



Findings & assessments on the failures of right to housing

Ravi Bundela

Research Scholar, N.L.U., Delhi, India

Abstract

A good law with poor interpretation and poor implementation can never make the nation good. Human rights are essential for any human being, therefore their recognition is extremely important. However, what if beyond recognition there is nothing? The answer is, the situation remains the same what it was before recognition. Hence, it is pertinent for the interpreting bodies to give meaning to the text with its spirit. The problem with the widely recognized right to housing is with the interpretation of the said right.

Keywords: housing, homelessness, interpretation, right to housing, human right

Introduction

The right to housing has achieved an important position in the international system of human rights protection. Moreover, the said right is codified in many Human Rights Covenants, interpreted in declarations and also protected by the constitutions of various jurisdictions. The right to housing has received wide range of case laws from the apex bodies and also got statements of interpretation, which makes the right visible in the queue of many human rights and establishes its significance by its application and realization. Nonetheless, the right has not contributed and established a radical social, political or economic change what it sought. The right remains bleak and if not opaque then at least translucent.

The population of the homeless has been rapidly increasing across the world. Therefore, the right has encountered with some major issues because of which it has not done what it sought to do. The critical analysis in the above chapters have given us the overview regarding the failings of the right, among the substantial failings the absence of normative content which the courts and interpretive bodies failed to provide as it is not practical to say as to what the right is, the palpability of the definition of the said right is questionable since there is no strong definition of the right to housing given by any statutory body. The second being the right is overly procedural and programmatic as it is implemented more of a program and less of a right which can be claimed and being procedural and it is the biggest hurdle in the implementation of the right. The third most failings is not to apply the right and attach the said right to the actual social conditions of homelessness, destitution, displacement and social and physical marginalization since the right has not seen in the backdrop of the consequences such as destitution etc. and they are kept away from the problem of the homelessness. Although the right was included in the body of human rights by the motivational factor of all these conditions.

Failure in the Legal Interpretation of the Right to Housing

In any interpretation the definition plays a potent role through which the violation is drawn. In this case the courts and the

other bodies responsible for regulating the human rights treaties has excluded the agony and suffering of the affected people from recognition. Since, it is pertinent for any institution to see and recognize the suffering of the people in the problem, which it is going to resolve because the solution will be redundant if it does not target the suffering. Moreover, any interpretation, which fails to exemplify the right in its social context of actual deprivation and the inadequacy of living conditions, which portrays the breach of the right, shall fall short of the radical potential of human rights^[1]. Therefore, it is this problem which the existing interpretation of the right to housing portrays. The actual relief coming from the current interpretations is far from the inadequate living conditions, the deprivations of homelessness and social exclusion experienced by billions. The outcome of the existing interpretations of the right to housing has three failures.

- a) The complexity of a definition. Nevertheless of the huge literature on the interpretation and of the wide jurisprudence, yet is difficult to locate a definition on the right.
- b) The right being overly procedural is another problem on the similar lines of interpretation. The unjustness does not stop here; rather the interpretation has gone unduly programmatic. Therefore, by overly stressing on the process, the substantial realization of the right has been forgotten.

Hence, the legal interpretation of the right remains at the level of abstraction from the real questions of homelessness, inadequate living and forced displacement. These three issues represent the serious drawbacks due to which the coherent development of the right to housing got affected. Moreover, the aggregate affect of the international failings is very heavy and due to which the right to housing fails to reach toward the actual realization of human rights for those who experience their violation.

Overly Procedural

The second problem with the interpretation of right to housing is it's overly procedural. The right ought to have been a

substantive right but this right in most jurisdictions is a set of elaborate procedural steps. Although procedural guarantee is important in the realization of the right but the undue focus on it at the cost of outcome can cause the right tied to the existence of the procedure itself, instead of enjoyment of adequate housing. In particular, if the legal interpretation of the right goes beyond the procedural to the 'programmatically' then the so much important right can only be enjoyed through government action.

