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The Right to Housing as a Right to Adequate Housing Options

Reviewing the Reasonableness of National Housing Policies in the Field of Alternative and Intermediate Tenures

https://doi.org/10.1515/eplj-2020-0006

> *"We commit ourselves to stimulating the supply of a variety of adequate housing options that are safe, affordable and accessible for members of different income groups of society (...)"*
>
> United Nations New Urban Agenda, No. 33 (2016) [1]

> *"It is important for a balanced housing system that development and availability includes sufficient owner-occupied, private rented, intermediate tenures (shared ownership-like tenures, cooperatives and community land trusts) and social housing schemes. It is suggested that the EU and its Member States promote a continuum of tenures, and that the potential role of intermediate tenures in preventing household over-indebtedness, enhancing flexibility and housing system stability be explored."*
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> Padraic Kenna et al., Promoting protection of the right to housing – homelessness prevention in the context of evictions, Study for the European Commission (2016), 198

I. Introduction

For the last decades, most European countries have been affected by a growing housing crisis, which the 2008 Great Financial Crisis and the current Corona crisis has further intensified. The indicators of the housing crisis are manifold: There is a huge demand and a general shortage of supply in attractive metropolitan areas. Due to the lack of space and often ineffective administrative procedures, the numbers of new residential buildings are unable to meet the growing demand. At the

1 New Urban Agenda, No. 33, adopted at the UN Habitat III conference in Quito (2016), http://habitat3.org/wp-content/uploads/NUA-English.pdf.

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same time, the share of social housing has decreased almost everywhere in the EU through privatisation, and the sector has only been relaunched in recent years. As a consequence, house prices and rents are rocketing, and the households priced out of the free rental and property markets in attractive metropolitan areas have increased drastically and include many middle-class families. This development is prominent in big capitals such as London or Paris, but materialises in most attractive urban areas. For example, in the affluent German city of Munich, less than 15 % of the rental housing stock is accessible to people with average salaries according to a recent survey.[2] The situation is widely similar in Barcelona and other Spanish cities.[3] Last but not least, homelessness is on the rise in most EU countries.[4]

It is obvious that confronting the housing crisis is an extremely difficult, lengthy and complex task. One scientific discipline is not sufficient to address housing policies, markets and systems constructively. Instead, an integrated interdisciplinary approach is needed.[5] Legal housing studies thus need to be linked with, and supported by, insights from sociological, economic and urban studies to enable innovative and effective housing policies and options to the benefit of European citizens.

The present article tries to make a modest contribution in this sense by linking two hitherto rather separate instruments and discourses, **namely the social right to housing** at various levels of governance as the most prominent legal tool**,** with **tenure neutrality and diversification** as two key principles of modern public housing policy:

Social rights, directed both vertically against the State and horizontally against powerful private actors and institutions, have gained an important social compensation and "buffering" function for citizens[6] after the decline of the welfare state and the deregulation and privatisation of form state activities in the field of housing.

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2 See *T. Öchsner*, Wo Wohnraum zum Luxusgut geworden ist, Süddeutsche Zeitung of 28.1.2019, https://www.sueddeutsche.de/wirtschaft/wohnen-mieten-leben-1.4306161; for the Dutch situation *J. Hoekstra*/*P. Boelhouwer*, Falling between two stools? Middle-income groups in the Dutch housing market, European Journal of Housing Policy 2014,14.10.1080/14616718.2014.935105.

3 See *S. Nasarre*/*E. Molina*, A legal perspective of current challenges of the Spanish residential rental market, International Journal of Law in the Built Environment 2017, 108–122.

4 See *P. Kenna*, Introduction, in: P. Kenna/S. Nasarre/P. Sparkes/Ch. Schmid (eds.), Loss of Homes and Evictions across Europe, Cheltenham/Northampton 2018: Edward Elgar, 1, 12.

5 See in this sense *B. Schönig* in: B. Schönig/J. Kadi/S. Schipper (eds.), Wohnraum für alle?!, Bielefeld 2017: transcript, 11, 23.

