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**Homelessness and Housing Rights in the European
Union's Social Policy**

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Abstract

The thesis presents international housing rights, with a focus on Europe. It shows their development of housing rights standards and analysis the jurisprudence related to them. The end of this part (Chapter 2) consists in a proposal concerning the future development of housing rights: it is argued that more individual enforceability is needed and that they could have a preventive function to protect persons in vulnerable situations from homelessness.

Policies on homelessness within the European Union's social policy are presented with an overview over the development of the EU's social policy and the growing importance the topic of homelessness plays therein (Chapter 3). It is critically examined if the EU policy on homelessness is able to deliver progress. Further, the role of housing rights within the EU social policy is analysed. Concluding that they do not play an important role yet, it is argued that the inclusion of housing rights to homelessness policies would improve their quality.

Finally, the need for an EU-wide policy on homelessness based on housing rights is argued (Chapter 4). Several possibilities are shown on how to include these rights to such policy and on which role they could play therein.

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Abbreviations

Art.	Article
CCP	Collective Complaints Protocol
CoE	Council of Europe
COHRE	Centre On Housing Rights and Evictions
CRC	Convention on the Rights of the Child
DCI	Defence for Children International
EAPN	European Anti-Poverty Network
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ERRC	European Roma Rights Centre
(rev.) ESC	(revised) European Social Charter
ETHOS	European Typology of Homelessness and Housing Exclusion
EU	European Union
EUCFR	European Union Charter on Fundamental Rights
EU-SILC	European Union Statistics on Income and Living Conditions
FEANTSA	Fédération Européenne d'Associations Nationales Travaillant avec les Sans-Abri
GC	General Comment
ICESCR	International Covenant for Economic, Social and Cultural Rights
NAPs	National Action Plans
NGO(s)	Non-Governmental Organisation(s)
no(s).	number(s)
OMC	Open Method of Co-ordination
p., pp.	page(s)
para(s).	paragraph(s)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCESCR	United Nations Committee for Economic, Social and Cultural Rights
v.	versus

1 Introduction

This thesis seeks to examine the relation between the European Union's policy on homelessness and housing exclusion and human rights to housing. Housing rights – although still not having too much attention – have been developed further towards justiciability and gained importance at international, regional and national level. In Europe, they gained importance through the inclusion of a right to housing in the Council of Europe's revised European Charter and the introduction of a collective complaints procedure in the 1990ies. Since then, one can observe a growing judicial practice and case law, both in the European Committee of Social Rights and as well at the European Court of Human Rights. At the level of the European Union, homelessness and inadequate housing have also become an issue. Latest since the implementation of the Lisbon strategy in 2000, social policy has gained more and more importance through the introduction of the social inclusion process and ambitious goals like to lift 20 Million people out of poverty.¹

Research of the last years has shown that the increasing EU social policy and the European Social Charter lead separate lives with very few occasions to meet each other. Nonetheless or exactly because of this, the relation between EU social policy and economic, social and cultural rights is of growing interest, not at least because the European Union's Charter on Fundamental Rights also includes such rights. This thesis aims to analyse this relation examining the EU policy on homelessness and housing exclusion within the broader context of the social inclusion process from a human rights perspective.

Homelessness and housing exclusion are issues which fit very well to analyse the relation of the Union to social rights: on the one hand, the topic gains more and more attention at EU level, on the other hand, the human rights monitoring and enforcement bodies, especially the ECSR developed a quite extensive case law which gave "*flesh to the bare bones*"² of several housing rights provisions.

Therefore I will first give an overview of the existing set of housing rights at international and European level in Chapter II. Their potential to improve the situation of homeless people will be critically reflected and a proposal on the future development of housing rights towards more individual enforceability and a stronger preventive function will be given.

¹ This is one of the objectives of the Europe 2020 strategy, see: European Council, Conclusions, 17 June 2010, p. 12.

² Khaliq/Churchill, 2008, p. 428.

In Chapter III I will give a detailed analysis of the EU policy approach towards poverty and social exclusion, with an emphasis on homelessness and housing policy. I will then analyse which role housing rights play in this policy area.

Finally I will argue that the EU policy on homelessness should be based on housing rights (Chapter IV). I will show that the inclusion of housing rights in an EU wide strategy against homelessness would improve its quality and which function housing rights could have within such strategy. Ultimately, several possibilities on how to include housing rights in the EU policy on homelessness will be presented.

Methodology

For the analysis of the development and the enforcement of housing rights in Europe I reviewed the most important academic writings and the case law of the European Court of Human Rights and the European Committee of Social Rights. The proposals on the further development of housing rights are based on the results of research in the field of homelessness, especially on factors which cause homelessness. In this regard, NGO-reports, especially those of FEANTSA, are a very valuable source for this thesis.

The overview on the European Union's social policy and the development of a policy on homelessness and housing exclusion is based on the relevant EU documents. For the critical assessment of this policy, I consult and discuss academic literature. The analysis of the role of housing rights in EU social policy is based on an examination of the synthesis reports of the peer reviews related to homelessness and substandard housing.

Based on the results of these examinations I develop my arguments for the inclusion of housing rights in a future EU strategy on homelessness and examine what potential for contribution they have. Using the relevant academic writing on the topic, I will also show how housing rights could be better protected, monitored and enforced.

2 Housing as a Human Right

Housing rights are enshrined in various human rights instruments at the level of the United Nations as well as on the regional level. As this thesis' geographic focus is Europe, I will deal more detailed with the provisions and standards in the European human rights instruments. The Chapter dealing with the UN instruments will therefore focus on the issues most relevant for the thesis and mainly seeks to call in mind, that the European Union's member states are parties to these instruments and therefore have corresponding obligations. The necessity of this "calling in mind" will be shown in Chapter 3, which deals with the relation of the EU's social policy to housing rights.

2.1 The right to housing in the United Nation's human rights instruments

In the United Nation's Human Rights instruments the right to housing has not an own article, but is included in the right of an adequate standard of living.³ Art. 25 (1) of the Universal Declaration of Human Rights states that "*[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, ...*".

Similar, the International Covenant on Economic, Social and Cultural Rights (in the following ICESCR), contains in Art. 11 a right for 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.*"

Several other UN Human Rights instruments like the Convention on the Elimination of All Forms of Discrimination against Woman or the Declaration on the Rights of Disabled Persons set out housing rights. The Convention on the Rights of the Child (in the following CRC) for example requires the State Parties to recognize that every child has an adequate standard of living which secures the necessary living condition for the child's development. Further, the State Parties have "*to take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing (Art. 27§3).*"

In the context of this thesis it is important to mention that all Member States of the European Union ratified the ICESCR, the CRC and various other instruments setting out housing rights

³ For an extensive description of the right to housing in the UN human rights instruments see Kenna, 2005b, pp. 1-12.

and are legally bound by the provisions therein. It is therefore necessary to take a look at the nature of obligations under these treaties.

According to Art. 2(1) ICESCR⁴ the State Parties are required “*to take steps, individually and through international assistance and co-operation, [...], to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*” General Comment no. 3 gives some more explanations on the notions contained in this paragraph. “To the maximum of available resources” means that the state has to show that every effort has been made, all disposable resources have been used to address at least its minimum core obligations and that priority was given to fulfil these requirements. In relation to the right to housing the minimum core obligation that everyone enjoys the right to adequate shelter and a minimum level of housing service without any form of discrimination.⁵ “Progressive realisation” obligates the state “*to move as expeditiously and effectively as possible towards that goal.*” Retrogressive measures therefore have to be carefully considered and fully justified. The notion of “progressive realisation” recognises the fact that the full realisation of all rights of the Covenant cannot be reached immediately.⁶ In the CRC, the obligations for State Parties with regard to economic, social and cultural rights differ from the ones in the ICESCR. Although State Parties “*shall undertake such measures to the maximum extent of their available resources*”, the notion of “progressive realisation” does not exist in the Convention (Art. 4). Therefore the obligation to comply with the provisions of the Charter is immediate and is only limited by the available means.⁷

The idea of minimum core obligations is problematic in its interpretation and raises some problems, because there are not yet clearly established minimum core obligations which are applicable for all states, because the context matters a lot in the assessment of country situations. The idea was to set a threshold where even the poorest country cannot go below. The danger is that countries with sufficient resources are satisfied with fulfilling this threshold. *Langford and King* state that the Committee so far failed to apply the doctrine of minimum core obligations in its conclusions and argue for a more contextual approach: the

⁴ UN Committee on Economic, Social and Cultural Rights, General Comment no. 3: The nature of State Parties obligations, 14 December 1990, para. 10.

⁵ Kenna, 2005b, p. 3.

⁶ UN CESCR, General Comment no. 3, para. 9.

⁷ For example, the Committee on Rights of the Child recommended to Latvia to provide adequate and affordable housing to families and to provide alternative housing arrangements in case of evictions, see: UN Committee on the Rights of the Child, Concluding Observations, Latvia, 2006, p. 13; For Bulgaria, the CRC recommended to make sure that adequate housing, sanitation and infrastructure is available for all families, especially for those with low income and for Roma, see: Concluding Observations, Bulgaria, 2008, p. 15.

more resources are available in a country, the higher the level of realisation of Covenant rights must be.⁸

Like any other human right, housing rights impose on a state a threefold obligation: to respect (not to violate), to protect (against violations of third parties) and to fulfil rights (through the adoption of appropriate measures towards the full realisation of rights). These obligations contain both obligations of conduct, which means to take appropriate steps and obligations of result, which means to reach specific targets and a certain standard.⁹

There were also measures identified by the Committee, which have to be taken immediately: ensure legal security of tenure; effective monitoring of the housing situation, especially the full extent of homelessness and inadequate housing; protect against forced evictions; provide effective remedies for those whose rights are violated.¹⁰

For further clarification of the right to housing, the Committee on Economic, Social and Cultural Rights (CESCR) issued a General Comment (GC) on the right to adequate housing.¹¹ Stating that in relation to the right to housing no country is free of serious problems, the CESCR clarifies that not only families but every individual has the right to adequate housing and that discrimination of any form is forbidden (para. 6). Para. 7 sets out what is meant by adequate: "*Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost*". This definition is followed by a set of factors which have to be taken into account in any particular context in determining whether a dwelling is adequate or not. These factors are security of tenure, availability of services, affordability, habitability, accessibility, location, cultural adequacy (para. 8). The relation to other rights like freedom of expression and association (in this context for tenants) or the right to privacy has to be considered as well (para. 9).

The state obligations play an important role in the GC. In general, the state parties' obligations consist in demonstrating that "*the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources*" (para. 14). The implementation of national housing strategies is required which define clear objectives, identify which/how resources are used and include a time frame and set out responsibilities (para. 12). Para. 13 sets out an immediate obligation to monitor the situation "*to ascertain the full extent of homelessness and inadequate housing within its*

⁸ Langford/King, 2008, pp. 492-495.

⁹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 6-7 (p. 693f.).

¹⁰ UN HABITAT, The Right to Adequate Housing, Factsheet 21, p. 31.

¹¹ UN CESCR, General Comment no. 4: The right to adequate housing, 13 December 1991.

jurisdiction.” The groups living in the most unfavourable conditions shall be given priority in the measures taken to improve the situation (para 11).

The CESCR issued a second general comment on the right to housing focussing on the issue of forced evictions.¹² General comment no.7 sets out that forced evictions are incompatible with the provisions of the Covenant (para. 1). The term “forced eviction is defined as *“the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”*

There is no prohibition where the eviction is carried out according to the law and in conformity with the Covenant.¹³ The obligation of the State in this regard is to refrain from forced evictions and to protect against forced eviction carried out by third parties (para. 8). Protection against forced evictions is based on legislation, which guarantees the greatest possible security of tenure to those who occupy dwellings or land and guarantees strict control over the circumstances in which evictions may be carried out (para. 9). There are circumstances where eviction can be justified, but the eviction must be carried out according to the law and in conformity with the Covenant. Further, there must be legal remedies available for the evicted persons (para. 11) and all feasible alternatives must be taken into consideration (para. 13). For justified evictions, the Committee sets out the following guidelines: 1. opportunity for consultation with those affected; 2. adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; 3 information related to the reasons for evictions; 4. government officials or their representatives must be present during an eviction; 5. identification of all persons carrying out the eviction; 6. no evictions in conditions of bad weather or at night; 7. provision of legal remedies; 8. if needed, provision of legal aid to persons to seek redress from the courts (para 15). Further, the authorities are obliged to ensure that nobody is left homeless after an eviction and have to make alternative housing available (para. 16).

The monitoring through the Committee is based on State reports, but submissions from NGOs and UN specialised agencies are also considered. The results of the assessment are issued in Concluding Observations. The objective of the reporting procedure is to facilitate a constructive dialogue about useful measures to implement the Covenant between the experts in the Committee and State party representatives.¹⁴ Since 2008, the Optional Protocol to the

¹² UNCESCR, General Comment no. 7: The right to adequate housing: forced evictions, 20 May 1997.

¹³ Ibid., para. 3.

¹⁴ Langford/King, 2008, 477-482; Lecki, 1995, p. 30. An example for concern related to the right to adequate housing in Europe is Bulgaria, where the Committee deplored the large extent of inadequate housing situation

ICESCR allows complaints related to all aspects of the right to adequate housing, but at the time of writing, the protocol has not yet entered into force, because of the low number of ratifications.¹⁵

2.2 The right to housing under the European Convention of Human Rights and Fundamental Freedoms

The European Convention on Human Rights (ECHR) does not contain social rights in a direct way, it protects various social rights (e.g. the right to work, trade unions) through their connection with the rights enshrined in the Convention.

The rights covered by the ECHR and having an influence on the protection of housing rights are: the right to life and human dignity and the protection of abuse (Articles 2, 3, 4), right to fair trial (Art. 6) and effective remedy (Art. 13), non-discrimination (Art. 14), right to liberty and security (Art. 5), private life and family life (Art. 8), right to education (Art. 2 of Protocol no. 1) and the protection of property and social benefits (Art. 1 of Protocol no. 1).¹⁶

Based on these rights, the European Court of Human Rights (ECtHR) has made numerous decisions which are related to housing.¹⁷ Art. 2 is applied to circumstances which amount to a life-threatening situation. In the context of housing, the Court held that dangerous emissions of industrial and power production can cause such a situation and that the States have the positive obligation to inform the public about the possible risks.¹⁸

The prohibition of inhumane or degrading treatment (Art. 3) is not only seen as a guarantee to protect against violation by a public body but as well requires a minimum standard of living. It is therefore possible that a situation of homelessness or inadequate housing conditions in exceptional circumstances or in vulnerable situations amounts to a violation of Art. 3.¹⁹ Housing, living conditions and safe environment can also be covered by the protection of private and family life under Art. 8. Violations were found for example because of eviction²⁰,

and recommended to establish a plan to improve the social housing situation, see: UNCESCR, Concluding Observations, Bulgaria, 1999, para. 18; 28.

¹⁵ 10 ratifications are needed; so far only Spain, Mongolia and Ecuador ratified the protocol, see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en (consulted on 06 June 2011).

¹⁶ Mikkola, 2010, pp. 82-94; Kenna, 2008b, pp. 200-205; Tulkens/Van Drooghenbroeck.

¹⁷ Although not comprehensive, FEANTSA offers a quite extensive list of decisions related to housing, see: <http://feantsa.horus.be/code/EN/pg.asp?Page=695>.

¹⁸ *Öneriyildiz v. Turkey*, application no 48939/99, Grand Chamber judgement, 30 November 2004.

¹⁹ *Moldovan and Others v. Romania*, application nos. 41138/98 and 64320/01, judgement, 12 July 2005, paras. 102-114.

²⁰ *Connors v. United Kingdom*, application no. 66746/01, judgement, 27 May 2004, para. 95: In this case the Court held that there was a lack of proper justification for the eviction.

the failure to control the effects of toxic emissions²¹, to avoid night-time noise²², or the omission to provide housing for a homeless, severely disabled person²³, although the Court did not discern a right to housing in relation to homeless.²⁴

The balance between the competing interests of housing rights and the right to property constitutes another important part of the Court's jurisprudence related to housing rights. The measures at stake were rent control legislation which was adopted to make housing available to tenants with insufficient resources. While this was held to be a legitimate aim to interfere in the landlord's right to respect for property, there must be a fair balance between the general interest (make housing affordable) and the property rights of the individual. In *Mellacher and others v. Austria*²⁵, the legislation dumped the receivable rent by 82%. However this was not considered to be a disproportionate burden, because the landlords were still allowed to recover the maintenance costs from the tenants; whereas in a Polish case²⁶, a similar legislation did not allow the landlords to cover their maintenance costs, which was held to be a disproportionate burden and therefore a violation of Art. 1 of Protocol 1. For housing policies promoting access to affordable housing by rent control these judgements mean, that the general interest in affordable housing takes precedence over property right of owners.²⁷ *Kenna* concludes his analysis of the Court's case law related to housing rights in acknowledging that there is potential to further develop positive state obligations in reference to housing, but criticising that the oblique manner in which it deals with housing and the reluctance to draw on the case law of the ECSR is weakening its ability to protect housing rights against the overwhelming commercial interests in the housing market.²⁸

2.3 The right to housing in the European Social Charter

2.3.1 The European Social Charter and its enforcement system

²¹ *Fadeyeva v. Russia*, application no. 55723/00, judgement, 9 June 2005.

