

Introduction

The Right to Housing: Law, Concepts, Possibilities

AHUMAN RIGHT TO housing represents the law's most direct and overt protection of housing and home. Unlike other human rights, through which the home incidentally receives protection and attention, the right to housing raises housing itself to the position of primary importance. Moreover, as human rights offer a powerful and universally recognised vocabulary in which to express harms, alongside concrete opportunities for redress, it is easy to see why the homeless, the inadequately housed and the forcibly displaced would turn to the language of human rights to articulate the hurt they have experienced. However, despite the fundamental importance of safe and secure housing to a fulfilled human existence, questions about *why* we should protect housing as a human right, and *what* such a human right should look like remain unanswered in law, theory and practice. Thus the meaning, content, scope and even existence of a right to housing raise vexed questions. On the one hand, the right appears in major international and regional human rights covenants, yet its status as a human right is often greeted with scepticism. On the other hand, those who embrace the right at times appear to be overinvested in its potential, resulting in a failure to acknowledge the possible limitations of the right.

Drawing on insights from across the disciplines of law, humanities and the social sciences, this book is both a contribution to the state of knowledge on the right to housing, and an entry into the broader human rights debate. The analysis reveals that while the right to housing often remains marginal or underdeveloped in our study of human rights, housing – and rights to it – are in fact central to the most deeply held assumptions that undergird our social relations. This book thus addresses profound questions on the role of human rights in belonging and citizenship, in the formation of identity, in the perpetuation of structures of social organisation and, ultimately, of the relationship between the individual and the state.

The work links together the rapidly developing, though still little analysed, legal materials on the right to housing with the wealth of rich analysis of the role and purpose of housing and home in the humanities and social sciences.

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The resulting study sheds bright light on previously only dimly glimpsed insights into the relationship between rights and the material conditions for their enjoyment. It thus opens up the space in which to consider the possibilities of the right to housing beyond its current incarnation. By illuminating these relationships, the analysis also calls us to question the limitations and possibilities of *all* human rights, by asking what they reveal about our assumptions of the relationship between rights, the individual and the state – in law and beyond.

In order to consider these questions, it is first important to evaluate the right to housing in law. Thus, Part I offers an analysis of the right to housing in international and regional human rights law, and in key national constitutions. This first Part of the book presents a picture of the right to housing as a legal human right. The book is not a practitioner's guide, and thus does not attempt a comprehensive analysis of every case or applicable legal statement. Nevertheless, it presents a detailed picture of the law on the right to housing across the relevant jurisdictions and legal regimes. In addition, the analysis places the legal interpretation in the context of the actual social conditions that motivate people to seek the right to housing before courts or through other quasi-legal institutions.

From a lawyer's perspective, Part I would be expected to offer answers. An analysis of the legal materials on the right to housing should reveal what the right to housing is; when and by whom it can be claimed; and when and by whom obligations are owed. Yet Part I yields no such certainty. Instead, the right to housing as interpreted across the relevant regimes and jurisdictions evinces three key weaknesses, assessed in the final chapter of Part I.

These weaknesses are as follows. First, there is a failure to define the right, symptomatic of a normative weakness in identifying what the right to housing *is*, and a resulting uncertainty about when, and by whom, it can be claimed. Secondly, the right's interpretation is overly procedural, even 'programmatically', privileging means at the expense of ends, and resulting in a right that appears to recede from the potential claimant's grasp. Finally, and most fundamentally, the right to housing fails to connect to the conditions of violation, suffering and destitution that characterise the lives of those who it might be expected to protect.

Yet the continuing claims made under the banner of the right to housing, and the glimmers of a fuller, deeper understanding of its potential, illustrate that the current legal interpretation does not exhaust the latent possibility of the right to housing as either a discursive or legal strategy. This point motivates the analysis in Part II.

Part II employs privacy, identity and space as three conceptual lenses through which to reflect on the right to housing more deeply and broadly than is possible through a purely legal analysis. Glimpses of the recurring importance of these concepts emerge in the legal analysis in Part I, both in the motivations for housing rights claims, and in the justifications for the right's interpretation given by courts and monitoring bodies responsible for its development. Nevertheless, the concepts remain as largely unexplored background to the explicit legal reasoning offered.