6 See for example the Horizon 2020 project RE-InVEST (2015–2019) that studied the impacts of the crisis on human rights and capabilities of vulnerable households in 13 jurisdictions.

Tenure neutrality means that rental and alternative tenures should not be treated less favourably than homeownership in housing policy and regulation.[7] **Tenure diversification** refers to a continuum of housing options, including not only home ownership and private market rentals, but also new public and social housing models as well as alternative and intermediate tenures below, above and between renting and ownership. Interdisciplinary housing research seems to suggest that States committed to tenure neutrality and diversification perform better in terms of housing supply and conditions.[8]

The research question pursued here is to connect and render mutually reinforcing both instruments by **extending the right to housing to a right to adequate housing options** - in other words, to a duty of states to ensure a minimum of tenure neutrality and diversification. To this end, social rights to housing will first be described in conspectus. This analysis shows that, whereas this right was substantially consolidated and enlarged by national and supranational courts, the recent extension of housing problems from special cases and minorities to the mainstream society has not yet been adequately addressed legally (II). Alternative and intermediate housing tenures may however provide remedial tools. To understand their types and uses better, they will be presented in the form of a continuum of housing tenures (III). In the last part, the right to housing will be extended into a right to adequate housing options, which gives European individuals a right to claim a basic degree of tenure neutrality and diversification from their states (IV).

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7 See for definitions of tenure neutrality *J. Kemeny*, The myth of home ownership. Private versus public choices in housing tenure, London 1981: Routledge & Kegan Paul Ltd., 146; *L. J. Lundqvist*, Housing policy & equality. A comparative study of tenure conversions and their effects, London 1986: Croom Helm, 16; *N. Barr*, The economics of the welfare state, 3rd edition, Oxford 1998: Oxford University Press, 130, 143 et seq., 365 et seq., 390 et seq.; *J. Le Grand*, The strategy of equality. Redistribution and the social services, London 1982: Unwin Hyman, 14 et seq.

8 See the recent legal-statistical PhD thesis, *J. R. Dinse*, Tenure preference in housing policy in Europe and poor living conditions: A comparative investigation of the relationship between housing policy preference for owner-occupation tenure and the occurrence of housing deprivation, Bremen 2019. According to this thesis, there is a direct correlation between a country's policy focus on home ownership, which is the predominant orientation of most EU States, and problems of housing deprivation, as measured by Eurostat surveys (in particular bad housing conditions and overcrowding). Conversely, more balanced policy approaches, which do not favour home ownership but enable a wider range of housing options (i.e., tenures or housing models), are statistically correlated with better housing conditions.

II. The Social Right to Housing at various Levels of Governance

The **right to housing** which forms part of the so-called social, economic and cultural human rights, is anchored in a wide range of international, European, national and sometimes regional legal instruments.[9] At the level of international law, a general right to housing was included already in the **1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights** ratified by nearly 150 states; the latter is periodically monitored through a UN Committee, which has elaborated detailed General Comments on the right to housing and created a jurisprudential corpus of principles for its implementation.

At the European level, the **Council of Europe** has been over many years the most active promoter of the right to housing. The **1961 European Social Charter and the 1996 Revised Social Charter** ensure the provision of family housing (Art. 16, 1961), of accommodation for migrant workers and their families (Art. 19, 1961 and of a general right to housing for everyone (Art. 31, 1996). The Social Charter is effectively monitored by the Committee of Social Rights, which may since 1995 also be seized by international bodies and NGOs through a collective complaints mechanism. This has given rise to a high number of housing-related decisions.[10]