²² *Moreno Gómez v. Spain*, application no. 4143/02, judgement, 16 November 2004, para. 61: "...the applicant suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances."

²³ *Marzari v. Italy*, application no. 36448/97, inadmissibility decision, 4 May 1999.

²⁴ *Chapman v. United Kingdom*, application no. 27238/95, judgement, 18 January 2001, para. 99: "It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."

²⁵ *Mellacher and others v. Austria*, application nos. 10522/82, 11011/84 and 11070/84, judgement, 19 December 1989, para. 47.

²⁶ *Hutten-Czapska v. Poland*, application no. 35014/97, judgement, 22 February 2005, para. 176.

²⁷ *Clements/Simmons*, 2008, p. 416.

²⁸ *Kenna*, 2008b, pp. 206-208.

Within the human rights system of the Council of Europe (CoE), the European Social Charter (ESC) is the “pendant” to the European Convention of Human Rights (ECHR) which both of which aim to establish the rights set out in the Universal Declaration of Human Rights (1948) on the European continent. While the ECHR covers civil and political rights, the ESC seeks to protect the second set of fundamental human rights – economic, social and cultural and rights. It was adopted in 1961 and entered into force in 1965. The content of the Charter is not particular new and mostly inspired by several conventions and recommendations of the International Labour Organisation. At the beginning of the 1990s, it was decided to revise and revitalize the Charter, resulting in a Collective Complaints Protocol in 1995 and the Revised European Social Charter in 1996.

Unlike the ICESCR, where a state has to ratify the whole convention, for ratifying the Charter, a State is not obliged to accept all the provisions contained in the Charter. It is enough to ratify a certain number of ‘hard core’ articles: five out of seven in the 1961 ESC, six out of nine in the revised version. In addition, for the 1961 ESC states must accept 10 out of 19 articles or 45 out of 72 numbered paragraphs. For the revised ESC, 16 out of 31 articles or 63 out of 98 numbered paragraphs have to be accepted. It is important to mention, that the Revised Charter does not supersede the 1961 ESC: the two documents exist next to each other and have to be ratified separately. Only if a member state that has ratified the 1961 Charter also ratifies the revised one, the revised ESC supersedes the old one.²⁹ The so-called ‘hard core’ provisions in the revised Charter are: Art. 1 (right to work), 5 (right to organise), 6 (right to bargain collectively), 7 (right of children and young persons to protection), 12 (right to social security), 13 (right to social and medical assistance), 16 (right of the family to social, legal and economic protection), 19 (right of migrant workers and their families to protection and assistance) and 20 (right to equal opportunities and equal treatment for men and women in employment). The right to housing (Art. 31) is not listed as a ‘hard core’ provision, at the same time Art. 16 includes housing rights for families (see below).

The European Committee of Social Rights (ECSR), a body composed of independent experts, receives reports from the state parties and makes a legal assessment of the conformity with the provisions of the Charter. The results of this assessment – legal ruling about compliance or non-compliance – are published in conclusions. The enforcement of these rulings lies in the

²⁹ Stein, 2001, pp. 19-32. At the time of writing, out of 47 member states, 31 had ratified the revised ESC, 12 had ratified the 1961 ESC and four had not ratified any of them, see: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp. (consulted on 15 June 2011).

hands of the Governmental Committee and the Committee of Ministers. If necessary, the Committee of Ministers can issue a recommendation and to call the member state to take action. Beside the framework of the reporting system, there is also a collective complaints procedure, where the ECSR adopts decisions on the merits if the case is admissible. Although the member states more and more comply with the ECSR's conclusions and decisions, there are still problems within the whole supervisory machine.³⁰

The possibility to file collective complaints was introduced by the 'Additional Protocol to the European Social Charter Providing for a System of Collective Complaints Protocol (CCP) in 1995, which entered into force in 1998.³¹ Collective Complaints can be brought in by four different kinds of organisations: international organisations of employers and trade unions (Art. 1.a. CCP); other international non-governmental organisations which have consultative status and are on a list issued by the CoE Governmental Committee (Art. 1.b. CCP)³²; representative national organisations of employers and trade unions within the jurisdiction of the state against which they lodge a complaint (Art. 1.c. CCP); representative national non-governmental organisations within the jurisdiction of the state against which they lodge a complaint which have particular competence in the areas covered by the Charter (Art. 2.1. CCP). Concerning the latter, an optional declaration has to be made by the contracting party. So far, Finland is the only country which accepts complaints from national NGOs.³³

Although the ESC is a legal document which binds the countries to comply with the ratified provisions and to change the situation according to the findings of the ECSR, the enforcement mechanism shows some weaknesses in practice. Among the several scholars criticising the supervisory system of the Charter, two shall be presented here. *Alston* analysed the strengths and weaknesses of the system applied in practice through a case study of Italy and identified several problems. It has to be critically added that *Alston* for sure chose an extreme example, but it illustrates very well that the system has to be improved. He first found that the procedure is heavy and slow: through the involvement of three different committees, a single round of reporting can take almost a decade. This long period of reporting and monitoring

³⁰ Brillat, 2005, pp. 32-37.

³¹ At the time of writing it was ratified by 14 Member States (Belgium, Bulgaria, Cyprus, Finland, France, Greece, Ireland, The Netherlands, Norway, Portugal, Spain, Sweden), see: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp (consulted on 15 May 2011).

³² In spring 2011, 75 international NGOs were listed, see: http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/INGOListJuly2010_en.pdf (consulted on 15 May 2011).

³³ Harris/Darcy, 2001, pp. 354-360.

makes it almost impossible to have a significant impact on public opinion or to ensure timely interventions to current or recent developments in a country. Second, he criticises the quality of the national report written in French for not being accessible to most of the Italians. Third, he also found serious weaknesses in the findings of the ECSR. One was the fact that the decisions of compliance or non compliance were deferred for 60% of the issues assessed, because further information was needed. At the same time, there was no threat that non-provision of information would lead to non-compliance with the Charter. The other was that the ECSR did not list any alternative resources like NGO reports or publications from trade unions. According to him, this absence has the “dangerous” effect, that there is no incentive for the civil society to engage in the process and the overwhelming focus is laid on legal measures and administrative framework. For *Alston*, it is therefore not surprising that the ESC remains invisible in the work of social organisations in Italy. Fourth, he sees uncertainty concerning the roles of the different Committees and fifth he considers the political sanctions to ensure compliance to be too weak.³⁴

More general, without relying on any country example, *Harris and Darcy*³⁵ also identified structural weaknesses of ESC supervisory system. They first criticise the role of the Committee of Ministers, which has the final word in the reporting and complaints procedure. According to them it is “*totally inappropriate [that] the final word in the implementation of a human rights guarantee rest[s] within a political body*”³⁶. The Committee of Ministers does not even enforce all the findings of the ECSR and sometimes fails to issue recommendations all violations found in a Member State. Therefore they argue that the function of the Committee of Ministers should be limited to review the compliance with the decisions of the ECSR. Second, they disagree with the fact that the decisions and findings made by the ECSR do not have the same legally binding force than the decisions made by the European Court of Human Rights. Therefore they claim that due to the indivisibility of human rights and the equal value of economic social and cultural rights, which are often claimed by states, the recommendations issued following the results of the supervision should be replaced by legally binding decisions. It would be more likely then, that the state parties would take measures to implement the decisions and comply with their obligations. Third, they consider the Charter’s supervisory mechanism as incomplete and ineffective as long as there is no individual

³⁴ Alston, 2005, pp. 51-60.

³⁵ Harris/Darcy, 2001, pp. 374-376.

³⁶ *Ibid.*, p. 375.

complaints procedure, which would be “*possible both in theory and highly desirable in practice*”³⁷.

2.3.2 The right to housing in the revised ESC³⁸

The main provision setting out a right to housing in the revised ESC is Art. 31. Other provisions, such as the rights of disabled people (Art. 15), the social, legal and economic protection of the family (Art. 16, already in the 1961 ESC), the right of migrant workers to assistance and protection, the right of elderly persons to social protection (Art. 23) and the right to protection against poverty and social exclusion also set out housing rights or are related to them.³⁹

Art. 31 of the revised ESC reads as follows:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1 to promote access to housing of an adequate standard;

2 to prevent and reduce homelessness with a view to its gradual elimination;

3 to make the price of housing accessible to those without adequate resources.

State obligations under Art. 31

In the case law of the ECSR, the right to housing is interpreted as a dynamic welfare right, which means that the obligations for the states are predominantly seen as so-called obligations of means. In case FEANTSA v. Slovenia (53/2008), the ECSR stated that under Art. 31 there is no obligation for states to achieve results, but to take practical and effective measures.⁴⁰

To comply with the provisions of Art. 31 a member state has to fulfil the following requirements:

- Necessary measures (legal, financial, operational means) to ensure steady progress towards the objectives of the ESC must be adopted;

³⁷ Harris/Darcy, 2001, p. 376.

³⁸ Although he is not only presenting the case law, but also his own views of the interpretation of the provisions contained in Art. 31, for this part I will mostly rely on Mikkola, *Social Human Rights of Europe*, 2010, because this publication is the most recent and most exhaustive in this topic. See also Kenna, *Housing Rights and Human Rights*, 2005, pp. 13-22; A shorter description of the right to housing in the ESC can be found in Harris/Darcy, *The European Social Charter*, pp. 282f.

³⁹ Kenna, 2005b, p. 27.

⁴⁰ FEANTSA v. Slovenia, collective complaint no. 53/2008, decision on the merits, 8 September 2009, para. 28.

- Meaningful statistics on needs, resources and results must be maintained;
- Impact of adopted strategies has to be reviewed regularly;
- Timetables and deadlines for the achievement of objectives of each stage have to be established;
- Attention has to be given to the impact of policy on the various groups concerned, especially to the most vulnerable.⁴¹

If a right is “*exceptionally complex or particularly expensive to implement*”, the member states have to take steps to achieve objectives “*within a reasonable time, with measurable progress and making maximum use of available resources.*”⁴²

Although defined as a dynamic provision, the right to housing also contains obligations of result. This interpretation arises especially with a view on the role of housing in the provisions of the Convention (see above). *Mikkola* lists the following rights⁴³, which require immediate results and should have the character of enforceable individual entitlements:

- 31§1: reasonable waiting time for standard housing
- 31§1/§2: habitability of standard and temporary housing
- 31§2: temporary housing for everyone in all circumstances
- 31§3: affordable housing for those with inadequate income
- (E): non-discrimination
- 19§4c: equal treatment

As the right to housing requires measures to progressively improve the situation within reasonable time and without allowing any regress on a state’s development, also the requirement of dynamic progress is moving from an obligation of means towards an obligation of result.

The provisions of Art. 31 cover three main areas: access to standard housing, homelessness and the affordability of housing.

Access to housing of an adequate standard (Art. 31§1)

⁴¹ FEANTSA v. Slovenia, collective complaint no. 53/2008, decision on the merits, 8 September 2009, para. 29.

⁴² Autism Europe v. France, collective complaint no. 13/2002, decision on the merits, 4 November 2003, para. 53.

⁴³ Later this a comment will be given to these proposals and it will be argued that there should be more rights of enforceable character, for example a right not to be left homeless after any form of eviction or discharge from prison or other institution.

The area of standard housing contains two key factors: accessibility and adequate standard. *Accessibility* must be ensured first by *contractual safety* with a view to the protection of the weaker party against unfair conditions or faults in the dwelling. Contractual safety has a twofold function: on the one hand it helps to fulfil the right to housing, on the other it is an important factor to prevent homelessness; This happens first through determining a minimum time of termination of the contract; second, by the *availability* of housing through the provision of a social housing stock for persons who don't have enough resources to rent from the open market. According to *Mikkola*, the rate of social housing should correspond to the poverty rate in the respective country and therefore be between 10 and 30% in the European context; and third, by targeting social housing to the most vulnerable. The *allocation* of social housing must be based on the urgency of need and not only on the level of income or property to make sure that the poorest and most vulnerable are not left out. Waiting periods for standard housing are a key factor in the assessment of the allocation of housing too. A maximum waiting period of six months for those in urgent need and of one year for others is suggested, but depending on the quality of temporary shelters these periods could be reduced or prolonged. To ensure equal allocation, discrimination against minorities should be avoided and special information and support for these groups should be provided.⁴⁴

Adequate standard refers to the quality of a dwelling. The ECSR stated that a dwelling is adequate “*which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law.*”⁴⁵ Under the Charter, these quality criteria are divided into a group concerning habitability and a group concerning suitability. *Habitability* means – also viewed in relation to the right to life, the prohibition of inhumane or degrading treatment and the respect for private and family life in the ECHR – that a dwelling is safe, healthy and allows hygienic living. This can also mean that the immediate surrounding can have an impact on the habitability of a dwelling. Further, working basic amenities are required, such as clean water, heating, waste disposal, sanitation facilities or electricity. To maintain the habitability of a dwelling, the authorities are also required to guard against interruption of essential services, such as water, electricity or telephone.⁴⁶

Suitability refers to size, surrounding, location in relation to work, school and social services as well as to the occupants' cultural background. Only one of these factors was taken into account by the ECSR so far, stating that a dwelling is over-crowded when the size is not suitable in relation to number of persons and the composition of the household. Following the

⁴⁴ Mikkola, 2010, pp. 346-353.

⁴⁵ ECSR, Conclusions 2003, France, p. 221.

⁴⁶ *Ibid.*, p. 224.

principle of inclusion and tolerance, *Mikkola* suggests that cultural suitability could mean that the occupants can follow their customary and cultural activities as long as they do not inappropriately disturb their neighbouring community.⁴⁷

The ECSR pays special attention to efforts made by states to promote access to adequate housing for vulnerable group⁴⁸ and requires that the right to adequate housing is legally protected through procedural safeguards; impartial legal and non-legal remedies must therefore be available and affordable.⁴⁹ The responsibility to guarantee adequate housing ultimately lies on the government, even if the housing policy is the competence of local authorities. It has to be shown that effective steps are taken to ensure that action at local level is effective.⁵⁰

Prevention, Reduction and Gradual Elimination of Homelessness (Art. 31§2)

Setting the objective of gradual elimination of homelessness, the wording of the provision in Art. 31§2 is quite strong, although there were attempts to establish a weaker provision to reduce homelessness only “as far as possible”.⁵¹ Compared to the ETHOS definition (see Annex), the ECSR defines homelessness or inadequacy of housing in a rather narrow way meaning situations of living roofless, in insecure or unhealthy situation, without necessary basic amenities or waiting an unreasonably long period for standard housing.⁵²

Measures to be taken for the *prevention* of homelessness are overlapping with those for standard housing, namely contractual safety and availability and allocation. Especially the targeting of the most vulnerable and disadvantaged groups in the allocation of housing plays an important role in the prevention of homelessness. For the case of evictions as a consequence of insolvency or wrongful occupation, the following measures of legal protection are considered to be necessary by the ECSR: the affected parties must be consulted to find alternative solutions and they must be noticed a reasonable period of time before ; at night or during winter evictions are prohibited. In case of illegal evictions, legal remedies, legal aid and compensation must be available and procedural safeguards are of great

⁴⁷ Mikkola, 2010, pp. 353-355; working basic amenities were listed in *FEANTSA v. France*, collective complaint no. 39/2006, decision on the merits, 5 December 2007, para. 76.

⁴⁸ ECSR, Conclusions Italy, 2003, p. 342.

⁴⁹ ECSR, Conclusions France, 2003, p. 224.

⁵⁰ *FEANTSA v. France*, collective complaint no. 39/2006, decision on the merits, 5 December 2007, para. 79.

⁵¹ Harris/Darcy, 2001, p. 283.

⁵² Mikkola, 2010, pp. 343f; pp. 357-360.

importance. In case of justified evictions in public interest, authorities are obliged to organise re-housing and to offer financial assistance if needed.⁵³

Reduction of homelessness requires both emergency and long term measures. To satisfy the most urgent need for people sleeping rough, a State Party must have sufficient space in temporary shelters to provide at least a minimum form of accommodation. Such shelters have to comply with the requirements of safety, health and hygiene; as well they have to offer basic amenities and should be situated in a safe surrounding. Requirements related to privacy, family life and suitability do not apply to this kind of dwelling, although the ECSR put an emphasis on the respect of dignity and on a degree of independence as high as possible.⁵⁴ The personal scope of the right to shelter was extended in a decision concerning unlawfully resident children, which were refused accommodation in shelters. The ECSR stated that *“eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect for their human dignity.”*⁵⁵

Affordability of Housing (Art. 31§3)

Art. 31§3 sets out the obligation for the states to make housing financially affordable for those who lack sufficient resources. States are free to choose from a variety of measure to provide they support, be it through the regulation of rents or social housing costs or be it through direct housing allowances. The criteria to assess compliance with this provision are overlapping and not yet fully elaborated. For the ECSR it is the important whether a state is able to correct an imbalance in the market which lets the prices raise and makes housing unaffordable for people with low income.