Here, these three ‘lenses’ offer an opportunity for re-evaluation of the questions of the right’s meaning, content and scope. Most importantly, the analysis illuminates how these concepts might provide justifications for a right to housing which currently fail to emerge from the legal interpretation of the right. At the same time, examining these concepts in light of potential justifications for a right to housing as a human right illuminates aspects of the concepts that otherwise remain hidden. Part II thus enriches our understanding of matters of privacy, identity and space, and how they relate to the concrete living conditions of individuals and groups around the world. In many ways, Part II is an attempt to begin a process of reflection and start a conversation on the meaning, purpose and possibility of the right to housing that is necessary and sorely lacking.

Part II assumes that human rights strategies in general, and that housing rights strategies in particular, have the potential to redress injustice, relieve destitution, and emancipate the marginalised. The conclusions offered in each of the three conceptual analyses thus rely on a faith in the utility and power of human rights. The chapters offer positive statements about how a right to housing can be justified, and why it should be.

Part III, however, begins with a sceptical question: *can* the right to housing offer possibilities for social transformation? A quick glance will reveal that Part III is the shortest section of the book. Its brevity should not, however, lead the reader to assume a negative resolution to the question posed. Rather, the succinctness of the final Part is based on the conclusion that it is not in the rehearsal of legal arguments that the possibility of the right to housing lies – though the law plays an important role. Its possibility exists, rather, in the agency and creativity of those who seek to realise the right. The potential of the right to housing is in the claims made under it, in which lie the irrepressible radicalism of all human rights.

I. ASSUMPTIONS, DEFINITIONS, SCOPE

Before turning to the substance of the analysis, it is important to clarify certain underlying matters of structure and content. Below are set out some necessary comments on the tensions raised in the structure of the book, the scope of the work, and matters regarding the definition of central terms.

A. Law, Concepts, Possibilities or Concepts, Law, Possibilities?: a Note on Structural Tensions

The structure and organisation of this book includes an inescapable tension, raised by the impossibility of completely severing law from concepts in any analysis of human rights. On the one hand, placing theory or concepts before law may be logically appealing, but is attended by problems of specificity and succinctness. On the other, placing law before concepts presents the law in a

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theoretical vacuum. The tension will persist regardless of the choice made, yet, here, the choice I have made is a conscious one, for three reasons. First, considering the law and then seeking any conceptual underpinnings for the right allows a more concrete and detailed discussion of the conceptual questions. These more theoretical questions can then be tied directly back into the legal analysis, without long detours into facts and reasoning. Cross-references are included throughout the book, in order to provide clarity without repetition. Law, then concepts, is a structure that enhances the clarity of the theoretical analysis, without detracting from the completeness of the legal analysis.

Yet the inescapable tension is deliberately emphasised in my choice of structure. Lawyers commonly begin and end their investigations within the framework provided by the law. But the fact that the legal analysis undertaken here fails to provide complete – or even in some cases adequate – answers, challenges those of us who approach social problems through the paradigm of the legal discipline to become aware of our doctrine's limits. Undertaking the conceptual analysis after the legal analysis allows us to lay other frames over the legal one, changing the composition of the picture in sometimes subtle, sometimes striking ways. In short, the structural tensions in this book should expose something about the right to housing but also about the law itself. It is this motivation – to disrupt the expected so that something new may be revealed – that provides the second reason.

Finally, a realisation that the law alone did not yield meaningful or coherent answers on the right to housing was what motivated the conceptual analysis undertaken in Part II, and it colours the reflections on the Possibilities in Part III. It was only after undertaking a standard – though critical – legal analysis of the right to housing that it became apparent to me that 'the answer' might not be forthcoming within the law at all. The existence of the three problems set out in chapter 5, and the failure of the legal approach to deal with these problems adequately, even at times to notice them, led me to undertake the conceptual analysis. Each stratum of analysis: from law, to concepts, to possibilities, illuminates a deeper layer, revealing a more complete picture of the right and its role and potential. Yet the picture would remain unseen if we did not undertake the process of analysis which provides the light by which to view it.

B. Defining Housing, House and Home

The concept of 'home' is not readily amenable to an objective definition, and even a definition of a 'house' is difficult to formulate, given the widely varying physical structures in which people live. Housing provides and protects some of the most fundamental human needs. Safe and secure housing shields us from the elements and provides refuge from external physical threats. It gives us a material base from which to build a livelihood and take part in the life of the community and the state. But housing also provides a space in which our psy-

chological needs can be met. Secure housing is both intrinsically and instrumentally important in the formation and protection of community, belonging and place in the world. Those whose housing is inadequate, who are forced from their homes, and who are homeless suffer severe personal and social deprivations with both psychological and material impacts.