Right to Housing and Its Procedural Interpretation

In various jurisdictions stress has been given on procedure. Except in IACtHR's text wherein the states have been held to an obligation to provide the substantive, material right to housing. The other jurisdiction has witnessed only proceduralism of the right, which has a tendency to stick in the procedure rather than to reach at substantive interpretation. South Africa is the glaring example for that where the right mentioned in Section 26 of the South African Constitution nevertheless the court has taken completely procedural approach for interpreting it. Since, Section 26(2) has eclipsed Section 26(1)'s guarantee of access to adequate housing^[2] as the text of Section of 26(2) talks about duty of the state to take reasonable legislative measure for housing. Although the rationale behind the housing provision in the constitution was very noble and transformative to bring those in the ambit of the South African society who have long been neglected in the Apartheid era, yet much attention was not given to the substantive enjoyment of the right which made the right de-radicalized. This has been seen in the case of Grootboom in which despite noting down the violation of the right to housing yet no practical change has come in the living circumstances of the sufferer party to the case^[3]. Moreover, the right to housing under Section 26(1) has not been given a definition by the court, the protection given in the said section appears to be confined to the oversight of reasonableness by the court. However, reasonableness itself was explained by the court as a procedural concept. The problems of this approach are described by the court's supervised order in the Joe Slovo case^[4] in which the party's failure to abide by the steps required to be followed in the order led to its being rescinded, with the improper effect of removing court oversight from the progressive enjoyment on the right to housing for the residents of Joe Slovo^[5].

The committee's CESCR and ESC has stressed on the means through which right can be implemented. They were concerned on those legislative steps that the state must take, rather than concerning on the substantive ends to be gained, no obligations were imposed by the ESC on result^[6], the CESCR has given an interpretation to the right to housing under the ICESCR which has included a minimum core obligation. Hence, unless there is a provision for each of the rights, the state will be in violation of its obligations.

In case of India the right is a procedural protection under Article 21 especially when the housing interests are at center. For instance in Olga Tellis the court has not gone to say that the pavement dwellers have the substantive right to make their home on the pavement rather the court only mentions that there must be fair process which must be followed before the pavement dwellers were to be evicted^[7]. Similarly in the case

of Nawab Khan^[8], the procedural guidelines have been provided and there was no focus on the substantive right to housing of the slum dwellers, which the court has rejected. Therefore, the substantive right of the pavement dwellers, the informal settlers and the slum dwellers have never been recognized through the expansion of the provision nor the focus is given to coin the definition which would have potentially solved the problem on the ground. However, the Indian jurisprudence elucidates about the importance of the procedural guarantee, which as per the said jurisprudence is pertinent in the realization of human rights. Since, the procedural considerations in human rights cannot always be seen as a failure to realize the substantive aims. Nonetheless, the procedural points as the state taking steps or to create legislation has been seen in the backdrop of severe difficulties of a procedural approach.

The Legal Right to Housing and Its Failure

The final drawback in the interpretation of the right to housing is the deficiency in completely inserting the right in the social context from which the violation occurs. This has been the most basic weakness comes out from the legal interpretation of the right to housing. The legal interpretation of the right has not been linked with the conditions of the right's violation. Although, the violation of the right to housing in social context is different in different region, city or state, also included the universality of the fact that majority of the world's population do not enjoy adequate housing which is close to the standards of safe and secure housing. In many states the majority population living in the condition wherein their right to housing is deceptive. The said population lives in circumstances of insecure tenure and also in informal settlements, which makes them prone to be evicted anytime in the name of rural development projects, city beautification and industrialization.

It has been analysed from the previous chapters of this thesis that the right to housing operates at high level of abstraction far from the conditions of material deprivation across the international, regional and national contexts. Since, at the international level the *right to housing* is *only one of the elements* of the right to adequate standard of living and it is not explored as to how housing contributes to the adequacy of living standards because this one element which appears one in the text of adequate standard of living, this element has the potential to almost fully contribute to adequacy in the standard of living, as there is a deep relationship between the physical infrastructure that constitutes housing and the human goods, needs and desires that constitute a fulfilled and adequate human life therefore housing itself is an adequacy in the standard of living. Hence, at the international level housing has been placed as one of the elements. This exploration of the relationship and how housing contributes to the adequacy of living standards should be at the core in the interpretation of the right to housing. The problem with the courts for implementing human rights are that they have limited remedial provisions and adding to this limitation the monitoring bodies too are expected only to focus on the sufficiency of the state policy instead to focus on the violation of the right, this is one more factor that the right largely exists in abstraction. On the other hand the CESCR has specifically