Support for homebuyers, especially for those who buy for the first time, is one measure to make housing affordable. Compliance with the Charter is assessed on the basis of the extent and the result of such measures. To guarantee equal opportunities to own a house or dwelling, there must not be any discrimination of migrants or minorities in purchase, loans, discounts, interest rate subsidies or tax reliefs. Another way is the support of low-cost housing through building grants, interest subsidies or investment loans.

The most important measures to make housing affordable are the provision of a social housing stock and the support of persons with low income through housing benefits. Social

⁵³ ERRC v. Bulgaria, collective complaint no. 31/2005, decision on the merits, 18 October 2006, para. 52.

⁵⁴ FEANTSA v. France, collective complaint no. 39/2006, decision on the merits, 5 December 2007, paras. 107-109.

⁵⁵ DCI v. The Netherlands, collective complaint no. 47/2008, decision on the merits, 20 October 2009, para. 63.

housing should target those most in need of it⁵⁶ and the waiting times in the allocation should not be unreasonably long. If the latter is the case, legal remedies must be available.

Housing benefits should be high enough to cover the price of basic amenities and guarantee that the price for housing does not rise to a level which hinders to satisfy other basic needs. Further, prices shouldn't lead to segregated low quality housing or slums and inadequate resources should not lead to homelessness. To evaluate housing allowances, the ECSR has set three requirements. The benefits must be targeted to the disadvantaged and those with low income; they must be based on objective criteria and there must be a possibility to legal appeal in case the allowance is not granted. In its case law, the ECSR expressed that housing benefit is an individual right in the sense that all qualifying households must receive it in practice and legal remedies must be available in case of refusal.⁵⁷

To develop a housing price indicator, *Mikkola* suggests starting from the assumption, that housing costs in general should not exceed a third of the disposable income, although acknowledging that one indicator alone would not be enough.⁵⁸

As was shown in this Chapter, the right to housing in Art. 31 of the rev. ESC is very broad in its scope and covers many areas which have an influence on the housing situation in a country and can therefore be considered to offer a very good protection of housing rights. The downer in this regard is the rate of ratifications: only 12 member states accepted both §1 (housing of adequate standard) and §2 (homelessness), only nine of them also accepting §3 (affordability of housing).⁵⁹ This low number of ratifications of Art. 31 can partly be mitigated through the application of Art. 16 (The right of the family to social, legal and economic protection), which also includes housing rights.

Art. 16 reads as follows:

“With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal

⁵⁶ International Movement ATD Fourth World v. France, collective complaint no. 33/2006, decision on the merits, 5 December 2007, paras. 98-100.

⁵⁷ ECSR, Conclusions, 2005, Sweden, p. 50.

⁵⁸ Mikkola, 2010, pp. 361-365.

⁵⁹ See: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRev_en.pdf (consulted on 05 May 2011).

arrangements, provision of family housing, benefits for the newly married and other appropriate means.”

Among the provisions of the revised Charter which contain housing rights, Art. 16 (social, legal and economic protection of the family) is of particular importance and interest, because claims related to housing rights against member states are often based on this article, when the respective member state did not ratify Art. 31 and families are affected.

The provision of family housing is listed as a key element of the protection of the family. The access of young couples to housing was a main priority of the ECSR in this respect. It requires targeted financial support in any form like benefits or tax reliefs. In general, Art. 16 view the right to housing only from the family perspective and focuses on the issues of adequate supply and adequate standard including essential services. Authorities also have to take into account the needs of families when developing and implementing housing policies.⁶⁰

The borderline between Art. 16 and Art. 31 is not a very sharp one as the provisions partly overlap and are identical with respect to the notions of adequate housing and forced evictions.⁶¹ For the ECSR, this bears the advantage, that housing rights can be assessed even if a Member State did not ratify Art. 31, because contrary to Art. 31, the right of the family to social, legal and economic protection is one of the Charter’s hard core provisions which enjoy the broadest acceptance among the member states with only six exceptions not accepting it: *“The Committee considers that the fact that the right to housing is stipulated under Article 31 of the Charter, does not preclude a consideration of relevant housing issues arising under Article 16 which addresses housing in the context of securing the right of families to social, legal and economic protection.”*⁶²

Therefore, as far as families are affected, the ECSR uses Art. 16 to assess the situation of housing rights in countries which have not ratified Art. 31.⁶³ In cases with states involved that ratified both provisions, the Committee held that *“the findings of a violation of Article 31 [...] amount to a finding that there has also been a breach of Article 16”*.⁶⁴

⁶⁰ Mikkola, 2010, pp. 463f.

⁶¹ COHRE v. Italy, collective complaint no. 58/2009, para. 115.

⁶² ERRC v. Bulgaria, collective complaint no. 31/2005, decision on admissibility, 10 October 2005, para. 9.

⁶³ For example: ERRC v. Bulgaria, collective complaint no. 31/2005; ERRC v. Greece, collective complaint no. 15/2003; see: Kenna, 2005b, pp. 33-36.

⁶⁴ FEANTSA v. Slovenia, collective complaint no. 53/2008, para. 75. Similar: COHRE v. Italy, collective complaint no. 58/2009, para. 116; ERRC v. France, collective complaint no. 51/2008, para. 89; ATD Fourth World v. France, collective complaint no. 33/2006, para. 158.

2.4 Summary: the Adequacy of the Protection of Housing Rights in Europe

Although there are three international treaties (and the Universal Declaration of Human Rights) under which housing rights are guaranteed, we cannot say, that these rights enjoy enough protection. Neither one of the three supervisory bodies alone nor all of them together do have enough competence, acceptance or power to protect those rights to a degree which makes them reality to the people living in Europe.

The powerful and influential European Court for Human Rights is very much limited and reluctant in its jurisprudence. Under the European Convention, housing rights can only be invoked in connection with other rights. This means that a person can only invoke housing rights if the situation violates other related rights. “Just” being homeless does not suffice to file a case.

The impact of the findings of the UN Committee on Social, Economical and Cultural Rights can also be doubted, not at least the right to housing is not very well elaborated in the ICESCR and just one element of the right to adequate standard of living.

Art. 31 (and Art. 16) of the revised ESC would have the potential to protect housing rights very well, because the provisions include various factors and areas of policy which influence on the effective exercise of the right to housing. Unfortunately, this potential is limited by the low number of ratifications of Art. 31, the low acceptance of the collective complaints procedure and the weak enforcement mechanism of the ESC.

With the exception of the cases which are admissible at the ECtHR, individuals do not have the possibility to invoke their right to housing before an independent judicial body, which has to be seen as the biggest problem in the effective protection of this right. Despite this rather negative conclusion on the current situation in Europe, there is still a potential for the further development of housing rights.

2.5 The future development of housing rights: a proposal towards more individual enforceability and a stronger preventive function

The adoption of rights-based approaches⁶⁵ towards homelessness is not very well developed in Europe.⁶⁶ Unfortunately there is not yet a country where the effective exercise of housing rights is fully realised and these rights enjoy the level of protection they would need. Where

⁶⁵ This means policies on homelessness which include a right to housing, either in the form of an individual enforceable entitlement like in France or in a form of obligation for the authorities to provide a home for all citizens like in Scotland.

⁶⁶ Kenna, 2005a, p. 93.

there is no enforceable right to housing, which is the case in the big majority of countries, academics and organisations working with the homeless claim that the absence of such right is one of the factors leading to housing deprivation and homelessness, because low income households hardly have access to affordable and adequate housing.⁶⁷ But the experiences in the few countries which have something a form of a right to housing show, that establishing a right to housing is not enough to solve the problem of homelessness and substandard housing. This is due to the fact that the successful implementation of a right to housing/housing rights depends on many factors related to various laws: relation between landlord and tenant, security of tenure, protection from eviction, provisions on maintenance and repairs, rental laws, property laws, housing subsidies and benefits, legislation on homelessness, regulation of land use and distribution, housing finance, building codes and standards, regulation of property speculation, laws concerning environmental health and planning, regulation of privatisation of public housing, non-discrimination laws, compensation and laws availing legal aid and judicial remedies.⁶⁸

The examples of France and England illustrate well the importance to take the various areas related to homelessness into account. France implemented an individual enforceable right to housing in 2007 as a response to a housing crisis and growing public pressure. In England, there is no individual right to housing, but a legal obligation for the authorities to provide housing for eligible families. The implementation of both forms of housing rights is in both cases insufficient, because there is a significant lack of social housing to realise the right to housing. Although being far away from perfect, the enforceable right to housing in France is seen to have the potential support homeless people to access housing.⁶⁹

Starting in 2003, Scotland started to implement a new national strategy and introduced new legislation concerning homelessness, which amongst a series of other measures eliminated the priority need distinction. Although there is no right to housing established explicitly, from 2012 on – after a period of transition – the local authorities will have the duty to ensure that all households have accommodation. As well as in England and France, the Scottish model also is highly dependent on the availability of social housing, especially because the strategy is very much based on housing-led solutions, which seek to provide standard housing immediately instead of temporary shelters.⁷⁰

⁶⁷ For example in Austria, see: Schoibl, 2009, p. 211.

⁶⁸ Leckie, 1995, pp. 9f.

⁶⁹ Loison-Leruste/Quilgars, 2009, pp. 94-96.

⁷⁰ Anderson, 2007, p. 167.

All three examples show the importance of a housing policy which aims to provide sufficient affordable housing of a good quality. Again we can see that the right to housing is not one single right, it requires the guarantee of whole set of housing rights.

The individual, enforceable right of guaranteeing that homeless persons have some form of housing is only one element of this complex right. Furthermore, there must be duties on the authorities to provide housing to homeless families and individuals and – the more programmatic duty – to guarantee that sufficient and adequate housing is available and affordable.

In this regard, Art. 31 of the revised ESC and the jurisdiction of the ECSR can be seen as an important contribution to the development of housing rights. To comply with the provisions, states have to adopt various measures ranging from market regulation to the provision of social housing and to monetary support for persons in need to maintain housing. The member states are required to take steps towards the progressive realisation of the provisions. Within the monitoring the ECSR can assess policy measures, eligibility grounds, strategies to prevent and reduce homelessness and not at least the legal remedies available for homeless persons or persons in inadequate housing conditions.⁷¹

Although the requirements under Art. 31 are quite extensive, there is a potential for further development of housing rights and a more effective protection of individuals. The following proposals do not aim to predict the near future, but seek to point out that the development of housing rights is not yet closed and could take this direction. I am aware that the realisation of such proposals is not realistic, because social rights are not yet widely accepted as being justiciable and only guaranteed as individual entitlements in exceptional cases. The ratifications and the list of accepted provisions of the revised ESC show quite well that States try to avoid ratifying articles which would be difficult to comply with or would require changes in the system. The latest example is Austria, which ratified the revised ESC in May 2011. Art. 31 and Art. 30 were among other reasons not ratified because it would require that citizens of other contracting parties have equal access to social housing and there is no equal treatment in subsidies for the construction of housing.⁷² This example shows that the political will to adapt housing legislation and policies to human rights standards is not big enough to expect fundamental changes. But this should not hinder us to have a vision for the future.

2.5.1 Starting point: homelessness, a violation of human dignity

⁷¹ Kenna, 2005a, pp. 107-108.

⁷² See a document of the Austrian Parliament dealing with the ratification of the revised ESC, at: http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01068/fnameorig_205634.html (consulted on 11 June 2011).

The starting point of the following considerations is that I consider homelessness and its potential consequences to be a serious violation of human dignity which limits the enjoyment of a series of other rights. I shortly elaborate on this basic assumption. First, homelessness is less and less perceived as a chosen lifestyle or individual failure but is considered to be a result of structural failures and developments in society. Therefore, the occurrence of homelessness is something the society as a whole has a responsibility for and not only the individuals who are affected. Second, - as the European Parliament's call to end street homelessness shows – the most extreme forms of homelessness are increasingly considered to be incompatible with human dignity and unacceptable in Europe. Despite this, there are reasons to doubt if apart from the homeless people themselves and a circle of experts there is much understanding on how severe this violation of human dignity can be.

The question if a situation of homelessness can reach the minimum level of severity to amount to inhuman or degrading treatment under Art. 3 of the European Convention cannot be answered clearly at the moment. On the one hand a court in the United Kingdom found a violation of Art. 3 because a person seeking asylum was forced to sleep in the streets without support and limited access to food and washing facilities, because the authorities refused to assist.⁷³ Similar, it can be argued that under Art. 3 the state has “*to provide basic shelter to individuals if the alternative was utter destitution, in which the physical or mental suffering reached the minimum level of severity – bearing in mind the duration and the age or state of health of the victim.*”⁷⁴ The ECtHR only found violations of Art. 3 related to homelessness in exceptional circumstances⁷⁵ and was reluctant to impose an obligation on states to provide a home to homeless persons under Art. 8.⁷⁶ Compared to other findings of inhumane and degrading treatment,⁷⁷ there are for sure many homeless persons whose living conditions would reach a similar level of severity.⁷⁸

Nonetheless the discussion if homelessness amounts to a violation of civil and political rights, it is clear that housing is “*the indispensable precondition for the exercise of most of the other*

⁷³ *Limbuela v. Secretary of State*, see: Kenna, 2005a, p. 102.

⁷⁴ Clements/Simmons, 2008, p. 417.

⁷⁵ *Moldovan and Others v. Romania*, application nos. 41138/98 and 64320/01, judgement, 12 July 2005, para 102-114.

⁷⁶ *Chapman v. United Kingdom*, application no. 27238/95, judgement, 18 January 2001, para. 99.

⁷⁷ Examples for inhuman and/or degrading treatment: Lack of toilet facilities in certain prisons in the UK, see: Committee for the Prevention of Torture, Report UK, para 47.

⁷⁸ The criminalisation of homeless persons can also amount to inhuman or degrading treatment when essential human behaviours like sleeping, urinating, bathing or storing belongings in public are criminalised and the homeless persons have no other choice to do so in public and are therefore forced to break the law, see: Human Rights and Equal Opportunity Commission, Homelessness is a Human Rights Issue, 2008, p. 12.

*fundamental rights*⁷⁹, therefore being homeless means not being able to exercise a number of fundamental rights⁸⁰ and can in its most extreme forms amount to a grave violation of human dignity, which can be directly or indirectly caused by states or authorities. Once accepting that a situation of homelessness is neither a chosen lifestyle nor a solely self-inflicted status and acknowledging its severity and negative consequences for the individual, the need to establish individual entitlements to be protected against homelessness is much more evident.

The jurisprudence of the ECtHR under Art. 3 is not only interesting for comparing the gravity of homelessness as a human rights violation, but also offers an interesting example on how the Court established positive obligations for the states to protect against inhumane and degrading treatment. In cases of extraditions for example, the Court held that extraditions are not allowed if the person is in danger to be subjected to inhuman or degrading treatment in the other country.⁸¹

If homelessness is perceived to be a potentially severe violation of human dignity, then it is clear that the individual has to have a right to housing. Further, one should consequently think of establishing positive obligations for the state, where the state has the direct responsibility for causing homelessness. In the following, I will elaborate on this and first present reasons for the need of individual enforceable housing rights and second examine on how persons in a specifically vulnerable situation could be protected against homelessness.

2.5.2 Individual entitlements

The most powerful legal provisions are of course those granting individual rights which can be invoked before an independent judicial body. Although the states are not required under the Charter to implement such legal entitlements, some elements of the provisions in Art. 31 ESC also have the potential to be given the character of individual entitlements.⁸²

The establishment of a right to standard housing within reasonable time would clearly support the programmatic shift towards housing led approaches in homelessness policies of many EU

⁷⁹ FEANTSA, Toolkit for developing an integrated strategy to tackle homelessness.

⁸⁰ The Australian Human Rights and Equal Opportunities Commission lists the following rights: adequate housing, health, personal safety, privacy, education, work, non-discrimination, social security, political participation, freedom of movement/association, freedom of expression and freedom from cruel, inhuman and degrading treatment, see: Human Rights and Equal Opportunity Commission, 2008, pp. 7-13.

⁸¹ The ECtHR stopped extraditions from Austria to Greece because the conditions in the detention centres amounted to inhuman and degrading treatment, see: EGMR stoppt Dublin-Überstellung nach Griechenland aus Österreich, 05 May 2010.

⁸² *Mikkola* lists the following rights, which in his view should be interpreted as individual entitlements: reasonable waiting time for standard housing, habitability of standard and temporary housing, temporary housing for everyone in all circumstances, affordable housing for those with inadequate income as well as non-discrimination and equal treatment, see Mikkola, 2010, pp. 346-348.

countries, which seek to provide homeless persons with standard housing immediately. Within the so-called staircase systems (homeless persons “start” in emergency accommodation and go up to and “get ready” for standard housing), there are many cases where individuals take much more time to fulfil the requirements for independent living.