Yet this book will not offer a comprehensive definition of a house, nor does it include one definition of a home. This is because it would close down possible avenues of analysis and thought to predefine one of the central questions of the book: what is housing, and in which circumstances should we protect it as a human right? Where necessary or useful, a specific definition is invoked for a particular argument. Overall, however, the analysis in the book is based on an appreciation that the very ambiguity in the concept of housing and the amorphousness of its physical manifestations is inherently bound up in questions about the right to housing's meaning, scope, content and potential. As such, artificial boundaries and definitions cannot be imposed and carried through from one section to the next without serving to dislocate the analysis from the actual living conditions of human rights violation and realisation that this work strives to keep in sight.

C. A 'Right to Housing' versus 'Housing Rights'

In defining the terms house, home and housing, I have made a conscious decision not to impose artificial lines and categorisations that might foreclose fruitful avenues of thought and analysis.

However, some clear conceptual lines must be drawn. One observed throughout is a distinction between 'the right to housing' as a human right, and 'housing rights'.

It might seem odd to mark a distinction between the 'right to housing' and 'housing rights' so early. Surely, one of the most important issues at stake is the question of what the right to housing is. As such, how can I be sure I have demarcated the concepts correctly? However, there are two reasons, in addition to issues of length and scope, why the distinction is drawn here and maintained throughout. These are, first, the subject of the right in question; and secondly, the way in which the right is claimed. Both these issues separate 'housing rights' from a 'right to housing' as a human right.

When I refer to a 'right to housing,' I refer to the human rights, as codified in or implied into international and regional rights treaties and declarations, and into domestic constitutional orders through bills or declarations of rights. As international or regional human rights, these rights to housing exist outside of questions of citizenship (although not outside questions of jurisdiction). They are rights based on the recognition of human beings *as* human beings,¹ not the

¹ A Gewirth, 'The Epistemology of Human Rights' in E Frankel Paul, FD Miller, Jr and J Paul (eds), *Human Rights* (Oxford, Basil Blackwell, 1984) 1.

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rights one has by virtue of one's membership in a particular national political community or on one's status within a specific sovereign state. In the domestic constitutional context, questions of citizenship and jurisdiction may both be applicable. Nevertheless, the claim to a right to housing as a *human* right springs not from the question of citizenship, but from the question of humanness or humanity and relates to a demand for the right that is audible beyond national borders, and which seeks the attention of the international community as a whole.

Housing rights, on the other hand, refer to legal rights codified into or arising from the domestic law of particular national states. These rights refer to entitlements under nationally conceived social welfare legislation for access to 'social' housing, or to support in relation to housing for tenants.² That the rights of owners are discussed through the paradigm of property law, not through housing law, creates a significant distinction in rights that is questioned later in this work.³ Substantive constitutional socio-economic rights, as O'Connell argues, impose binding obligations over and above any moral obligations arising from welfare entitlements, which are in contrast 'essentially discretionary in nature'.⁴

The second point of distinction is based on the way the rights are claimed and invoked. In elucidating his right to the city, Henri Lefebvre recognised a crucial distinction between the demand for a *right* to housing, and the decision by the state to provide housing by taking control of pre-existing parts of the market economy,⁵ (although such a decision may give rise to legal rights and entitlements). The right to housing as a human right is motivated by such a distinction, which rests on the cry for recognition of the *right* as much as it does on the provision of the good. I seek to examine why, how and when this demand of right is articulated, and the implications it may have in protecting 'more durable human rights dimensions' of the social values and interests that have also, at times and in places, been protected through domestic social welfare legislation.⁶

While recognising that drawing a bright line between the right to housing as a human right and housing rights as tenants' rights or as social welfare rights more generally is theoretically and practically difficult, I confine myself to an examination of the right to housing as a human right for these reasons. My decision reflects the fact that this is a book that asks questions about *human* rights. It specifically interrogates what, how and whether a human rights approach, howsoever conceived, adds to the issues of housing and its relation-

² N Bernard, 'The Scope and Meaning of the Right to Housing' in (2008) FEANTSA *Homeless in Europe Magazine* (Autumn) 15.

³ See further Chapter 7, II.A.

⁴ P O'Connell, *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (Oxford, Routledge, 2012) 6.