worked on the point of security of tenure^[9] but nevertheless attention was not paid on the core issue highlighting the inability of large proportions of the world's population to enjoy security of tenure. Moreover, issues like land ownership and control, marginalization and dispossession of indigenous peoples and forced eviction of people from their land to clear way for the developmental projects and industrialization has severely affected the right to housing. The committee has not dealt these issues in detail, and although the CESCR has taken the security of tenure as one of the measure to tackle homelessness yet those basic issues through which the problem of security of tenure emanates are not been explore by the committee. In the South Africa the courts has failed to connect the actual deprivation, which it seeks to address with the right to housing. However, the provision of right to housing is enshrined in the South African Constitution and it was given to transform South Africa's staggering inequalities of opportunities and much was expected from the said provision of the constitution before bringing it into the constitution. However, instead of invoking the provision with the positive approach towards enforcing a fully substantive right to access to adequate housing, the courts in South Africa have been conservative and cautious to apply the said provision. The cases on the issue of housing have not contributed much to furnish the substance to the said right rather the approach of the court is to apply the principles of reasonableness and imposing duty on the states to consult with the complainants for setting out the process of engagement. Although, there have been cases wherein concrete remedies were ordered. The consequences in many cases has been that even when the courts found the violation of the right, very little has been done to alleviate the real suffering of the affected^[10]. Moreover in South Africa there has been too much of focus on the legal process which has shifted the attention away from the conditions through which actual social change is possible, since the South African jurisprudence suggests that so far the state acts reasonably, material deprivation and inequality of opportunity will remain unremedied. It is very important to link the right to housing with the actual economic, social and cultural deprivations that still prevails in the South African society but the constitution despite having a noble vision of transformation coupled with the backdrop in which it was drafted, could be able to have that transformation. However, the Joe Slovo case have taken a shift from the hitherto jurisprudence on the right to housing which stressed on the living conditions of the plaintiffs although there have been some dissatisfaction among the judges for applying private law principles in the problem of constitutional rights^[11]. An analysis of the social and cultural conditions which brings the right to housing might be productive for the international and regional bodies which considers housing in light of nuanced forms of discrimination. The decision in *Kell v. Canada*^[12] by the CEDAW committee highlights to take a stronger stance on the violations and denials of rights. Moreover, the African Commission and the Inter-American human rights bodies too highlights that they takes a cognizance of the inter-linking between the right to land, rights of peoples to culture, to political and social subjectivity and the right to housing, but so far they are yet to be fully analysed. The questions on the subject of economic

and social basis of society cannot be ignored by those attempting to do justice to the future prospect of human rights. Here, another question becomes pertinent as to how the right can be reconnected with the conditions of social dispossession? The answer may lie in the European Social Committee's attention on those worst off and its consideration of state policies in Europe. The explicit links have also been made in *Limbuela* case by the UK House of Lords between the right to home and family life and the actual deprivation visited on the plaintiff who was denied access to minimal goods. In India the housing rights cases have furnished the strongest jurisprudence especially in the case of *OlgaTellis* wherein housing has been treated as Fundamental Right and having recognized its personal and social functions^[13].

Conclusion on the Gaps and Analysis

It has been widely discussed that the existing legal interpretation of the right to housing suffers from severe infirmity, which have come out by keeping in mind the legal interpretation of the right in the backdrop of the social context in which it is prompted and alleged. Reason being, the institutions, which are responsible in interpreting and monitoring and also giving meaning, have stalled to concretely define the right. Moreover, the right has been made overly procedural in the existing fragile legal interpretation also programmatic in nature keeping the focus only on the policy and not on substantive conditions that are necessary for the realization of the right. Lastly, the right has not been embedded with the actual circumstances of deprivation and violation, which portrays the lives of many people around the world, hence the legal interpretation of the right operates at a high level of abstraction. However, the power and utility of the right cannot be rejected on its current legal interpretation.

References

1. Expert Group Meeting, *Homelessness: A Proposal for a Global Definition and Classification*, 2001.
2. K Young, *The Minimum Core of Economic, Social and Cultural Rights: A Concept in search of Content*, 33 YALE L.J. 133, 139, 2008.
3. Government of the Republic of South Africa and Others v. Grootboom and Others, 2001. ZACC 1
4. Residents of JeeSlovo Community, Western Cape v. Thubelisha Homes and Others, 2009. ZACC 16
5. ZACC 8, 2011.
6. International Movement ADT Fourth World v France, ESCR Case no 33/2006, 2007.
7. *OlgaTellis v. Bombay Municipal Corporation*, AIR 1986 SC 180
8. *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, AIR 1997 SC 152
9. S Marks, *Human Right and the Bottom Billion*, 1 European Human Rights Law Review 37, 2009.
10. Constitution of the Republic of South Africa, 1996
11. Residents of JeeSlovo Community, Western Cape v. Thubelisha Homes and Others (2009) ZACC 16
12. *Cecilia Kell v. Canada*, CEDAW c/51/D/19/2008
13. *R v. Secretary of State* (2005) UKHL 66