Unlike the Social Charter, the 1950 **European Convention of Human Rights** has created rights that citizens may directly enforce before courts. Though this Convention does not contain a general right to housing, the activist European Court of Human Rights has in the last decades gradually and creatively extended several of its provisions to a wide range of housing problems, including Article 8, the right to family and private life and protection of the home; Article 6, the right to due process in the case of eviction; Article 3, the right to be protected against inhuman and degrading treatment; Article 2, the right to life; and Article 14, the right to protection against discrimination. In addition, the right to housing is also grounded in the right to property. An individual's substantial interest in a 'good' can cover in certain situations the protection of one's home irrespective of the tenure status (Article 1, protocol 1). The rich case law of the European Court of

9 See the overview in *P. Kenna*, Housing Rights and Human Rights, Brussels 2005: FEANTSA.

10 See Feantsa/ Fondation Abbé Pierre (eds.), Housing-related binding obligations on States, 2016, 3ff.

Human Rights[11] extends to many fields of the right of housing, including adequate and affordable housing, the protection against eviction, the status of informal settlements, housing rights of vulnerable groups such as Sinti and Roma etc.[12]

In contrast, the "right to housing acquis" of **EU law** is smaller but growing: Whereas housing is affected collaterally by several European policies and legal branches (ranging from anti-poverty and anti-exclusion to non-discrimination, tax, private international and consumer law), a directly enforceable housing right is contained only in Art. 34 (3) of the 2000 **EU Charter of Fundamental Rights**, namely a "right to social and housing assistance". However, this provision has not yet proven relevant as the Charter applies only to actions of the EU and national implementation measures, but not to autonomous national measures to which housing widely belongs (Art. 51). However, significant efforts have been made to apply other Charter provisions (such as the prohibition of discrimination on grounds of sex, race, colour, ethnic or social origin, Art. 21) and rights relevant to housing (such as the right to privacy and family life, Art. 7, and the right to an effective remedy and to a fair trial, Art. 48) with a view to enhancing consumer protection (Art. 37) in housing credit and mortgage agreements.[13] That notwithstanding, the potential of the Charter for the promotion of housing rights has not yet been fully used. More detailed housing rights are contained in the 2017 **European Pillar of Social Rights**. Yet this is an intergovernmental framework whose implementation lies primarily on the Member States and has not been very effective so far.

Lastly, at the level of **national law**, the "housing rights picture" is diverse. More than 50 national constitutions worldwide explicitly stipulate the right to housing. In Europe, the constitutions of most EU States contain general and/or detailed housing rights as well.[14] Yet typically, these provisions are regarded as not directly enforceable programmatic statements referring to state duties and policy goals. Therefore, supranational housing rights seem to have more signifi-

11 Cf. P. Kenna, 'Using the ECHR to Advance Human Rights' (2004) 2(1), *Housing & ESC Rights Law Quarterly* 5

12 See again Feantsa/ Fondation Abbé Pierre (eds.), Housing-related binding obligations on States, 2016, 3ff.

13 See *P. Kenna/H. Simon Moreno*, Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights, ELJ 25 (2019), 608; *J.W. Rutgers*, 'The right to housing (Article 7 of the Charter) and unfair terms in general conditions' in H. Collins (ed.), European Contract and the Charter of Fundamental Rights (Antwerp: Intersentia, 2017) 125–137; *Anna van Duin*, 'Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC' (2017) EuCML 190.

14 See the survey in United Nations Housing Rights Programme, Report No. 1, Series of publications in support of the Global Campaign for Secure Tenure No. 05, 2002, 36ff.

cance than national guarantees even within national legal orders. At the level of infraconstitutional law, in most States there are lots of housing-related entitlements, for example in the legislation on social assistance. However, with the notable exception of the French *"droit au logement opposable"*[15], they do not convey to citizens a direct subjective right to be assigned a dwelling by public authorities.