⁵ H Lefebvre, *Writings on Cities* (E Kofman and E Lebas (eds and trans), Malden, Blackwell, 1996) 78.

⁶ M Langford, 'The Justiciability of Social Rights, from Practice to Theory' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, Cambridge University Press, 2008) 3.

ship to the actual living conditions of individuals and communities around the world in light of, or absent, domestic social welfare legislation, as the case may be. As such, the book's starting point is with human rights, and rights as human rights remain its central concern. Housing rights are only considered where they butt up against, come into conflict with, or otherwise serve to illuminate – by similarity or difference – a right to housing as a human right.

D. Categorising the Right to Housing: Economic, Social or Cultural Right?

By virtue of its placement in the International Covenant on Economic, Social and Cultural Rights⁷ (ICESCR), the right to housing traditionally falls within the category known as social, economic and cultural rights. This designation seems firmly entrenched, despite the official position adopted by the United Nations and endorsed by most human rights practitioners, activists and academics that all human rights are indivisible, interdependent and interrelated.⁸ Moreover, indivisibility often remains in the realm of rhetoric, rather than appearing as a commitment to equal realisation, enforcement or attention for all human rights. The suggestion that housing is a right has been met with opposition, normally based on a perception that housing cannot fulfil the characteristics necessary for designation as a right. However, even when the indivisibility and interdependence of rights is taken seriously, important questions arise about whether diverse rights rest on different moral, legal and normative bases. If all rights are indivisible and interdependent, do economic, social and cultural rights continue to exist as a separate category of right, and if so, what is the significance of this categorisation or, if necessary, their further sub-categorisation as economic, social or cultural right?

In Eide's attempt⁹ to illuminate the human goods we seek to protect through economic, social and cultural rights, he argues that the 'core' of *social* rights is the right to an adequate standard of living, which is embedded in Article 25 of the Universal Declaration of Human Rights¹⁰ (UDHR), Article 11 of the ICESCR, and in the provisions of the Convention on the Rights of the Child¹¹ (CRC). This right to an adequate standard of living has a minimum basic content that ensures subsistence to all people in the form of food, clothing, housing and necessary conditions of care.¹² *Economic* rights, Eide states, are instrumental to the

⁷ International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200A (XXI) (adopted 16 December 1966, entered into force 3 January 1976).

⁸ United Nations, Vienna Declaration and Programme of Action A/Conf.157/23 (1993) Part 1, para 5.

⁹ A Eide, 'Economic, Social and Cultural Rights as Human Rights' in RP Claude and BH Weston, (eds), *Human Rights in the World Community: Issues and Action*, 3rd edn (Philadelphia, PA, University of Pennsylvania Press, 2006).

¹⁰ Universal Declaration of Human Rights, UNGA Res 217 A (III) (adopted 10 December 1948).

¹¹ Convention on the Rights of the Child, UNGA Res 44/25 (adopted 20 November 1989, entered into force 20 September 1990).

¹² Eide, 'Economic, Social and Cultural Rights as Human Rights' above n 9 at 173.

provision of these social rights. He categorises the important economic rights as the right to property and the right to work as codified in the UDHR, and the right to social security as included in the UDHR, the ICESCR and the CRC. These economic rights are also instrumental as ‘a basis of independence and therefore of freedom’.¹³ Alternatively, economic rights could be defined as rights to produce and to consume. Trudeau writes that ‘[a]s a producer, man has a right to demand from society that it offer him a market for his useful labour or produce. As a consumer, man has a right to a share of the total production of society, sufficient to enable him to develop his personality to the fullest extent possible’.¹⁴

To Eide, then, social rights are rights which enable humans to exist in society at a certain minimum level. In Eide’s definition, the right to housing is a social right. Constituting a necessary basis of subsistence, adequate housing facilitates human participation in the life of the community. However, the right to housing is also a cultural right. The form, location, arrangement and materials of the home are an expression of cultural practice and values. This is true for all groups, not just for indigenous and minority groups, though it is these groups for whom the cultural aspect of housing rights might most often be violated.¹⁵ Others, like Alston, argue that ‘it is unproductive to seek to distinguish rights that are so closely intertwined’.¹⁶

