, 2nd ed., London, Bloomsbury Publishing, 2023.

12 A.M. Dickerson, 'Systemic Racism and Housing', *Emory Law Journal*, Vol. 70, 2020, p. 1535; P. Wolifson, S. Maalsen & D. Rogers, 'Intersectionalizing Housing Discrimination under Rentier Capitalism in an Asset-Based Society', *Housing, Theory and Society*, Vol. 40, No. 3, 2023, pp. 335-355.

13 P. Kenna, 'Can Housing Rights Be Applied to Modern Housing Systems?', *International Journal of Law in the Built Environment*, Vol. 2, No. 2, 2010, p. 108.

14 *Ibid.*

3 OCCUPANCY RIGHTS

Occupancy rights apply when residents face limitations in enjoying their residence, such as unauthorised entries. Many constitutions lay down the inviolability of the home and protect people against home searches. This protection is also offered by, for example, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 16 of the Convention on the Rights of the Child.

Occupancy rights are closely linked to classical notions of privacy and domesticity, including the freedom to do as one pleases within the confines of one's home. Walzer describes this idea eloquently:

'Our homes are our castles' was first of all the claim of people whose castles were their homes, and it was for a very long time an effective claim only for them. Now its denial is an occasion for indignation and outrage even among ordinary citizens. We greatly value our privacy, whether or not we do odd and exciting things in private.¹⁵

Occupancy rights protect individuals from paternalistic or moralistic restrictions on their behaviour within their homes. Individuals should be free to read books they like, decorate their homes, and eat and drink as (much as) they please.¹⁶ For instance, one may argue that an obligation to wear specific clothing inside one's home, such as a veil, infringes on occupancy rights, codified in, for example, Article 17 of the ICCPR.¹⁷ The same applies to a governmental ban on drag performances that may apply to one's home.¹⁸ Similarly, prohibiting the entry of visitors into one's home may also be seen as a violation of occupancy rights.¹⁹

It is also important to consider occupancy rights in cases of substandard housing or health hazards in the housing surroundings. The UN Committee on Economic, Social and Cultural Rights (CESCR) defines habitability as a key aspect of the right to

15 M. Walzer, 'Liberalism and the Art of Separation', *Political Theory*, Vol. 12, No. 3, 1984, p. 317.

16 This freedom should be limited to activities that do not cause harm to others. The fundamental debate about what qualifies as harm is beyond the scope of this contribution. See about this debate: B. Harcourt, 'The Collapse of the Harm Principle', *Journal of Criminal Law and Criminology*, Vol. 90, 1999, p. 109.

17 Cf. Human Right Committee 29 March 2000, General Comment No. 28 Art. 3 (The equality of rights between men and women), HRI/GEN/1/Rev.9 (Vol. I), para. 13.

18 Cf. B.V. Ries, 'Don't Be a Drag: How Drag Bans Can Violate the First Amendment', *Tulane Journal of Law & Sexuality*, Vol. 33, 2023, pp. 1-38.

19 H. Verbeek et al., 'Allowing Visitors Back in the Nursing Home During the COVID-19 Crisis: A Dutch National Study into First Experiences and Impact on Well-Being', *Journal of the American Medical Directors Association*, Vol. 21, No. 7, 2020, pp. 900-904.

adequate housing in their General Comment No. 4. This means that housing should provide residents with enough space and protect them from cold, dampness, heat, rain, wind, or other threats to health, structural hazards, and disease vectors.²⁰ However, research indicates that this is not always the case. In her study of building inspections in Chicago, Bartram found that many residents live in substandard housing, and Black and Latinx people are disproportionately affected.²¹ In Europe, substandard housing has also been researched.²² Data from Eurostat indicates that in 2021, almost 15% of the European Union's population lived in homes with structural issues, such as damp walls, floors, or foundations, as well as rotten window frames or floors.²³ Research has found substandard housing is a common problem in other countries such as Brazil, China, and Russia as well.²⁴

Occupancy rights also entail the right to be connected to essential services, such as drinking water and energy for cooking, heating, lighting, and the internet.²⁵ In the Social and Economic Rights Fulfilment (SERF) Index, which measures the realisation of human rights, access to water and sanitation are two of the three indicators of the realisation of the right to housing.²⁶

The other indicator of the realisation of the right to housing in the SERF Index concerns housing affordability. This relates to occupancy and access rights, as access to affordable housing is a prerequisite for enjoying it. According to the CESCR, housing costs should not compromise the ability to satisfy other basic needs.²⁷ Research concerning housing affordability has focused on the financialisation of housing, housing subsidies, or energy poverty in the context of housing.²⁸ Others have focused on the effectiveness of

20 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, p. 3.

21 R. Bartram, *Stacked Decks: Building Inspectors and the Reproduction of Urban Inequality*, Chicago, University of Chicago Press, 2022.

22 See, for example, M. Vols & A. Belloir, 'Tackling Rogue Landlords and Substandard Housing: Local Authorities' Legal Instruments and Their Effectiveness', *Journal of Property, Planning and Environmental Law*, Vol. 11, No. 1, 2019, pp. 2-19.

23 Eurostat 'Total population living in a dwelling with a leaking roof, damp walls, floors or foundation, or rot in window frames or floor' EU-SILC survey, 2023.

24 See M. Vols et al., 'The Right to Adequate Housing & BRICS: An Exploratory Comparative Analysis of Brazil, China and Russia', *European Journal of Comparative Law and Governance*, Vol. 11, No. 1, 2023, pp. 1-41.

25 For the relation between the right to housing and the right to energy, see: M. Hesselman, 'Right to Energy', in C. Binder, M. Nowak, J. Hofbauer & P. Janig (Eds.), *Elgar Encyclopedia of Human Rights*, Cheltenham, Edward Elgar Publishing, 2022, pp. 62-69.

26 See <https://serfindex.uconn.edu/> (last accessed 15 December 2023).

27 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, p. 3.

28 See, for example, J. Hohmann, 'Toward a Right to Housing for Australia: Reframing Affordability Debates through Article 11(1) of the International Covenant on Economic, Social and Cultural Rights', *Australian*