Administrative and court procedures based on these international, supranational and national instruments have shaped and consolidated the right to housing significantly and in many cases protected European citizens effectively.[16] Yet these procedures have up until now mostly dealt with housing rights of vulnerable groups, such as the elderly, the handicapped, single parents and families with low income, minorities (in particular Sinti and Roma) or in specific critical situations such as eviction proceedings. A somewhat wider public was only addressed through the rights to shelter and to social housing, the latter being generally limited by the available public resources. However, nowadays, **threats to the right to housing are no longer limited to vulnerable citizens but extend to the "mainstream society"**, including most lower and many middle class families. More than the protection of sitting tenants against rent increases, notice and eviction, and the protection of indebted homeowners against mortgage foreclosure and eviction, the supply of, and access to, a sufficient number of affordable dwellings has become the primary concern of many national housing policies.

It is true that the EU has already tried to address such "mainstream housing problems". Back in 2007, the EU states proclaimed the **Leipzig declaration on sustainable cities**, which has contributed to the development of a **European Urban Agenda**, of which housing is a key component.[17] Later efforts have been undertaken in the framework of **European Pillar of Social Rights** and during the **European Semester**, where housing in general and social housing in particular have been assessed in a review of Member States` economic and social policies.[18] In addition, a housing partnership was concluded within the EU Urban Agenda,[19] which has in December 2018 published a first Action Plan.[20] Whereas these efforts

15 See e.g. *Ch. Robert*, Le droit au logement opposable: une avancée incontestable, des questions en suspens, Recherches et prévisions 2008, 106–113.

16 See again Kenna, op. cit.

17 https://ec.europa.eu/regional_policy/archive/themes/urban/leipzig_charter.pdf.

18 The 2019 reports have just been published on 27 February at: https://ec.europa.eu/info/publications/2019-european-semester-country-reports_en

19 https://ec.europa.eu/futurium/en/housing

20 https://ec.europa.eu/futurium/en/system/files/ged/final_action_plan_euua_housing_partnership_december_2018_1.pdf

have raised public conscience of, and political concern about, the European housing crisis, they do not seem to have generated substantial results thus far.

It is probably fair to say that a satisfactory legal response to the shift of housing problems from vulnerable groups and special cases to the mainstream society has not yet been found. However, a law and policy approach based on tenure neutrality and diversification, as well as the extension of social rights to these, may have the potential to fill this gap.

III. Alternative and Intermediate Tenures

As mentioned, the state of the art in interdisciplinary research on housing supply and conditions suggests that States with housing policies favouring "tenure neutrality" and "tenure diversification" perform better in terms of housing supply and conditions. However, the potential of new forms of tenure, in particular alternative and intermediate tenures, has not been adequately addressed in law and policy research, let alone realised in practice in most States. As is shown by the compendium of 50 alternative housing models recently published by the European federation against homelessness (FEANTSA),[21] many alternative tenures are still at the development stage. To consolidate alternative and intermediate tenures and to structure future research, a taxonomy on different housing options will be suggested here (1), on which a more detailed description of key novel tenures may be based (2).

1. A Taxonomy of Alternative Housing Tenures

Following the key criterion of housing stability, often also labelled security of tenure, one may analytically reconstruct – alongside the main tenures social housing, ordinary market rent and full ownership – a continuum of housing options encompassing **"rent minus", "rent plus", "ownership minus" and "ownership plus" tenures.**[22]

21 Feantsa (ed.), Housing Solutions Platform, 50 Out-of-the-Box Housing Solutions to Homelessness & Housing Exclusion, 2019.

22 Categories suggested by *Ch. Schmid*, Security of Tenure in Comparative Perspective, German Contribution to the UN Habitat III conference, Quito 2016. See for a continuum based on strong property rights, *M. Haffner*/*D. Brunner*, German cooperatives: property right hybrids with strong tenant security, OTB WORKING PAPER 2014–7, http://repository.tudelft.nl/view/ir/uuid%3Acb635acb-b59a-455b-bd63-ae8b1d01fc98/.