A right to temporary housing for everyone, not only for citizens, is inevitable in a situation where the number of homeless migrants is rising⁸³ and to avoid that authorities exclude persons from other countries from basic services.⁸⁴

Individual entitlements to affordable housing could take the form of means-tested housing allowances or support to cover costs for basic amenities. Such payments are especially important to support persons in situations of unemployment or other financial constraints to avoid that they lose their home.

It is clear that such rights are not the solution to all housing problems, but they provide a certain degree of protection to the individual. If housing is to be considered to be a fundamental right, there must be effective remedies for the individual to claim his/her rights to give this right a meaning and realize it; or, as Kenna states: “*without a remedy, there is no right.*”⁸⁵

Further, having an individual enforceable right to housing makes a huge difference for homeless people, because they certainly change the position of the individual suffering from homelessness. There is a difference between being an object of charity asking for support and having the position to claim a subjective right.⁸⁶ In her analysis of the right to housing in France, *Loison* points out, that – although there are still many failures within the system – the establishment of an individual, enforceable right to housing changed the situation because it gave much more visibility to those who are affected by homelessness or housing deprivation. The housing crisis as a whole got also more visibility and the claims lodged by many households helped to get a clearer picture of the housing situation. Further, the individual right gives them better opportunities to hold governments at different levels accountable over their obligations.⁸⁷

There is a growing trend to criminalize homeless persons all over Europe. The motivation for the use of repressive and coercive measures against them is apparently to make them

⁸³ Busch-Geertsema et. al., 2010, pp. 53f: extreme examples are Southern European cities like Barcelona, where foreigners accounted for 62% of the homeless.

⁸⁴ See for example the Dutch legislation which excluded children residing illegally in The Netherlands from services and where rejected asylum seekers lost their right to shelter after 28 days, see: *Defence for Children International v. The Netherlands*, collective complaint no. 47/2008, complaint, 12 February 2008.

⁸⁵ Kenna, 2005b, p. 90.

⁸⁶ Human Rights and Equal Opportunity Commission (AUS), *Homelessness is a Human Rights Issue*, p. 13.

⁸⁷ *Loison-Leruste/Quilgars, Implementing the Right to Housing in England and France*, p. 95.

invisible.⁸⁸ This is a development which clearly indicates the need to reinforce and strengthen their rights and – through giving them an individual entitlement to housing – to acknowledge that their situation means a violation of human rights and that the society has the obligation to do its best to improve it. But criminalisation means that the opposite is happening. Homeless persons are considered to be a threat to public order, which can be solved with prohibitions. They are in some cases not at all seen as bearers of any rights.⁸⁹ *Mitchell* argues that “*demonizing homeless people*” make them “*seem somehow less than human, endowed with fewer rights than those of us who live in houses.*”⁹⁰

In Budapest, a new law was established which permitted the local governments in the district to criminalise persons sleeping rough in public spaces. On the ground of that law, the mayor of the capital issued a Decree establishing fines at around 200€ and imprisonment in case of non-payment.⁹¹ *O’Sullivan* emphasises the connection between the growing criminalisation of poor and homeless people and the growing number of prisoners in European states.⁹² This connection is of course a vicious circle as the prison is proofed to be one of the most important “producers” of homelessness (see below).

Due to the high degree of stigmatisation of homeless people there is no reason to think that a enforceable rights to housing will change improve their situation immediately, but such entitlement will for sure make a difference in the perception of homelessness in the society. If homeless persons are by law acknowledged to be victims of human rights violations and are empowered to claim their right, it will be much more difficult to justify and introduce laws who criminalize them

2.5.3 Strengthening the preventive function of housing rights through the protection of persons in vulnerable situations

In many European policies on homelessness, the prevention of homelessness is considered to be fundamental in any strategy to solve the problem. Art. 31§2 contains the obligation for the state to prevent homelessness and many elements of housing rights have a general preventive function, like the control of the housing market. On the other hand, housing rights can also

⁸⁸ A FEANTSA publication includes examples for repressive measures against homeless persons from Belgium, The Netherlands, Germany, Spain and France, see: FEANTSA, *Homeless in Europe*, Summer 2006.

⁸⁹ See the case of Vienna, where the City Council introduced a law which allows banning homeless persons from public spaces, which was justified just because their “shabby appearance” (“*verwahrlostes Auftreten*”) disturbs the citizens from using public space. During the discussion of the law, the rights of homeless people were not an issue, see: *Initiativantrag zur Änderung des Wiener Landessicherheitsgesetzes*, 01 March 2010.

⁹⁰ *Mitchell*, 2003, p. 196.

⁹¹ FEANTSA, 2011a.

⁹² *O’Sullivan*, 2007, pp. 3-4.

have a targeted preventive function, which is not yet developed. In the following I will show, how individual rights to housing and positive obligations to protect against homelessness could help to prevent that people in vulnerable situations end up sleeping rough on the streets or in temporary shelters. Recent research identified several entries to homelessness: evictions and situations of transition from institutional living appear to be among the main reasons.⁹³ Further, these situations involve the state as a direct or indirect “producer” of homelessness.

Persons facing eviction: A right to be re-housed?

The protection of persons who face evictions is of particular importance. According to the case law of the ECSR, legislation protecting individuals in case of eviction should include the following elements: before the eviction, there should be an obligation to consult the affected parties and measures should be taken to find alternative solutions. If evictions take place, the conditions must respect human dignity, they must be forbidden at night or in winter and – in case the eviction is justified by public interest – the authorities have to re-house the parties or provide financial assistance.⁹⁴

Those procedural safeguards as well as housing allowances or a certain level of minimum income to some extent help to avoid evictions. There are procedural safeguards implemented in many countries, but evictions, for example after rent arrears, are still one of the main triggers to homelessness.⁹⁵ Taking prevention serious, the persons facing eviction should have an enforceable right to be re-housed and correspondingly not be evicted until alternative standard accommodation is found. Such obligation seems to be a heavy burden for the state authorities, but if homelessness is taken serious as a human rights violation and taking into account the social and real costs of the consequences many evictions have, such approach would not only better respect the individuals rights, but would be very likely to be a more sustainable and efficient approach than can be found now in many European states.

Hungary provides a good example here, where the insufficient protection against eviction caused mass homelessness after the transition in the beginning of the 1990ies. The shocking extent of homelessness both in numbers and in severity is still an unsolved problem 20 years later.⁹⁶ Although the key importance of evictions as a cause for homelessness are known and they are accepted to be interfering in various human rights, latest examples – like the

⁹³ Busch-Geertsema et. al., 2010, pp. 49-51.

⁹⁴ ECSR, Digest Case Law, p. 172.

⁹⁵ Eviction is also identified to be the main reason for homelessness in Austria, see: Schoibl, 2009, pp. 215-221.

⁹⁶ Langford, 2008, pp. 260-264: The Hungarian Constitutional Court ignored the existence of a right to housing at the international level and preferred property rights over social rights: the requirement to evict was even given priority over the best interest of children, which were to be given into state care after their parents lost their home.

systematic evictions from Roma in France⁹⁷ or the mass evictions actually taking place in Spain⁹⁸ – show, that the protection for individuals affected is currently insufficient.

Transitions from institutional living

Beside evictions there are other situations where the state has a responsibility for persons becoming homeless. Persons in transition from institutions, like prisons, child/youth custody or hospitals are particularly vulnerable to become homeless.⁹⁹ Depending on the institution and the situation of the individual, the state is to a certain extent responsible for their situation of homelessness, most obvious in the case of prisoners, who are forced by the state to give up their home in many cases.

The relation of homelessness and prison sentences was impressively described in a survey in Norway, where one third of the prisoners were homeless when they entered, but two thirds were homeless when they left prisons.¹⁰⁰ In the Austrian province of Salzburg, in 2002 approximately 45% of the persons released from prisons did not have a proper accommodation after release.¹⁰¹ A positive obligation for state authorities to protect prisoners against homelessness would mean that the state either has to ensure that they do not lose their home during their stay in prison or to ensure that they have affordable standard housing available when they leave prison.¹⁰² A similar entitlement to be protected against homelessness could be given to young persons growing up in institutional care, who are particularly vulnerable to become homeless after leaving the institution. Such individual right to be protected against homelessness in vulnerable situations is justified because otherwise the state directly causes homelessness through prisons and institutional care. Such protection for prisoners can be also supported by the argument that there is an increasing recognition of the importance of stable accommodation in the rehabilitation and prevention of re-offending.¹⁰³

⁹⁷ The evictions of Roma in France, which took place in summer 2010, are now subject of two complaints before the ECSR: COHRE v. France, collective complaint no. 63/2010 and ERTF v. France, collective complaint no. 64/2011.

⁹⁸ See Chapter 4.

⁹⁹ Busch-Geertsema et. al., 2010, p. 50; Frazer/Marlier, 2009, p. 3f: “*In terms of preventing homelessness, two approaches are particularly evident: developing initiatives to reduce the number of evictions and increasing support for people leaving institutions to access suitable housing.*”

¹⁰⁰ Busch-Geertsema et. al., 2010, p. 35.

¹⁰¹ Schoibl, 2009, p. 216.

¹⁰² Norway already reacted to this problem and reports that no one should be required to stay at an emergency shelter after release from prison or discharge from an institution. This shows that the proposal for such protection of prisoners is not impossible to implement, see: National Report on the Implementation of the Revised European Social Charter (Norway), 02 May 2011, p. 59.

¹⁰³ FEANTSA, Ending Homelessness, p. 13.

To comply with such an obligation, the state would have to show, that all efforts were made to protect the individual. But in cases where the state has made all reasonable efforts, but the individual ends up being homeless for reasons beyond the scope of action of the state, there shouldn't be a violation to avoid that the provision does not put an impossible burden on the authorities. Of course, this shall not be used as an excuse of a lack of quality of the services and the support offered.

Positive obligations to protect would significantly increase the potential of housing rights to prevent homelessness and give the persons threatened by homelessness the remedy to claim their right before being homeless and before suffering the negative effects of this situation. Traumatization, health problems, stress and other forms of individual suffering could be avoided; for the state authorities such strong protection for the individual in the short term would be a difficult task, but in the long term, the number of homeless people could for sure be reduced and the expensive and difficult service provision to manage homelessness would shrink significantly. Such right would in fact mean that the "second generation" right to housing would be applied like the first generation civil and political rights and have a similar character. Homelessness could to a certain extent be made "illegal" that way.

3 Homelessness and housing exclusion in the European Union's social policy

In 2008 the European Parliament adopted a declaration on ending street homelessness. The Members of Parliament called on the Council to agree on a commitment of all Member States to end street homelessness by 2015 and on the Commission to develop a framework definition, to gather data and to report on progress made by the Member States. Further, the parliament urged the Member States to develop winter emergency plans.¹⁰⁴ In December 2010, the end of the European Year for Combating Poverty and Social Exclusion, the European Parliament adopted a *Written Declaration on an EU homelessness strategy*. Homelessness is considered to be “*an unacceptable violation of fundamental human rights*”, therefore the Parliament repeats its request and calls on the Council to make a commitment to end street homelessness until 2015. The Commission is called to develop an ambitious strategy and to provide support for the member states whereas Eurostat is called to collect data on homelessness. The MPs also list priorities for action: no one sleeping rough, no one living in emergency accommodation for longer than the period of an ‘emergency’; no one living in transitional accommodation longer than is required for a successful move-on; no one leaving an institution without housing options and no young people becoming homeless as a result of the transition to independent living.¹⁰⁵

The two declarations on ending street homelessness and the development of a European homelessness strategy are not the first attempts to deal with the issue at European level. Already some years before, the problems of homelessness and housing exclusion have become European policy issues.¹⁰⁶ Within the social inclusion process in the Lisbon and the Europe 2020 strategies, homelessness and housing exclusion have gained more attention at EU level and have become important questions of the European Union's social policy. As the EU is the most important and powerful “supragovernmental” player in Europe, it is important to analyse its approach towards homelessness and housing exclusion and its relations to other regional organisations like the Council of Europe. This chapter seeks to examine the development of the EU's anti poverty and social inclusion strategy and will critically analyse the methods – the Open Method of Co-ordination (OMC) – objectives and measures set on EU-level in relation to homelessness and housing exclusion.

¹⁰⁴ European Parliament, Written Declaration on ending street homelessness, 2008.

¹⁰⁵ European Parliament, Written Declaration on an EU homelessness strategy, 2010.

¹⁰⁶ The term “housing exclusion” is used in the context of the EU social policy, meaning a situation where people live in substandard housing conditions, see for example: Synthesis Report (France), 2007.

3.1 The European Union's Social Policy and the development of strategies against poverty and social inclusion

The European integration process had economic integration in its focus from the beginning which was later completed with political integration. Social integration has not been included among its main goals and therefore the European Community, later the European Union had no regulatory competence in the social field; social policy and regulation of social matters has been left within the competence of the member states.

The consequences of the common market and the fear that the liberalisation could undermine the achievements in the area of social policy in some member states made clear that economic and political integration is not possible if social integration is entirely neglected.¹⁰⁷ This led to the emergence of the idea of the “social dimension” of the European integration and to the development of a more coherent social policy by the 1980s. At the end of the decade (December 1989) this led to the adoption of Community Charter of Fundamental Social Rights of Workers in order to counterbalance this tendency of undermining standards at the national level.¹⁰⁸

From the beginning of the 1990s the common European policy also started to deal with the phenomenon of poverty and social exclusion on the European level and to develop common objectives in the social fields. Starting with the Council's recommendations on common criteria concerning sufficient resources and social assistance in social protection systems in 1992, it was acknowledged that social exclusion is more prevalent than before in the EU. Social Exclusion was considered to be an obstacle from participating in social and economical life.¹⁰⁹ The Council noted that growth alone is not sufficient to reach social inclusion and therefore recommended the member states to establish a minimum income (or a functional equivalent). It also set up a system of exchange of information and experiences – the “*embryonic form*” of the Open Method of Co-ordination (see below).¹¹⁰

Already the Treaty of Rome (1957) included a Title (Title III) on Social Policy, renumbered, re-named and broadened by the Maastricht Treaty¹¹¹, stipulating the task (as distinct from the

¹⁰⁷ Bercusson et al., 1997.

¹⁰⁸ Horváth/Ódor, 2010, pp. 241-245.

¹⁰⁹ European Council, Recommendation on common criteria concerning sufficient resources and social assistance in social protection systems, 24 June 1992.

¹¹⁰ Ferrera/Matsaganis/Sacchi, 2002, pp. 228-229.

¹¹¹ Treaty on European Union, 29 July 1992 (Maastricht Treaty), Title VIII on Social policy, education, vocational training and youth.

“objectives”) of the Commission to “promote co-operation” between Member States in certain fields. These fields covered only the employment area and social security.

The Treaty of Amsterdam (1997) has made a significant progress by the amendment and broadening this of this Title (now as Title IX). In Art. 136 it included the “promotion” (and not only the promotion of co-operation) of certain areas as one of its “objectives”. Furthermore and significantly for the topic of this thesis the fight against social exclusion is explicitly mentioned in the Treaties for the first time. Member states should therefore be supported by the Community in the field of inclusion to the labour market and in the development of cooperation between them. The Commission was given the task to encourage this cooperation between the member states and to facilitate coordination.

In 1999 the Commission issued a Communication which introduced a concerted strategy for modernising social protection, which had four key objectives. One of them was to promote social inclusion.¹¹²

The 2008 Treaty on the Functioning of the European Union (TFEU)¹¹³ after Lisbon complemented the areas of exclusive competence and subsidiarity by establishing in Art. 4 the shared competence between the Member States and the institutions of the European Union in some areas of social policy. The Lisbon Treaty also established the principle of conferral in Art. 1 TEU, which states that the Member States create among themselves a Union on which they “*confer competences to attain objectives they have in common.*” This means that competences which were not conferred upon the Union by the Member States remain at the national level (Art. 4(1) TEU). The principle of proportionality limits the action of the Union. Art. 5 (4) TEU states that “*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*”

In Art. 9 of the new treaty, the fight against social exclusion is listed among the fundamental principles which have to be taken into account in the action of the Union. This means that the Union, as before, can and should be active in these areas, but these actions are only of a complementary nature in order to encourage measures at the national level and promote coordination between the member states (Art. 153). The measures taken by the EU institutions must not aim towards a harmonisation of national systems as the Member States still define the fundamental principles of their social protection systems (Art. 153§4).

¹¹² European Commission, A Concerted Strategy for Modernising Social Protection, 14 July 1999.

¹¹³ The Treaty on the Functioning of the European Union, together with the renewed, significantly amended Treaty on the European Union are called now the „Lisbon Treaty“. The third, separate part of it is the European Union’s Charter of Fundamental Rights, as adopted in 2007.