Further, we must ask in what way, if any, social rights can be distinguished from civil and political rights. Both socio-economic and civil-political rights are designed to bring human beings into society. Civil and political rights assume participation is achieved through civic acts such as voting and speaking, yet such acts also have a social character. The means through which participation is achieved may be different for the two sets of rights, but the normative basis upon which the protection rests appears strikingly similar when expressed in these terms. The normative proximity underlying all rights is also evident in theories of rights grounded in dignity or capabilities, for example.¹⁷

Throughout the book, I question whether there is a meaningful theoretical argument, based on human rights *norms*, for a clear distinction to be made between categories of rights. Like the consciously self-critical work of Craig Scott, I am ‘prepared to engage in category-crossing to the point that we begin to defy the categories themselves’.¹⁸

¹³ Ibid. Likewise, Fabre defines social rights as rights to the meeting of minimum material needs: C Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford, Oxford University Press, 2006) 1.

¹⁴ PE Trudeau, ‘Economic Rights’ (1961) 8 *McGill Law Journal* 121, 122.

¹⁵ See further Chapter 7 III.B.

¹⁶ P Alston, ‘Economic and Social Rights’ (1994) 26 *Studies in Transnational Legal Policy* 137.

¹⁷ See C Gearty, *Can Human Rights Survive* (Cambridge, Cambridge University Press, 2006) and MC Nussbaum, *Creating Capabilities: the Human Development Approach* (London, Belknap, 2011), respectively.

¹⁸ Craig Scott, ‘Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”’ (1999) 21 *Human Rights Quarterly* 633, 636.

If, as I am prepared to argue, economic, social and cultural rights may be hollow as a *normative* categorisation of rights why, then, do I continue to use the category to refer to rights such as the right to housing?

First, categories have various practical benefits. They are useful as a form of shorthand: 'economic, social and cultural rights' is an especially practical term when referring to the rights contained in the ICESCR, the Covenant bearing their name. Secondly, they can be seen as the 'working hypothesis' that we use to understand the norms, functions and relationships of human rights.¹⁹ Yet the time may come – in fact, may have come – to discard the hypothesis altogether.

Secondly, it can be argued that the category of economic, social and cultural rights has a discursive force shaped by its inferior status in human rights hierarchies. As Scott notes, to an 'important extent, such categories have arisen and continue to exist as categories of resistance to dominant human rights discourses. Varying degrees of discursive power have emerged from the very marginality of these categories'.²⁰ Collapsing all human rights into one category could have the effect of stifling creative and rebellious human rights thought and practice. Yet as important as this insight is, it is one imposing a force of protest or subversion on the rights from above, rather than an inherent distinction of principle between two distinct typologies of rights.

Finally, the distinction between economic, social and cultural rights and other categories of rights remains highly relevant in a legal sense, due to differing obligations imposed on states through the ICESCR, for example, as opposed to the International Covenant on Civil and Political Rights²¹ (ICCPR), or through the Revised European Social Charter²² (RESOC) as contrasted with the European Convention on Human Rights²³ (ECHR). Such differing legal obligations illustrate Henry Shue's argument that it is not the normative or moral basis of various rights that differ, but in fact the correlative duties to fulfil those rights.²⁴

I use the term 'economic, social and cultural' or at times 'socio-economic' or 'social' to describe the right to housing throughout this book for the reasons suggested above. Despite my adoption of this terminology, serious questions as to how, whether and why the right to housing should be given this categorical designation rather than another must be kept in mind.

Throughout, I attempt to illustrate the interconnections extant in the theoretical foundations of the right to housing, which cross borders erected by treaties and ideologies. Thus, the analysis undertaken in the book questions the categorisation of the right to housing, and recognises that the normative proximity of

¹⁹ Ibid at 642.

²⁰ Ibid at 644.

²¹ International Covenant on Civil and Political Rights, UNGA Res 2200A (XXI) (adopted 16 December 1966, entered into force 23 March 1976).

²² European Social Charter (Revised), CETS no 163 (opened for signature 3 May 1995, entered into force 1 July 1999).

²³ European Convention for the Protection of Human Rights and Fundamental Freedoms, CETS no 005 (opened for signature 3 November 1950, entered into force 3 September 1953).

²⁴ H Shue, *Basic Rights*, 2nd edn (Princeton, Princeton University Press, 1996) 52.

rights such as the right to housing and the right to life should be recognised in judicial interpretations and in academic writings on the subject. Without this recognition, analyses of the right to housing will fail to move beyond the institutional questions of enforcement and interpretation which so often obscure meaningful debate on the nature and content of the right, and which it is the project of this book to overcome.

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