"**Rent minus**" tenures encompass squatting, gratuitous housing loans (typically among relatives), Airbnb type short contracts, Common law licenses as well as informal, "black market" occupancies – *i.e.*, tenancies with illegal elements such as the violation of tax, registration or inhabitability requirements, which for this reason remain in an extra-legal sphere.[23] Despite the lack of statistical data, informal occupancies seem to make up the largest share of tenures apart from ownership in Central and Eastern European[24] countries but are widespread also in Southern European countries with registration requirements for rental contracts.[25] Obviously, rent minus tenures will never qualify as best practice models and will not, therefore, be considered further in the present context. Instead, research should focus on elevating rent minus to ordinary rental tenures, e.g. by finding means to render legally valid black market tenures under private law despite violations of public law regulation.

"**Rent plus**" and "**ownership minus**" tenures make up the category of intermediate tenures.[26] The latter may be distinguished from the former in that the occupier's status comes closer to ownership than to rent; of course, there is no absolute borderline between both. Their subcategories will be treated in more detail below.

"Ownership plus" tenures mean full ownership endowed with additional "accessories", such as security devices and services in the case of "gated communities", or even the grant of national (and thus also EU) citizenship to buyers of high value real estate in Malta. Importantly, the additional features of "ownerhips plus" tenures are not related to their private law configuration in a narrower sense and will not, therefore, be analysed in more depth her.

2. Categories of intermediate tenures

On the basis of the above taxonomy, intermediate tenures may be further subdivided into three major categories, which may of course overlap: new and old property and land law instruments; forms of private-public articulation and cooperation; and private governance structures between state and market.

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23 See e.g. Tenlaw, CROATIA Report 2014, 111 (www.tenlaw.uni-bremen.de); HUNGARY Report, 76; SLOVENIA Report 2014, 85.

24 See e.g. Tenlaw, HUNGARY Report 2014, 19–20; Tenlaw, LITHUANIA Report 2014, 16; Tenlaw, SERBIA Report 2014, 27.

25 See e.g. Tenlaw, ITALY Report, 17–18; SPAIN Report, 25–26; SWEDEN Report 2014, 20.

26 See *S. Monk/Ch. Whitehead*, Making housing more affordable: The role of intermediate tenures, Oxford 2010: Blackwell Publishing.

a) New and old property and land law instruments

In the property and land law systems of all EU states, there are of course several legal instruments guaranteeing housing rights different from ordinary rent and ownership. To start with, apartment ownership is present in various models and conceptions, ranging from property to company law models (as in Scandinavia). However, its focus is more on the technical juxtaposition of some of form of separate entitlement to the apartment and of a common entitlement to the common parts of the building such as external walls, stairs and common rooms. By doing so, it does not generally contain particular economically or socially innovative features of an intermediate tenure.

Moreover, there are in most legal orders several "old" property law concepts relating to dwellings including usufruct and real housing rights. Most of them have in common that they are not particularly suited, and therefore rarely applied, to address modern housing situations.[27] Some old instruments, particularly if remodelled more recently, do however provide interesting alternative tenures. These include building or ground leases (Erbpacht, enfiteusis, right to build, diritto di superficie or similar solutions), which may be found in many EU States. For example, in the Netherlands, ground leases have been developed into an instrument of urban planning enabling social land use control.[28] Another model in this sense is the Finnish occupation right, which provides a sort of upgraded rent of a dwelling.[29] Under this right, the tenant needs to make an advance payment of 15 % of its market value and pay a monthly rent for the rest to the owner. This gives the tenant the right to use the dwelling indefinitely (subletting of up to two years is permitted in some situations) and to inherit it, but she is not allowed to sell it without the consent of the owner. However, the rightholder may transfer the right back to the owner, thus extinguishing it.

The most innovative new property law instrument are temporal (time-limited) and shared ownership-models as designed in recent Catalan legislation (Act 19/

27 See *S. Nasarre Aznar*, La insuficiencia de la normative actual sobre accesso a la vivienda en propriedad y en alquiler: la necesidad de institutionces juridico-privadas alternativas para facilitar el acceso a la vivienda, in *idem* (ed.), El acceso a la vivienda en un contexto de crisis, 2011, 163.