The Lisbon Treaty didn't really change the EU's social competences, although *Pochet and Degryse* see a potential for the development of a framework for social improvement, if there would be the will to do so.¹¹⁴

3.2 The “fight against poverty and social exclusion” in the Lisbon strategy

The analysis of the EU's social policy in the decade of the Lisbon strategy aims to show the two contradicting trends. At the beginning, there was a big and broad emphasis on the social field including a strong focus on poverty and social exclusion. But reality hit back. After the Lisbon strategy had turned out to be ineffective, the emphasis on poverty and social exclusion decreased and the financial and economic crisis did the rest to refocus EU policy on economic growth, stability and employment. As will be shown below, housing (especially homelessness) survived this reorientation and can still be found in a quite prominent position within the social agenda. Despite this backlash in the efforts against poverty and social exclusion, it is important to present this part of the Lisbon strategy because it shifted the EU policy on homelessness and housing exclusion. One of the main features of this decade's social inclusion process is the Open Method of Co-ordination, a new form of governance, which will be described and examined critically in relation to housing and homelessness.

3.2.1 The Nice-objectives

In 2000, the Extraordinary European Council in Lisbon defined a strategic goal for the decade 2000–2010: *“to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.”*¹¹⁵

This goal not only required measures in the fields of economic policy and employment, but also in the field of social policy. Within this field, the fight against poverty and social exclusion became a key objective.¹¹⁶ In the same year, the European Council issued the so-called Nice-objectives, which consist in four main objectives and several subordinated objectives.¹¹⁷ The Nice objectives put an emphasis on employment and access to resources and rights (1), social exclusion (2), support of vulnerable groups (3) and the mobilisation of

¹¹⁴ Pochet/Degryse, 2010, pp. 249f.

¹¹⁵ Lisbon European Council, Presidency Conclusions, 23 and 24 March 2000.

¹¹⁶ Litschel, 2009, p. 610.

¹¹⁷ European Council, Objectives in the fight against poverty and social exclusion, 13 March 2001, pp. 6f.

all relevant bodies (4). Housing is not listed as a main objective, although many detailed objectives are related directly or indirectly to housing.

Objective #1 (facilitating access to resources, rights, goods and services for all) contains the implementation of housing policies as an objective, in order to provide access for all to decent and sanitary housing, as well as the basic services necessary to live normally having regard to local circumstances (electricity, water, heating, etc.).

Objective #2 deals with the prevention of risks of exclusion and calls the member states to implement policies which avoid that life crises lead to situations of social exclusion, such as indebtedness, exclusion from school and homelessness.

The support for the most vulnerable and those living in persistent poverty in *objective #3* undoubtedly includes homeless people and must therefore also be seen in connection to homelessness policy.

Under *objective #4* – the mobilisation of all relevant actors – participation and self-expression of people living in poverty and social exclusion are brought in.

3.2.2 The Open Method of Co-ordination

To implement the strategy and to achieve the strategic goals, a new instrument of governance was chosen: the Open Method of Co-ordination (in the following OMC): a voluntary, flexible and decentralised form of cooperation.¹¹⁸ It was adopted with two main goals: first, to harmonize national goals and policies in areas where the EU had no regulatory competence and second, to correct the democratic deficit of EU level regulation which has been an object of criticism more and more since the 1990s. The introduction of the OMC aimed is to spread best practice and to reach greater convergence. EU-level guidelines and specific timetables to achieve certain goals were set up and indicators and benchmarks were established to be able to compare country situations. Mechanisms for periodic monitoring, evaluation and peer review for mutual learning were created.¹¹⁹ In practice this means that the OMC is a method to combine national action plans (in the following NAPs) issued by the member states and support offered by the Community, which develops action programs and issues summary reports based on these NAPs to identify best practices and innovative approaches.¹²⁰ The OMC was applied in several areas, primarily in the field of employment, social security, and not at least in the fight against poverty and social exclusion having the advantage for the

¹¹⁸ Eurostat, 2010, p. 8.

¹¹⁹ Ferrera/Matsaganis/Sacchi, 2002, pp. 229-231.

¹²⁰ European Council, Objectives in the fight against poverty and social exclusion, 13 March 2001, p. 5.

Member States that it differs from the traditional Community method, because there are no binding rules and no sanctions.¹²¹

According to *De la Porte* mostly to those areas of policy which are traditionally thorny, first because they are matters of national sovereignty, second because effective policies in these areas – like social inclusion – are difficult to devise.¹²² But there are differences between the various OMCs, for example between the OMC in the social inclusion process and the one applied for the employment strategy. Compared to the latter, the OMC for social inclusion does not contain recommendations to the member states and they are not obliged to implement the common objectives into national policy. Although the OMC is a soft law method it is a kind of policy intervention which has a strong potential of conditioning national policies towards a common direction.¹²³

Beside the Commission, the Social Protection Committee¹²⁴ is the second driving actor in the OMC. Together with the Commission, it assesses the NAPs, but more important its main task is to develop the social indicators, for which there is an own sub-group under the Committee. The Committee is a group of government representatives, usually coming from national ministries of social affairs or employment. *Spinnewijn* calls the Committee a weak body because of a lack of expertise in some fields, for example this is the case within the topic of homelessness. The consequence is that the Commission often remains the only strong player.¹²⁵

3.2.3 The backlash to growth and employment

In 2004/2005 the evaluation of the Lisbon strategy was not satisfying at all.¹²⁶ Economic growth and the employment rate did not develop as expected and the number of people living in poverty in Europe could not be reduced. “*A new start for the Lisbon strategy*”¹²⁷ was needed and a new Social Agenda 2006-2010 was issued.¹²⁸ The need for “*urgent action*” led to a revised Lisbon strategy and a re-focus on growth and employment without delay.¹²⁹ As a

¹²¹ Nilssen, 2009, p. 72.

¹²² De la Porte/Pochet/Room, 2001, p. 302.

¹²³ Ferrera/Matsaganis/Sacchi, 2002, pp. 282-232.

¹²⁴ The SPC is an intergovernmental body representing the interests of the different member states in the Inclusion OMC.

¹²⁵ Nilssen, 2009, p. 76f.; Spinnewijn, 2009, pp. 303-304.

¹²⁶ See the report prepared by a high-level group chaired by Wim Kok, *Facing the Challenge: The Lisbon Strategy for Growth and Jobs*, November 2004.

¹²⁷ European Commission, *Working together for growth and jobs. A new start for the Lisbon strategy*, 02 February 2005.

¹²⁸ Litschel, 2009, p. 612f.

¹²⁹ European Council, *Presidency Conclusions*, 22 and 23 March 2005, p. 2.

result of this refocusing, the original broad approach to combat poverty and social exclusion, which explicitly named housing, almost disappeared. Objective #1.1 (participation in employment) can still be found in the renewed strategy, but decent housing, necessary resources to live a life in dignity or the prevention of poverty and exclusion did not appear in the new documents anymore. The credo is “*Growth and employment making for social cohesion*”¹³⁰; the inclusion in the labour market is the main objective, the fight against poverty and social exclusion is reduced to access to work and vanished into thin air as an independent objective in the EU’s political agenda.¹³¹

The reform also changed the OMC: the former National Action Plan for social inclusion and the one for social protection were combined into National Strategy Reports on Social Protection and Social Inclusion.¹³² The Commission issued new objectives for the now joint OMC. In the field of social inclusion “*a decisive impact on the eradication of poverty and social exclusion*” shall be made through the promotion of participation in the labour market, access to basic resources, rights and services and a good coordination and involvement of all relevant actors at all levels.¹³³

3.3 Social inclusion in the Europe 2020 strategy

Replacing the Lisbon strategy from 2000, ‘Europe 2020’ is the European Union’s new strategy “*for jobs and smart, sustainable and inclusive growth*”. It is meant to help recovering from the economic crisis and get stronger “*by boosting competitiveness, productivity, growth potential, social cohesion and economic convergence.*”¹³⁴

The strategy contains five headline targets which will guide the actions of the Union and the Member States: employment; improving the conditions for innovation, research and development; meeting climate change and energy objectives; improving education levels and promoting social inclusion in particular through the reduction of poverty.¹³⁵ For the promotion of social inclusion/reduction of poverty the aim is to “*lift at least 20 million people out of the risk of poverty and exclusion*”¹³⁶.

¹³⁰ European Council, Presidency Conclusions, 22 and 23 March 2005, pp. 9-11.

¹³¹ Litschel, 2009, pp. 617-619.

¹³² Ibid., p. 613.

¹³³ European Commission, Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union, 22 December 2005, p. 5f.

¹³⁴ European Council, Conclusions, 17 June 2010, p. 2.

¹³⁵ Pochet, 2010, pp. 141f.; European Council, Conclusions, 17 June 2010, p. 2.

¹³⁶ European Council, Conclusions, 17 June 2010, p. 12.

Similar than in the strategies developed before, the Member States have no obligations under this strategy and are free to set their national targets and priorities. To reach the goal of smart, sustainable and inclusive growth and support the Member States, the Commission developed seven “Flagship Initiatives”. Two of them are attached to inclusive growth: "An Agenda for new skills and jobs" focuses on employment, labour market and productivity. The objectives of the second one, the "European Platform against Poverty", are strengthening economic, social and territorial cohesion, raising awareness, recognising the fundamental rights of people living in poverty and social exclusion and enabling them to participate actively in society and live a life in dignity. The initiative foresees that the Commission changes the OMC on social inclusion and social protection into a platform for cooperation, mutual monitoring and exchange of good practice. The platform aims at fostering the commitment by public and private players reduce social exclusion. Its rationale is the coordination of all policy areas which have an influence on poverty and social exclusion.

The member states are called to promote collective and individual responsibility in the fight against poverty and social exclusion and to define measures targeting the specific situation of groups, which are at a particular risk (naming one-parent families, elderly women, minorities, Roma, people with a disability and homeless persons).¹³⁷

Although housing and especially homelessness were given much priority in the years before, the EU 2020 does not mention homelessness as a top priority of the strategy, which is very much focussed on inclusion through growth and employment. The European Parliament’s call to include the objective to end street homelessness by 2015 was not followed.¹³⁸ But the Commissions Communication proposing the European Platform points out that homelessness and housing deprivation belong to the worst forms of poverty and that approaches to prevent and tackle homelessness remain an important part of the strategy for social inclusion. The Commission also issued an accompanying document which lists key initiatives under the new European Platform against Poverty and Social Exclusion. This document lists active inclusion, child poverty, Roma inclusion, homelessness and housing exclusion and financial inclusion as thematic priorities. The further development of measures and means against homelessness will take into account the outcome of the consensus conference on homelessness.¹³⁹

¹³⁷ European Commission, Europe 2020. A strategy for smart, sustainable and inclusive growth, 03 March 2010, pp. 16-18; Calandrino, 2010, p. 136.

¹³⁸ European Parliament, Written Declaration on an EU homelessness strategy, 2010.

¹³⁹ European Commission, The European Platform against Poverty and Social Exclusion, 16 December 2010, pp. 5-10.

The latter commitment is a crucial one: the extent to which the findings of this conference will be taken into account will have important influence on future homeless policies in Europe.

3.4 The European Consensus Conference on Homelessness

The European Consensus Conference on Homelessness was an event organised by the Belgian Presidency, the Commission and FEANTSA in 2010. Its aim was to establish a common understanding and diagnostic on key questions related to homelessness and to contribute thereby to the development of a common European strategy on homelessness. The conference dealt with six key questions. The outcome of the conference are non-binding recommendations issued by a jury of independent experts, which seek to provide a strong basis for measures against homelessness within the Europe 2020 strategy and the European Platform against Poverty and Social Exclusion. Related to the key questions the jury

1. recommends the adoption of the European Typology of Homelessness and Housing Exclusion (ETHOS, see Annex) created by FEANTSA to establish common definitions of homelessness;
2. concludes that homelessness can and should be ended and sets targets to achieve this goal;
3. calls for a housing led approach meaning that the focus should be on permanent housing and prevention through financial support;
4. calls for the empowerment and participation of homeless people to enable them to decide on their own;
5. sees the growing importance of the relation between homelessness and migration and states that nobody should be left in need in Europe and calls for a detailed study on the issue;
6. concludes that there is a need for an overall EU homelessness strategy and that such strategy must
 - a., reach all relevant field of policy such as housing, social affairs, health and employment;
 - b., allow participation of all stakeholders;
 - c., be based on data collection and research;
 - d., identify clear targets.

The jury calls upon the Member states to identify dates by which rough sleeping and long-term homelessness will be ended and prioritise prevention, quality services and access to affordable housing (support). The EU strategy serves to frame strategies at the national level and support, monitor and coordinate them.¹⁴⁰

¹⁴⁰ European Consensus Conference on Homelessness: Recommendations of the Jury, pp. 2f.

In its recommendations, the jury makes some references to housing rights in international human rights instruments. It is stated “*that homelessness represents a grave injustice and a violation of fundamental human rights that cannot be tolerated. Public policy should seek to progressively reduce, and to end homelessness.*” In the jury’s view, homelessness policy should aim at the realisation of housing rights without further specifying their scope or claiming that those rights need more acceptances and a better status in the Members States legal systems.¹⁴¹

The recommendations of the jury do not have any binding status. Therefore it will be interesting to follow, which of those recommendations are taken into account and which do not gain much importance. The question is not only if the Commission adopt these recommendations, but even more difficult, if the Commission is able to make the Member States accept them without being able to put any pressure on them. The first and basic step is the adoption of the ETHOS definition. Without the acceptance of this common language on homelessness and housing exclusion, the envisaged EU wide strategy against homelessness will fail in its very beginning.

3.5 Homelessness and housing exclusion in OMC Peer-reviews and Joint Reports

Although the scope of the anti-poverty strategy was narrowed in the wording of the documents, housing and homelessness not only remained important topics in the OMC for social inclusion, the focus on the issue even got stronger. The Joint Report 2005 already showed that housing and homelessness had become a (key) priority for some member states (especially France, Finland)¹⁴². In the third round of NAPs (2006-2008), access to housing and homelessness appeared as key priority, although still only one out of many priorities.¹⁴³ The Joint Report 2009 includes a chapter on access to housing and homelessness, where recent developments and efforts in the member states are described. For combating homelessness the report states that a coordinated policy approach between the areas of housing, social assistance, services, employment and health is needed. The important role of facilitating access to affordable housing through social housing policy and/or increased housing support, rent control, rent guarantees or tax rebates is mentioned as well. Although many states give priority to the issue, the targets they set themselves are quite different. Some

¹⁴¹ European Consensus Conference on Homelessness: Recommendations of the Jury, p. 9.

¹⁴² European Commission, Joint Report on Social on Social Protection and Social Inclusion 2005.

¹⁴³ Spinnewijn, 2009, pp. 303-309.

states set very concrete and specific targets (i.e. Finland: 50% reduction of long-term homelessness until 2011), others have broader targets which focus on the increase of service supply for homeless people. As in other reports before, the lack of comparable data is considered to be hindering the progress on national level as well as the cooperation on European level.¹⁴⁴ Other chapters of the report also establish relations to housing and homelessness, such as children's health, social ties and education, which is closely linked to a family's housing conditions.¹⁴⁵ The 2010 Joint Report points out the importance of the issue of homelessness and housing exclusion: *The crisis has aggravated poverty in its multiple aspects, for instance housing exclusion. Over the last decade, affordability, homelessness, social and housing polarisation and new forms of housing deprivation have been an increasing concern for public policy, which in this field often lacks adequate information and evaluation systems. Integrated strategies to address housing exclusion and homelessness have an important role to play in post-crisis policies, with a view to build cohesive and environmentally sustainable societies.*¹⁴⁶ According to Calandrino, this means a strong political commitment, although there are no recommendations under the Social OMC. The report points out the various aspects related to homelessness and housing exclusion:

- The importance of national strategies to raise awareness, improve coordination and implementation and to identify financial resources;
- The lack of data on homelessness in most member states is identified to be one of the main obstacles to develop effective policies;
- Social and public housing is considered to be one of the main solutions, but there are challenges because of excess demand and a low quality of housing stocks;¹⁴⁷

Within the peer-reviews, the topics housing and homelessness appear quite often. In 2010, two out of nine reviews dealt with homelessness. The peer groups dealt with the Finnish National Programme to reduce long-term homelessness and the Portuguese comprehensive and participative strategy on homelessness. In 2009 the Austrian approach to count homeless people was reviewed, in 2007 the French National Action Plan against Substandard Housing. In 2006 and 2005 the peer groups discussed the Norwegian and the Danish strategies to prevent and tackle homelessness; in 2004 the English “Rough Sleepers Unit” was under

¹⁴⁴ European Commission, Joint Report on Social Inclusion 2009, pp. 60-61.

¹⁴⁵ Ibid., p. 42.

¹⁴⁶ European Commission, Joint Report on Social Inclusion 2010 (draft), p. 3.

¹⁴⁷ Calandrino, 2010, pp. 134f.

review. Starting from 2004 up to the beginning of 2011 around 60 reviews were undertaken, six of them dealing with homelessness, one dealing with substandard housing.¹⁴⁸

3.6 The EU's social inclusion process: the way out of homelessness and housing exclusion?

Undoubtedly, homelessness and housing exclusion have played a role in the social agenda between 2000 and 2010 and will still continue to do so in the new European Platform against Poverty and Social Exclusion. But what can be expected from those political efforts? There are serious concerns about the social inclusion process, especially in the field of homelessness and housing exclusion. This does not only concern the fact that the Lisbon strategy failed to achieve its objectives and that the financial and economic crisis cannot be seen as the excuse for this failure.¹⁴⁹ The concerns against the EU's approach towards poverty and social exclusion in general and the topic of homelessness and housing exclusion in detail are various. They reach from the underlying rationale over the questioning of the OMC as an effective instrument of governance to the neglected follow-ups of commitments, statements and common findings. These various weaknesses of the EU's approach towards poverty could leave the impression – I exaggerate – that the “efforts” made are not more than wasted paper and lip-services.

3.6.1 The materialistic foundation of the EU's social inclusion strategies

It is important to keep in mind, why the EU is developing strategies against poverty and social exclusion. Although other writers¹⁵⁰ do not pay much attention to this question, it is in my opinion crucial to analyse the underlying rationale of political strategies to understand its developments and outcomes. Although the EU's strategies, Lisbon and the EU 2020, have a more or less social content, they are still economic strategies: the social objectives seek to improve the economic performance of the Union and do not at first serve the well-being of all citizens. Analysing the rationale of the strategies, I will argue that they need a normative foundation and that the EU needs a commitment to social justice.

The context of being part of an economic strategy influences the foundation and framing language of the social inclusion strategy. In contrast to the ESC, the overarching goal of

¹⁴⁸ All peer-reviews can be downloaded from the following webpage: <http://www.peer-review-social-inclusion.eu/peer-reviews>.

¹⁴⁹ Pochet, 2010, p. 3.

¹⁵⁰ For example Kenna (2005b) who does not pay attention to that question, although he is dealing with the EU social inclusion process from a human rights perspective.

fighting poverty and social exclusion in the EU context is not framed as normative-moral obligation to secure basic human rights to the citizens, although it cannot be said that ethical considerations are absent. But in fact, the social inclusion strategy is based on and legitimized by the material-economical discourse about the sustainability of the welfare state. How dominant this discourse is, can be demonstrated with two examples. From the perspective of sustainability, Joint Report 2006 speaks about the long-term dimensions of social inclusion and expresses the need to focus on child poverty, because *“poverty and exclusion pass from generation to generation and Europe’s future human resources are diminished.”*¹⁵¹ It is striking, that even the objective of combating child poverty is framed in a materialistic language.¹⁵² The second example is taken from a general description on the objectives of the Lisbon strategy in a Peer Review on substandard housing and reads as follows: *“The Commission estimates that the costs of the under-use of available human resources and wider costs of wastage in the European economy, including poverty and social exclusion, are huge. According to the Commission ‘These are cancers at the heart of European society’.”*¹⁵³

Although this statement is certainly true, it makes perfectly clear what was said before: the materialistic discourse is dominant in the framing of the strategy; economic considerations are given much more space than references to human dignity. The economical development is the centre of the strategy, not the well-being or the rights of the citizens. The concerns about sustainability and cost efficiency – which have their good reasons – can be also found in peer reviews which deal with homeless policies. Although not taking too much space the participants in peer reviews put an emphasis on the cost efficiency of new strategies¹⁵⁴ while on the same time they give less emphasis to the question if a new strategy serves better the rights, interests and dignity of homeless people.

Within the framing idea of the discourse about the sustainability of the welfare state, Nilssen identifies two programmatic ideas within the social inclusion strategy. The primary idea is that employment is the key to combat social exclusion. The core elements of this active social inclusion through work are an active labour market policy to increase employability, financial incentives to work and the removal of obstacles which hinder entering the labour market. A redistribution or social justice discourse which claims rights to certain resources does not play an important role.¹⁵⁵

¹⁵¹ European Commission, Joint Report on Social Exclusion and Social Protection 2006, p. 6.

¹⁵² Nilssen, 2009, pp. 86-89.

¹⁵³ Synthesis Report (France), 2007, p. 4.

¹⁵⁴ Synthesis Report (Portugal), 2010, p. 27f. The cost-effectiveness of the Portuguese strategy is listed as a ‘key lesson’, p. 33.

¹⁵⁵ Pochet, 2010, p. 143; Nilssen, 2009, pp. 77-82.

The second programmatic idea within the discourse is the idea of targeting social services which is mainly lead by considerations of efficiency in the distribution of resources. Targeting, i.e. through means testing should ensure, that those who can work are brought into employment through incentives and deterrents and that only those who are not able to work get benefits. This approach can have consequences for the citizens because the growing importance of local discretion and benefits conditions can interfere in their rights and diminish legal security.

The two dominant programmatic ideas demonstrate very well that social policy to a large extent is reduced to labour market policy. Active inclusion and targeting of social services are not necessarily contradictory to social rights, but they bear a potential danger through their sole dominance in the policy, i.e. through obstructing debates about redistribution or social justice. But it is very likely that the social inclusion strategy will not deliver satisfying results ignoring this issue: it is highly questionable to link the whole strategy to a high level of economic growth, which will result in more jobs and solve the problem of social exclusion automatically. Looking at this general basis assumption of the EU strategy from a social rights perspective, one has to ask: How can be made sure that even the poorest and most excluded benefit from that economic growth? What happens if there is no growth?

Although focussing purely on the sustainability discourse in the legitimisation of the social inclusion strategy must be seen critical from a human rights perspective, there is also some advantage in this approach. The materialistic economical legitimisation of the social inclusion strategy can be seen as a precondition for the important role it was given, because the member states were rather ready to accept a materialistic economical approach towards social policy (which is their competence) than a normative-moral one.¹⁵⁶

One could argue that it doesn't matter, if a strategy against poverty is framed in a materialistic or in a normative language as long as it is able to improve the situation. This view would of course be too superficial. Poverty is in deed a waste of human capital, but it is first a human rights violation, especially in situations of homelessness. Growing poverty is of course a threat to the welfare state, but first it is – in its most extreme forms like homelessness – a threat to the lives and wellbeing of those persons who live in situations of poverty. If this is not acknowledged, the commitments made to eradicate poverty and the importance given to participation of those affected by poverty and social exclusion seem to be purely tokenistic.

¹⁵⁶ Nilssen, 2009, pp. 82-91.

The growing discontent with the EU shows that efficiency and economic considerations do no longer suffice to justify the European project.¹⁵⁷

3.6.2 The OMC as an appropriate method of governance

The Open Method of Co-ordination, especially in the field of social inclusion, is subject to many critiques. The many changes made in the OMC for social inclusion could lead to the interpretation, that either even the Commission itself wasn't always satisfied with the outcome and/or that there was a need to dress it up to make it more attractive, in the meanwhile arriving in the European Platform against Poverty and Social Exclusion.

One of the main and most fundamental arguments against the OMC concerns its soft nature as a volunteer process without obligations, especially if compared to the strict obligations member states have in other areas of policy. For example the Pact of Stability and Growth imposes a strong obligation to budgetary discipline on the member states which makes it unlikely that the member states will follow volunteer recommendations to spend more money in the field of social policy.¹⁵⁸ The absence of obligations poses the risk that Member States only keep their constructive attitude as long as the socio-economic context is favourable and that the common objectives are abandoned or limited if difficulties occur.¹⁵⁹

In addition, at least two fundamental elements of the governance method are subject to serious doubts: peer pressure and mutual learning. It is difficult to imagine how states as abstract entities feel peer pressure, because the state officials present in the process are not the peers which are compared to each other. Therefore it can be doubted, if there is any meaningful "sanction" or pressure resulting from the peer reviews.¹⁶⁰

The process of mutual learning within the OMC – which is considered to be the key mechanism – is questioned by *Mabbett*. She points out that a process of mutual learning not only requires the agreements on common objectives and therefore criticises the outcome orientation of the OMC. In her view, it is a failure of the OMC not to facilitate learning about the policy instruments linked to the objectives. Although the free choice of policy measures is seen as a strength of the method by many, she argues that this approach bears the danger that the Member States accept the common objectives without changing their policies and therefore without having this an impact on the national level: "*it will turn out to be a symbolic*

¹⁵⁷ Delanty, 2008, pp. 679-689.

¹⁵⁸ Attia/Bérenger, 2009, p. 9; Pochet, 2010, p. 143; De la Porte/Pochet/Room, 2001, p. 299.

¹⁵⁹ Begg/Berghman, 2002, p. 191.

¹⁶⁰ Kenna, 2005b, p. 79.

process in which declarations about goals are made without mechanisms for adopting the instruments necessary to achieve them.”¹⁶¹

The mentioned doubts on the impact of the social inclusion process on the national level are indeed another aspect of criticism, which is shared by many writers.¹⁶² The OMC is considered to be a forum for dressing up often poor national policies using a new EU language without changing the substance.¹⁶³ The limited impact can be shown on the example of Hungary: in a peer review 2010 Hungary emphasised that the new government will develop a new mid-term action plan to reduce homelessness.¹⁶⁴ In the country’s capital Budapest, in spring 2011 this “reduction” of homelessness ended up in the annulment of contracts with service providers for homeless and a new regulation criminalizing people sleeping rough with fines up to 200€ or imprisonment in case of inability to pay. Although there are thousand of people sleeping rough in Budapest, the city does not provide one more bed.¹⁶⁵

Even those who are optimistic about the potential of the OMC, deliver arguments of concern. *Begg* and *Berghman* say that the mechanisms of the method are not of that much importance, rather it is the political will of the actors which makes the OMC work or not.¹⁶⁶ Taking into account what was analysed before, this statement is certainly true. But the high dependence on the political will of the actors raises the question, if the OMC isn’t a too open governance method to deal with serious types of poverty, which violate fundamental rights and require immediate measures.

If the OMC is applied to special issues like homelessness and housing exclusion, the above mentioned concerns are of course valid too and new, specific problems arise. Dealing with homelessness, there are several limitations the OMC is confronted with.

First, the OMC brings together representatives from the national level, but homelessness and housing issues are not under their competence, which rather lies in another ministry or more likely at the regional or local level.

Second, the gathering of comparable data and the development of a common indicator to measure progress is vital for the OMC. The EU-SILC¹⁶⁷, gathered from household surveys, does not deliver the relevant data. There are some indicators which are useful and give

¹⁶¹ Mabbett, 2007, p. 79.

¹⁶² Ferrera/Matsaganis/Sacchi, 2002, p. 237, but as well Kenna 2005b, Mabbett, 2007 or Pochet, 2010.

¹⁶³ Kenna, 2005b, p. 79.

¹⁶⁴ Synthesis Report (Portugal), 2010, p. 22.

¹⁶⁵ FEANTSA, FEANTSA Opposes Decree Criminalising Homelessness in Budapest, 2011.

¹⁶⁶ Begg/Berghman, 2002, p. 192.

¹⁶⁷ European Union Statistics on Income and Living Conditions.

information about substandard housing and housing costs: the overcrowding-rate, the housing cost overburden rate or the severe housing deprivation rate. Some items listed in the material deprivation rate¹⁶⁸ are also related to housing. But there is no indicator measuring how many people sleeping rough or in temporary shelters etc. as the survey is based on households. Although this problem was discussed for many years, there has not been found a solution to this challenge so far.

Third, there is a lack of thematic expertise in special topics such as homelessness within the Commission and the Social Protection Committee. This lack of knowledge leads to the fact that easy topics are chosen, where there is a high level of consensus and which are focussing on the OMC itself, such as stakeholder participation. Therefore, the process of the OMC seems to get more importance than the content.¹⁶⁹

Beside this principle concerns, *Spinnewijn* sees a striking lack of strategic intervention by the Commission within the OMC because the attempts to develop an EU stream of action on homelessness is insufficient without any attempts to cluster the funded projects and peer reviews. The focus on homelessness under the OMC is neither strong nor strategic enough to create a European dynamic to seriously face the challenges. Taken together with the absence of follow-up mechanisms and initiatives after the thematic peer review on homelessness, this questions the effectiveness of mutual learning among the participants. The role of the Commission in the process is subject to criticism as well. Beside the lacking thematic expertise, especially its reluctance to focus on too special social problems is seen to be a reasons for the OMC's ineffectiveness. The Commission instead prefers the option to keep the OMC thematically broad and sees the method as an instrument to develop and establish a European Social Model, which is a quite unrealistic objective as social policy is still the competence of the Member States and no fact are pointing to a change of this situation in the near future.¹⁷⁰

Although the social inclusion process has had the positive effect to raise questions related to poverty and social exclusion to the political agenda, the discussion above shows, that the progress made and the effects on the national level were very limited. If one reads the various documents related to social inclusion, it is striking how the OMC is presented to be the panacea which will deliver solutions for various social problems. But especially the example of homelessness shows that the OMC cannot be applied successfully to all fields of social

¹⁶⁸ For explanation of these indicators see:

http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Material_deprivation (consulted on 10 March 2011).

¹⁶⁹ Calandrino, 2010, pp. 128-130; Spinnewijn, 2009, pp. 303-305.

¹⁷⁰ Spinnewijn, 2009, pp. 305-307.

policy. The example of homelessness is so striking because in this field the OMC lacks one of its key elements, which is a set of common indicators. In a provocative way, after the method was applied for more than ten years now, one could conclude that the OMC has become an end in itself, a method which is applied to social problems where it is incapable to deliver progress and which has become more important than the objective it seeks to obtain. Although this statement may be a little bit exaggerated, the arguments above clearly justify a conclusion in this direction.

3.6.3 The “outcome” of the OMC in relation to homelessness and housing exclusion

The question of the efficiency, the “outcome” or the influence of the social inclusion process on the Member States is a difficult one (not at least due to the missing indicators to measure progress), which is answered very pessimistic by many. But despite the many open questions and failures of the social inclusion process and social policies at EU level, there is also some outcome. The above mentioned European Consensus Conference on Homelessness is certainly a big step forward. How big depends on the degree to which the recommendations are followed.

Analysing the peer reviews in relation to homelessness and housing exclusion, there are two possibilities of what happens to a topic in the future peer reviews: substandard housing for example was raised in one peer review¹⁷¹, commitments were made etc. but the topic never appeared again and it is very unlikely that there has been follow up. The issue is also not given any particular importance within the European Platform.

On the contrary, in relation to homelessness, there is one trend which occurred in all peer reviews and which seems to have been promoted through the OMC. The experiences of the mutual exchange in the peer reviews dealing with homelessness led to a programmatic shift within homeless policies: from staircase approaches to so called housing first or housing-led approaches. Staircase services are used in many countries to support homeless people. They are based on temporary accommodation and services to make the homeless people ready for independent living. The underlying assumption is that homeless people are not able anymore to live independently and therefore have to undergo a kind of step-by-step rehabilitation before they finally have their own home again. This staircase services necessarily include the possibility to take steps backwards, even back to the street or the possibility that it takes a very long time, until somebody is considered to be “ready”. This kind of services was often

¹⁷¹ Synthesis Report (France), 2007.

criticized for imposing too high expectations on homeless people and perpetuating homelessness and of being expensive in maintaining and relatively poor in the outcome. The alternative approach to support homeless people is the so-called housing first or housing-led approach. This approach acknowledges that housing is a fundamental need and right and supports homeless people to live in ordinary housing by providing services according to their needs.¹⁷²

The peer-reviews dealing with homelessness reflect a more or less radical shift to such housing first approaches in the Member States. Finland is the most extreme example by setting itself the objective to change the system completely into a housing first system and eliminating temporary accommodations. Respecting the right to privacy in the Finnish constitution, every homeless person should immediately get into supported housing, which means having the own keys for the own room, but being able to rely on support if needed.¹⁷³ Ireland follows a similar objective of getting rid of temporary accommodation, while Denmark is also introducing housing-led services, but still using temporary housing beside. In Lisbon there was also a housing-first pilot project.¹⁷⁴

Already in 2006 the participants of the peer review agreed that a housing first approach is desirable¹⁷⁵ and the recommendations after the European Consensus Conference on Homelessness also include a strong focus on these kinds of services.¹⁷⁶ The question is if the all the Member States will follow this programmatic shift which has far-reaching consequences for the provision of services for homeless people. This new approach is very likely to be included in a future common strategy, which the European Parliament and the Consensus Conference called for. This would mean that the Member States have to change more than just the framing language of their strategies but have to set up new systems of service provision for homeless persons. As the Commission cannot impose anything on the member states under the European Platform against poverty and social exclusion, it is hard to imagine that all Member States will follow the new approach and change their system in the near future.

Although dealing with homelessness at EU level brought a programmatic shift towards housing-led policy approaches in some Member States, the impact of commitments and objectives set at EU level is very low on the national level. Due to its soft nature and other

¹⁷² Busch-Geertsema et. al., 2010, pp. 71f.

¹⁷³ Synthesis Report (Finland), 2010, pp. 8-13.

¹⁷⁴ Synthesis Report (Portugal), 2010, pp. 23-29.

¹⁷⁵ Synthesis Report (Norway), 2006, p. 17.

¹⁷⁶ European Consensus Conference on Homelessness: Recommendations of the Jury, pp. 14-16.

failures, the OMC in its current form cannot be perceived to be a proper governance method to promote the eradication of homelessness in Europe.

3.7 The role of housing rights in the EU's social agenda

The European Union seeks to promote universal human rights¹⁷⁷ and all Member States have ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Being included in the latter, housing rights therefore have a clear basis in the EU.¹⁷⁸ The EU Charter on Fundamental Rights (EUCFR) includes a provision (Art. 34§3) expressing that the EU “*recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources*”. The Charter is less an instrument to create new rights but more as a protecting shield for already existing rights against measures which could undermine them. This means that impact of the work of the European Commission is assessed also in relation to this article and that provisions concerning migrants, refugees and other third country nationals will have to be assessed in this relation as well.¹⁷⁹ Compared to the housing rights laid down in the revised ESC, one can observe that this provision is very limited only containing a right to housing assistance, which is only one amongst a number of housing rights in the ESC. The full range of housing rights, as laid down in art 31 of the revised ESC was until now only ratified by eight Member States of the EU.¹⁸⁰

The acknowledgement that there is a right to housing does not mean that such right plays an important role in the framing of new policies and strategies. On the contrary, the actors within the several OMCs seem to avoid framing their policy and goals in a human rights language and not even the provision included in the EUCFR found its way to the OMC.¹⁸¹ This is the case when it comes to the issue of homelessness and housing exclusion, but can be also shown in other areas of social policy.

Hervey analyses the EU *acquis communautaire* and the OMC in relation to the right to health. She finds that the relevant legal documents from the EU do not make any express reference to Art 11 ESC, even where policy measures fall within the scope of the right to health. According to her, there are two possible reasons for this failure to connect the EU policy to the ESC articles: 1. either this failure expresses that the right to health is effectively guaranteed within the member states and therefore there is no need to mention this right; or 2.

¹⁷⁷ See the Preamble of the Charter of Fundamental Rights of the European Union, 18 December 2000.

¹⁷⁸ Kenna, 2005b, pp. 59f.

¹⁷⁹ Kenna, 2006, p. 7.

¹⁸⁰ France, Finland, Italy, Netherlands, Portugal, Slovenia and Sweden ratified all three paragraphs, Lithuania did not ratify §3 (affordable housing for those who lack resources).

¹⁸¹ De Witte, 2005, p. 166; Kenna, 2005a, p. 453.

the non-connection is due to the division of competence between the EU institutions and the member states. The assumption that the right to health is effectively guaranteed is contradicted by the findings of non-compliance of the ECSR. The second argument is more likely to be the reason for avoiding references to human rights: if the Member States cede competence to EU in health care, this might mean that national welfare is no longer an issue under national competence and could lead to a move towards standardisation and a loss of control at the national level. The governments seem to be very concerned about their remaining competences and try to avoid that the market integration through EU law spills over to national welfare legislation. Surprisingly, within the OMC there are not even references to Art 35 of the EUCFR. Within environmental law, in measures concerning food safety as well as in protective measures like the anti-tobacco policy the linkage to a right to health are ignored.¹⁸²

In the field of homelessness and housing exclusion under the OMC for social inclusion, the same question on the role of housing rights within the EU's social policy leads to similar findings. Although the Commission acknowledges that "*access to affordable accommodation is a fundamental need and right*"¹⁸³, the role of housing rights and the references made to the existing human rights treaties and the obligations the Member States have under this treaties is at best limited, but more often not existent. This absence of a human rights language is both obvious in the documents framing the OMC for Social Inclusion or the European Platform against Poverty and Social Exclusion as such and in the outcome of the OMC, namely the synthesis reports of the peer reviews. The synthesis reports do not emphasise that housing is a basic human right and that the Member States have certain obligations, both under the ICESCR and the ESC. One good example is the issue of data collection in the field of homelessness, which the Member States are strictly (no elimination of the obligation because of scarce resources) obliged to under human rights law: State parties have "*obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion.*"¹⁸⁴ With respect to housing, this means the obligation to ascertain the full extent of homelessness and inadequate housing and to provide detailed information about homeless persons and

¹⁸² Hervey, 2005, pp. 305-332.

¹⁸³ European Commission, The European Platform against Poverty and Social Exclusion, 16 December 2010, p. 10.

¹⁸⁴ UN CESCR, General Comment no. 3, para. 11; The ECSR explains this obligation under Art. 31§2 of the revised ESC stating that a state "*must be in position to control the situation. The regular collection of data is a first step towards achieving this objective.*" (Conclusions, France, 2005, p. 46f.).

families, inadequately housed persons who lack access to basic amenities, persons living in illegal settlements and forced evictions.¹⁸⁵

A peer review in 2009 dealing with the difficulties of data collection is not mentioning these obligations, although all participating states have problems and Slovenia is presented as example for a complete failure in this regard.¹⁸⁶

In November 2010 there was a peer review assessing Portugal's national strategy on homelessness where the participating states found some difficulties in the strategy, but many positive elements which could be transferred to other states. But at least two very interesting facts related to homelessness were not mentioned: first, the positive fact that Portugal is one of the few countries which has ratified the complete Art. 31. And second, the negative fact that the country had some problems with the housing situation of Roma. Shortly before the peer review, a collective complaint filed by the European Roma Rights Centre was declared admissible by the ECSR, where Portugal was alleged to violate housing rights of the Roma population in a discriminatory way. The case did not only concern one or two families, but the extreme substandard living conditions of many Roma communities in various municipalities, some of them living in tents, others in an old slaughterhouse.¹⁸⁷ Although there was not a decision by the Committee yet, the problems must have been known to the actors within the peer review. But instead, the assessment of the Portuguese national strategy on homelessness does not even contain the word "Roma".¹⁸⁸

The 2007 peer review dealing with the French National Action Plan on Substandard Housing also avoids mentioning that France ratified Art. 31 of the revised ESC and that the ECSR found a violation of Art. 31§3 (because of inadequate availability of social housing) and that France failed to provide enough information to assess compliance with §1 (this provision deals exactly with substandard housing) and §2.¹⁸⁹ The two collective complaints¹⁹⁰ which were pending before the ECSR and which alleged violations of all housing rights in the revised ESC were also not mentioned. The rights of homeless persons or person living in substandard housing were not given much attention as well, although France established an opposable right to proper housing in the same year. The Danish representatives considered this to be an interesting issue: *"A very positive and transferable point from the French system is*

¹⁸⁵ UN CESCR, General Comment no. 4, para 13.

¹⁸⁶ Synthesis Report (Austria), 2009.

¹⁸⁷ ERRC v. Portugal, collective complaint no. 61/2010.

¹⁸⁸ Synthesis Report (Portugal), 2010.

¹⁸⁹ ECSR, Conclusions France 2005, pp. 44-50.

¹⁹⁰ International Movement ATD Fourth World v. France, collective complaint no. 33/2006 and FEANTSA v. France, collective complaint no. 39/2006 (the ECSR found violations of Art. 31§1, 31§2, 31§3 in both cases).

the legal right of every individual to be housed.”¹⁹¹ But in the end the point was not raised in the conclusion or within the lessons to learn.¹⁹²

Concluding this analysis, the result is quite disillusioning. The actors, who deal with homelessness and housing exclusion in the social inclusion process, are dealing with many issues which are related to the fundamental human rights of citizens and to the obligations of the Member States under the international human rights treaties they have ratified. But the social inclusion process appears to be a political platform which is almost completely free from rights and ethical or legal obligations of the actors involved. The volunteer and open process therefore does not contribute much to an effective realisation of housing rights. In my view, there is justified concern if the OMC because of its human rights deficit is not even undermining other efforts to strengthen the social rights of people living in Europe.

¹⁹¹ Synthesis Report (France), 2007, p. 21.

¹⁹² Ibid., pp. 31-33.

4 The Future EU policy on homelessness: based on housing rights?

Homelessness and housing exclusion have gained much attention in EU social policy over the last decade. There have been several peer reviews dedicated to the area and in 2010 the European Consensus Conference on Homelessness recommended the implementation of an EU-wide strategy against homelessness. Although the Commission agreed to take the jury's recommendations (see Chapter 3) into consideration in the framing of future policies, it is not sure that there will be such strategy developed in the near future. On the other hand, the commitment towards the objective of eradicating street homelessness is rising and European Parliament's declarations to end street homelessness and to adopt a European homelessness strategy gave it EU wide democratic legitimacy. At the time of writing it is not clear, which form such European policy on homelessness will exactly take, but it will for sure happen under the European Platform against Poverty and Social Exclusion, using the established governance method, the OMC and its tools like NAPs, reports and peer reviews.

In this Chapter I will first elaborate some reasons why there is a need to further develop a European policy on homelessness. I am going to argue that such policy, whatever strategies are implemented, need to be based on and include housing rights. Then, the added value of housing rights within EU policy will be argued and potential functions of housing rights will be proposed. Ultimately I will discuss different possibilities on how to include housing rights in the EU policy on homelessness.

4.1 A European policy on homelessness?

Why has the phenomenon of homelessness to be addressed at EU level, if housing policy is still the competence of the Member States and even very often situated at the local level? There are several reasons for the need of an EU wide approach.

First of all, globalisation and the European integrated market have weakened the states' capacity to regulate the markets. This development challenges national housing policies, which aimed to regulate the prices through rent control and public housing to make housing affordable and available for those who could not compete in the market or had a weak position. Therefore these changes are a threat to the effective realisation of housing rights because the states are losing their regulating function. The challenges cannot be faced at the

national level and are prevalent in the whole EU; and the EU has become the main player to determine the opportunities to steer the market.¹⁹³

Second, the growing migration of EU citizens within the Union is another relevant argument for a common European framework. It must be ensured that all of them enjoy the same level of access to social services and support in all Member States. In relation to homelessness, EU citizens still do not have access to temporary accommodation and basic services and some countries even repatriated homeless persons to their home country thereby ignoring that they were exercising the right to free movement as EU citizens.¹⁹⁴

Third, the exchange of good experiences, practices and results from research from one country can be very valuable for developing strategies in another. Although I heavily criticised the idea of mutual learning within the OMC in Chapter III, there is for sure a potential to learn from different experiences in the Member States. A European policy could facilitate this exchange of best practices.

And fourth it is clear that any strategy with clear objectives cannot develop its full potential if there is no monitoring of progress. A European strategy offers the possibility of an international supervision. Such supervision aims to avoid that a Member state fails to implement the common strategy, can detect failures and thereby contribute to improve the EU strategy itself as well as the implementation in the Member States.

A European policy on homelessness would in my view have the function of a common commitment to eradicate street homelessness and improve the housing situation in the EU and set the objectives and the framework for the Member States. It would not mean that every Member State has to implement the same strategies and measures. Within this framework, the Member States could develop their own strategies, the achievement of the objectives and the implementation of the framework would be supervised at EU level.

4.2 A rights-based policy including the promotion of individual enforceable rights

I am going to argue that an EU policy on homelessness needs to be based on housing rights. This would mean that housing is considered to be a fundamental human right and that the policy seeks to strengthen housing rights of the citizens in the Member States, including the promotion of individual enforceable rights.

¹⁹³ Kenna, 2005a present an extensive analysis of the impact of economic globalisation on housing rights.

¹⁹⁴ FEANTSA, 2011b.

It is not unquestioned, whether a homeless or housing policy should be based on rights or not. As was shown before, the EU policy on homelessness up to now was not at all based on rights and the growing importance of housing rights was not reflected there. Of course there are voices, like *Kenna*, arguing that a housing rights approach has to be developed in the EU, especially to counterbalance the market forces.¹⁹⁵ But the predominant opinion on the need of housing rights seems to be better represented by the view of *Frazer* and *Marlier*. They argue that the existence of enforceable housing rights is not necessary and state that “*it is evident that the lack of such guarantees does not necessarily result in a poor national performance in relation to HHE [homelessness and housing exclusion].*”¹⁹⁶

Concerning the latter statement, it is certainly the case that the overall situation regarding homelessness can improve without giving any housing rights to the citizens. But what is the benefit for the homeless individual if homelessness is reduced by 50%, but he/she is still sleeping rough and has no legal remedy to claim a decent accommodation? Homeless people are not one closed group where the situation of all its members is improving when the numbers of homelessness are reduced: it is the individual suffering from a violation of a fundamental human right. Strategies therefore must be based on individual rights to empower people and guarantee that nobody is left out. This is not possible without legal provisions protecting the individual, similar than for example in the case of torture, where nobody would be satisfied with an improvement of the general situation, as long as people are tortured. Laws at the national level must address these violations of the fundamental right to housing and provide for legal remedies when they occur.

Taking into account the absence of human rights language in the EU social inclusion process (see Chapter 3) there is not much hope that a future European strategy will include an emphasis on housing rights. But – as the example of disability legislation shows – the EU is not incapable to give its policies a normative basis, which is a precondition for the development of a rights-based approach based on human dignity. Unlike the social inclusion policy, which is predominantly framed in economic language (see Chapter 3), the disability legislation has a twofold basis: equality is on the one side viewed as a productive factor in a rational market-driven economy which helps to create wealth; on the other hand equality is seen as an end in itself and to secure human rights of the disabled.¹⁹⁷

To ensure that all efforts against homelessness are an end in themselves too, irrespectively of their economic effectiveness, a future EU strategy on homelessness must also have a double

¹⁹⁵ Kenna, 2005b, p. 44.

¹⁹⁶ Frazer/Marlier, 2009, p. 4.

¹⁹⁷ Quinn, *The ESC and EU Anti-discrimination Law in the Field of Disability*, p. 280.

foundation with an equally strong normative emphasis. It is certainly clear, that the establishment of a right to housing or a set of several housing rights is not a panacea to cure homelessness. Nonetheless I will argue that such rights first, can play an important role in the prevention and reduction of homelessness. I will then show that they have the potential to be used as “the new benchmarks”¹⁹⁸ of the common strategy and housing policies at EU and the national level. Ultimately, I will examine some proposals on how to include housing rights in the social inclusion process and possibilities on how the protection and monitoring at European level could be improved.

4.2.1 The role of housing rights in the prevention of homelessness

The prevention of homelessness was more and more emphasised both in research on homelessness and in housing policy. The analysis of the reasons for homelessness very often highlight that the continuing deregulation of the housing market is a main factor. In this regard, the weakened role of the state makes strengthened housing (and other social) rights more necessary to guarantee that all individuals enjoy them.¹⁹⁹ If these rights are guaranteed and protected they also have a preventive function.

With regard to the area of housing policy, the preventive function of housing rights is of huge importance due to the “double character” of housing. Housing is on the one hand a very important individual market commodity with a high business volume and a huge potential for profit. On the other hand, housing is a public good and basic human need, which requires state intervention.

The developments in the last decades tend towards a continuing commodification of housing. In the European context, housing policy traditionally meant that the state provides correctives to the housing market and seeks to satisfy the housing demand and the housing need.²⁰⁰ To a different extent in each state, this balancing function has decreased and the states have less and less ability to protect housing rights. The globalisation of a neoliberal economy has brought a paradigm shift away from the provision of social housing for large numbers of the population and an ideological opposition to social welfare forcing governments to deregulate the market and withdraw subsidies.²⁰¹

¹⁹⁸ I borrow this term from Padraic Kenna, see: Kenna, *Housing Rights: The New Benchmarks for Housing Policy in Europe?*

¹⁹⁹ Maastricht Guidelines, p. 692.

²⁰⁰ Bengsten, *Housing as a Social Right*, pp. 257-259.

²⁰¹ Kenna, 2008a, p. 430.

At the same time as the public money spent is getting less, speculation in housing increases the prices. The privatisation of large parts of the social housing stock is further aggravating the situation,²⁰² leading to serious problems with the affordability of housing not only for the poorest, but to a growing extent reaching the middle class. This affordability-crisis in housing is seen to be the main reason why the number of people sleeping rough on the streets is growing, and their “face” is changing: it is not the single, often alcoholic men, but more and more young people, women and children who find themselves in the streets.²⁰³ The financial and economic crisis and the recovery packages to overcome it had an additional negative effect on the affordability of housing.²⁰⁴

Another problem is related to the changes in the labour market. The shift towards more flexible forms of labour creates an increased risk of episodes of poverty, where the housing systems are not prepared or able to respond to.²⁰⁵

Financial risk-avoidance strategies adopted by housing companies also increase the number of homeless people because they have the effect that social housing is less available for those who would need it most, because tenants have to be reliable.²⁰⁶

These developments occur to a different extent in EU Member States. Spain can be seen as an extreme example, where these developments actually lead to a social crisis. Because the case is so recent shows well what can happen if the housing market is deregulated, I will shortly present in here. In Spain, speculation increased the prices for housing over years and the banks gave loans which were very unlikely to be paid back. But the “bubble” burst and prices fell. The consequences of this market development are mass evictions of people who cannot pay back their mortgage. Activists claim that 1.4 million families are expecting to be evicted and that currently around 270 evictions take place per day in Spain, amounting to some 15.000 families affected in the first trimester of 2011. The evictions are aggravated by high debts: if a flat is repossessed by the bank, the debt is not paid. The apartments only value half as three years ago, which in accordance with to Spanish law means that the other half of the value remains as a heavy debt on shoulders of the persons evicted. It is not surprising that these developments lead to civil disobedience and public unrest. The bad housing situation especially for the young people is an important request of the “Spanish Revolution” in spring

²⁰² Kenna mentions Germany as an example, where nearly half a million of flats belonging to the social housing stock were sold international funds, see: Kenna, 2008a, p. 417f.

²⁰³ FEANTSA, Tragic deaths of migrants in Paris fires show the stark reality of the housing crisis in Europe today, Press release, August 2005.

²⁰⁴ EAPN, Social Cohesion at stake: The Social Impact of the Crisis and of the Recovery Package, p. 23.

²⁰⁵ Kenna, 2008a, p. 431.

²⁰⁶ Doherty et al., 2005, p. 8.

2011 and various groups claiming the right to housing try to avoid evictions through peaceful means of assemblies, which hinder the police to enter the houses.²⁰⁷

Housing rights can be a means to counterbalance these negative effects of the housing markets and can therefore prevent homelessness. For example, the negative effects of the market can be limited either by enabling people to participate in it or by creating a protected market through the provision of social housing. Sufficiently high monetary housing allowances as well as other forms of secured income can prevent people from becoming homeless in case of unemployment or other events like injury and sickness. In the context of an EU wide trend of decreasing welfare states, the implementation, monitoring and jurisprudence of housing rights can provide some protection against changes for the worse. Legally enforceable rights on the one hand and accountable and well-defined responsibilities of states on the other hand are needed to avoid that ineffective regulation of the housing market undermines housing rights and causes homelessness. As was shown in Chapter 2 housing rights also can help to reduce the number of evictions and mitigate their effects through procedural safeguards. The Spanish example shows that housing is related to many factors, one of particular importance being consumer protection. Interestingly enough, home loans were excluded from the EU's efforts to harmonize consumer protection, according to Kenna and confirmed by the situation in Spain, this is a "*major obstacle to housing rights within the European Union*".²⁰⁸

The analysis has shown that the EU needs to promote in its policy on homelessness housing rights which have the potential to counterbalance the negative effects of the market and which entitle the individual to housing, if homelessness shall be eradicated. While it is clear that this promotion is not realistic to happen under the current circumstances, I want to show in the following that there would be several possibilities on how to include these rights in the EU policy on homelessness.

4.2.2 The potential role of housing rights in the EU policy on homelessness

Among the EU Member States, there is a growing consensus that homelessness is unacceptable in the EU and we witness of a shift from managing homelessness towards a political commitment to end it.²⁰⁹ Almost needless to say that a growing acceptance and

²⁰⁷ See numerous articles in the Spanish newspaper EL PAIS, 15 June, 12 June, 06 June and 31 May 2011; The Guardian, 16 June 2011.

²⁰⁸ Kenna, 2008a, pp. 458-460.

²⁰⁹ FEANTSA, Ending Homelessness, p. 2f.

enforceability of housing rights would contribute this ambitious goal, be it in the form they already exist or in a further developed one (see my proposal on enforceable rights to be protected against homelessness).

At EU level, social policy is framed and governed within the OMC and the new European Platform against Poverty and Social Exclusion. Although being a soft procedure, the OMC has influence on the Member States: “*cognitive maps*” are developed, policy issues shaped and certain worldviews and solutions are promoted, which has an influence of which policy measures are considered to be desirable or possible, respectively unthinkable. Therefore it has a potential to be a useful instrument to promote and support the further realisation of social rights in Europe, but its influence can also lead to the opposite.²¹⁰

Since the OMC was introduced, there have been suggestions on how to improve it and – from a social rights perspective – on how to include social rights within this new method of governance and to make sure, that the policies developed in the OMC do not undermine social rights. There are several different models proposed, ranging from the establishment of an own OMC for fundamental social rights²¹¹ to the proposal of a thematic OMC for homelessness.²¹² *Smismans* points out that social rights could have two functions within the social policy governance of the EU. On the one hand, social rights could have an ex ante function as normative objectives to guide to a programmatic direction. They would inspire the development of a common programmatic framework on EU and on national level and this function could avoid that the link between social rights and the policies implemented is not lost – what could occur if the language of social rights is not included. On the other hand, social rights could have an ex post function as a justiciable standard which has to be respected. Examining the latter function, he concludes that fundamental social rights at the moment do not offer much as a justiciable threshold to avoid a potential race to the bottom effect in the area of employment.²¹³ Housing rights do as well have the potential to be attributed to such ex ante and ex post function within the EU homelessness policy. They can be used *as the new benchmarks* of housing policy in Europe.

4.2.3 Housing rights as normative objectives and “new benchmarks” within the EU policy on homelessness

Dealing with homelessness and housing exclusion under the social inclusion process at EU level, the need to “*agree a common framework and common guidelines for measuring,*

²¹⁰ Bernard, 2003, pp. 257-264.

²¹¹ Smismans, 2005, pp. 232-233.

²¹² Spinnewijn, 2009, pp. 313-315.

²¹³ Smismans, 2005, p. 224; p. 230.

monitoring and reporting on HHE [homelessness and housing exclusion]²¹⁴ was emphasised more than once. *Fredman* argues that fundamental social rights should be used to develop foundational agendas from which derogations are not allowed to avoid the subordination of social goals to efficiency concerns.²¹⁵ The use of social rights as policy benchmarks and the development of indicators related to these rights was proposed in the context of employment.²¹⁶ In the area of housing, *Kenna* argues that, housing rights “offer a coherent set of benchmarks to challenge the orthodoxy of commodification”²¹⁷ and “can provide effective measurements of the realization of the right to housing in key areas and are legal, transparent, and accessible.”²¹⁸

A commitment to a Europe built on social justice and strengthened social rights is not precluded by the principle of subsidiarity which leaves the competence for social policy within the Member States.²¹⁹ The use of internationally agreed and developed housing rights standards does not mean an EU wide harmonisation of policy in the field of housing and homelessness through a common legislation, but the opposite: how the Member States realise these rights is still in their competence, their function is to set the objectives to reach with the respective policy or strategy.²²⁰

Indicators to measure policy progress, which are related to the realisation of housing rights could for example be: number of people sleeping rough/living in temporary shelters, average time spent in temporary shelters, share of social housing stock on total housing stock, number of social housing built by year, relation of people waiting for supported housing and available flats or the relation of housing prices to (social) income.

4.2.4 Monitoring of housing rights within the EU social policy ?

Being internationally agreed rights, human rights in general as well as housing rights need to be monitored and enforced. The success story and the growing case law of several adjudication and monitoring bodies in the world, especially the European Court of Human Rights in Strasbourg, show the need for such supervisory and enforcement mechanisms and the value they have for the individuals in protecting their fundamental rights.

The necessity of supervising and enforcing housing rights is there to guarantee that States comply with their obligations to realise housing rights within their jurisdiction and that

²¹⁴ Frazer/Marlier, 2009, p. 8.

²¹⁵ Fredman, *Fundamental Rights in the EU social space*, p. 55.

²¹⁶ Smismans, 2005, p. 232.

²¹⁷ Kenna, 2005a, p. 111.

²¹⁸ Kenna, 2008a, p. 461.

²¹⁹ Delanty, 2008, p. 689.

²²⁰ This was stated for the field of employment by Smismans, 2005, p. 231.

individuals have the possibility to file complaints against interference and non-compliance. To give any adjudication or monitoring body the strength it needs to force states to comply with the provisions they ratified, the sanctions in cases of violations must not be only of a symbolic nature.

The inclusion of housing rights to the social policy of the can only fully contribute to their effective protection if these rights are monitored and enforced. There are several future possibilities on this question. In principle, we can divide the proposals in two types: one sees the supervision taking place within the EU's social inclusion process, the other under the already established adjudication and monitoring bodies of the Council of Europe. In the following, I will discuss these possibilities.

Amongst other writers, *Smismans* proposed the establishment of a fundamental social rights OMC, which would have a monitoring function over the implementation of the rights (only rights contained in the EUCFR) in the Member States and be an instrument to give more substance to social rights.²²¹ This function would be very similar to the one from the Council of Europe's ECSR, which monitor compliance with the (revised) European Social Charter. It wouldn't be desirable to introduce another human rights monitoring body at EU level, because all EU Member States are parties to several human rights treaties which have their own monitoring and adjudication bodies and as was shown above, housing rights are to different extent monitored by the UNCESCR, the ECtHR and the ECSR. Beside this concern, I seriously doubt if monitoring can effectively take place in the different instruments under an OMC, for example through peer reviews or national reports. The OMC is not an institution and consists mostly out of state representatives, not of judges or experts and is a political and not a judicial body. The monitoring could in my view only consist in a superficial assessment of compliance with an overall strategy, whereby it is to be doubted if state officials find non-compliance in each others strategies if they have all problems themselves, which is very likely to be the case.

Traditionally, the institutions of the Council of Europe assess compliance with human rights standards in Europe. Either under the ECHR and its adjudication body, the ECtHR or under the (revised) ESC and the ECSR, which monitors compliance with the provisions of the Charter. As shown before, both systems enforce and guarantee the effective exercise of housing rights only in an insufficient way, because the one is reluctant and limited in its competence, the other is too weak. Beside this disadvantage, the ECSR has developed a valuable case law, especially in the area of housing rights, which shows first, that these rights

²²¹ Smismans, 2005, p. 232-233.

are justiciable and second, that housing rights can be used very well as benchmarks to assess the housing situation in a country.

The ECSR could have a very valuable function to monitor housing rights and thereby assess homeless and housing policies in the EU. The precondition would be that all Member States in the EU ratify the revised ESC including all provisions of Art. 31 and accept the collective complaints procedure. Compared to the proposal of a fundamental rights OMC, this would have the advantage that an independent expert body assesses compliance, and not the state officials themselves within the soft tools of the OMC. Of course such monitoring would only make sense, if the findings of the ECSR are taken into account in the further development of policies and strategies in the OMC, which is absolutely not the case at the moment. To reach a high number of ratifications and thereby raise the impact of the ECSR, the EU would have to make a clear commitment to social rights and to the ESC, which is not very likely to happen as important Member States as Germany or the UK have not ratified the revised Charter.

The gap between the EU and the ESC seems to be huge, but the EU and the Council of Europe will come closer soon, because Art. 6 (2) of the Lisbon Treaty²²² foresees the EU's accession to the ECHR. The advantages of such accession are obvious, because the EU itself is not yet bound to comply with the standards of the Convention. If this rapprochement will have an effect on the EU's relation to social rights is not clear at the moment. One could argue that if the EU accedes to the Convention, it can also accede to the COE's second human rights system, the ESC. According to *De Schuetter*, this would be even necessary because he sees the political risk that the EU's accession to the Convention without making some steps towards the ESC would threaten the indivisibility of human rights and would in fact mean the EU's denial of social rights. At the level of the Member States, accession is needed because only if the union is bound to comply with the provisions of the Charter, the states don't have an incentive to undercut each other in the "*inter-jurisdictional regulatory competition*", but will on the opposite be encouraged to raise their own standards. In the actual situation there is a danger, that – due to the optional character of the ESC and the very different undertaking of the states – those states gain a benefit who engage least in social rights protection.²²³

Another possibility to guarantee the effective exercise of housing rights would be to extend the competence of the European Court of Human Rights through an additional protocol and

²²² Art. 6 (2) TEU: "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*"

²²³ De Schuetter, 2005, pp. 114-131.

include social rights which protect housing and other basic needs like social and medical assistance or minimum income. This idea was already raised in the Parliamentary Assembly of the Council of Europe at the end of the 1990s but was never realised. The actual situation of the Court with an overwhelming burden of open cases raises doubt if the jurisdiction could or should be further extended. And not at least because of the growing jurisprudence of the ECSR, it is questionable if this idea will be further discussed and if this objective will be attained in the near future.²²⁴

In summary, the possibilities for the development of an effective protection of housing rights through a European monitoring body are limited by several reasons. Due to the above mentioned problems, monitoring under within the EU social inclusion process is unlikely to be effective. Although it would be the most desirable solution to have an effective housing rights protection through the ECSR or the ECtHR, it is unlikely that the competences of the ECtHR will be extended or that the ECSR is going to be significantly strengthened. It is therefore unlikely that housing rights are going to be protected as strong as civil and political rights and that individuals can file complaints before a judicial body. It is obvious that housing rights currently have more potential to be used as a programmatic framework for the development of a homelessness policy. Although this would still mean an incomplete protection of housing rights due to a lack of judicial review and very limited individual enforceability, the use of housing rights as the new benchmarks would in fact mean a significant improvement of the EU policy on homelessness. Respecting and promoting a set of housing rights like it is laid down in the revised ESC helps to promote these rights and guarantees that the diversity of factors which contribute to their realisation is taken into account. Further it can be avoided that the measures taken do not have a negative effect on the housing situation in a country.

²²⁴ Clements/Simmons, European Court of Human Rights, p. 427.

5 Conclusion

The analysis of the development and enforcement of housing rights has shown that they enjoy increasing importance and recognition. The inclusion of a right to housing in Art. 31 of the revised ESC and the case law developed in relation to the provisions therein are the best example for this development. Despite this emerge of housing rights and the obligations under international human rights treaties, housing rights are still not protected efficiently enough to guarantee the citizens the effective realisation of these rights, mostly due to the limited competence of the ECtHR and the weaknesses in the supervisory system of the ESC. The large extent to which homelessness still occurs in Europe is the best proof for this lack of protection. Homelessness has to be recognised as a severe violation of human rights. Therefore housing rights still have to be further developed towards more individual enforceability. They can also have a targeted preventive function: the proposal of a positive obligation of states to protect against homelessness in situations of particular vulnerability would be one way to achieve a better protection of housing rights.

At EU level, homelessness has become an important issue as part of the social inclusion process. An EU-wide policy on homelessness in the form of a framing strategy is about to be developed soon. Assessing the policies and the progress made up to now, it is clear that it cannot be expected, that the EU's social policy will contribute much to eradicate homelessness and improve the housing situation. Although the commitments are ambitious, there are several structural failures within the social policy (especially concerning the OMC). The process is too soft to enforce progress and the impact on the national level is very limited. The lacking political will on the national level in many cases trumps the efforts and commitments made at EU level. From a human rights perspective, the EU's social policy and the policies on homelessness fail to include housing rights.

This does not mean that the EU social policy and housing rights are incompatible. The inclusion of housing rights into a future EU strategy against homelessness would certainly improve the quality of such strategy and better guarantee that the most vulnerable are not left out. Housing rights could have an important programmatic function to shift such a policy and to be used as benchmarks for policy progress. But, as any other human right, they need effective protection. The monitoring of the ECSR, in the best case extended to a possibility of individual complaints, would probably be the best way currently available to assess country situations and the strategies which are implemented to combat homelessness. Therefore the

EU would have to come closer to the revised ESC and strengthen the ECSR through promoting the ratification of Art. 31 and the Collective Complaints Protocol.

The eradication of homelessness in Europe would be certainly possible to a high degree when strong housing rights were promoted at EU level and implemented in the Member States. Although this is possible, the political will to do so is not there at the moment. The proposals on the future of housing rights in Europe and their possible inclusion in the EU's social policy are therefore not realistic to become reality in the near future. Despite this pessimistic view to the future, the analysis in this thesis shows that it is certainly possible to improve the protection of housing rights.

Annex 1: European Typology of Homelessness and Housing Exclusion (ETHOS)²²⁵

		Operational category	Living situation
Conceptual category	Roof-less	1. People living rough	1.1 Public space or external space
		2. People staying in a night shelter	2.1 Night shelter
	Houseless	3. People in accommodation for the homeless	3.1 Homeless hostel
			3.2 Temporary accommodation
			3.3 Transitional supported accommodation
		4. People in women's shelters	4.1 Women's shelter accommodation
		5. People in accommodation for immigrants	5.1 Temporary accommodation or reception centre
			5.2 Migrant workers' accommodation
		6. People due to be released from institutions	6.1 Penal institution
			6.2 Medical institution
			6.3 Children's institution or home
		7. People receiving longer-term support (due to homelessness)	7.1 Residential care for older homeless people
	7.2 Supported accommodation for formerly homeless persons		
	Insecure	8. People living in insecure accommodation	8.1 Temporarily with family or friends
			8.2 No legal (sub)tenancy
8.3 Illegal occupation of land			
9. People living under threat of eviction		9.1 Legal orders enforced (rented)	
		9.2 Repossession orders (owned)	
10. People living under threat of violence		10.1 Police-recorded incidents	
Inadequate	11. People living in temporary or non-conventional structures	11.1 Mobile home	
		11.2 Non-conventional building	

²²⁵ ETHOS was developed by FEANTSA, for a description see: Busch-Geertsema et al., Homelessness and Homeless Policy in Europe, pp. 19-22.

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