28 *H. Ploeger*/*H. Bounjouh*, The Dutch urban ground lease: A valuable tool for land policy?, Land Use Policy 2017, 78–85; *W. K. Korthals Altes*, Land pricing upon the extension of leases in public leasehold systems, Journal of European Real Estate Research early online 2018, 1–15, https://doi.org/10.1108/JERER-05-2018–0021.

29 See the summary in *S. Nasarre Aznar*, Los anos de la crisis de la vivienda, 2020, 532.

2015) inspired by Common law models.[30] It is the first time since Napoleon times that a civil law jurisdiction has allowed the fractioning of ownership by percentage (shared) or by time (temporal), making it more affordable and thus counteracting household over-indebtedness. Shared ownership provides the buyer with a share of the property, while the seller remains owner of the other share. The buyer uses the property exclusively and pays rent for the share they she does not yet own. She has the right to progressively acquire more shares on the property until becoming full owner. Temporal ownership in turn allows a new owner to acquire ownership from an original owner, but only for a certain time period, namely between 10 and 99 years under Catalan law. During this time, she has all the powers on the property. Shared ownership and temporal ownership can be combined, thus rendering housing even more affordable while preserving the essence of homeownership.[31]

b) Tenures with mixed private-public features

This category encompasses rentals supplemented with additional, socially protective, elements. For example, in Sweden the rent is negotiated collectively on a yearly basis by landlord and tenant associations, as is the case in collective labour law for working conditions in most European countries. Collectively negotiated rents are typically considerably lower than market rents, which entails the existence of long waiting lists to rental apartments in attractive areas. Somewhat similar is the Italian solution under which parties who adhere to a model agreement prepared by landlord and tenant associations (which also foresees lower rents as compared to market rents) benefit from an advantageous tax treatment.[32] However, this possibility is said to be rarely used in practice. In Germany, compulsory low rents may be linked to public object-related subsidies for the erection of rental building by private parties or investors. To this end, the award of subsidies is contractually tied to the obligation of the builder and future landlord to charge only so-called cost-oriented rents for the period of 15 years, after which the respective units may be re-rented at market conditions.[33]

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30 See H. Simón et al., Shared ownership and temporal ownership in Catalan law, International Journal of Law in the Built Environment 2017, 63–78; *S. Nasarre Aznar,* Los anos de la crisis de la vivienda, 2020, 540.

31 Feantsa (ed.), Housing Solutions Platform, 50 Out-of-the-Box Housing Solutions to Homelessness & Housing Exclusion, 2019, 112.

32 *Tenlaw*, Italy, 59.

33 *Tenlaw*, Germany, 23.

Another interesting instrument are social rental agencies, which may be found in the Benelux countries and France, but also elsewhere at regional or municipal level.[34] These aim to make available private rental dwellings to poor tenants to compensate for the decreasing number of public dwellings due to budget cuts and privatization. Such agencies are generally financed by public funds, and act as intermediary between private landlords and households in need of affordable housing. They source suitable properties within the housing market and negotiate medium term leases with a private landlord. The agencies pay or at least guarantee the full rent (which is usually slightly less than market level) to the landlord even when the dwelling is temporarily not occupied. Moreover, they frequently also act as rental manager of the dwelling, carrying out maintenance works and other tasks, so that the owner does not need to care about the dwelling herself.

c) Private governance structures

Private governance structures presuppose that "tenants" are actively involved in the creation and/or management of the rental space they use. The classic example are cooperatives, which exist in most EU States, albeit in different forms. A similar construction is the German "Mietshäuser-Syndikat"[35] which relies on the establishment of a non-profit private limited company for each residential building. Also the the French "société immobilière à vocation sociale", which however depends on public funding, may be mentioned in this context. Further examples are provided by collaborative economy models,[36] the most prominent one being community land trusts.[37] These have been developed in the US since 1969 on the model of the Jewish National Fund. Today, there are about 220 trusts providing about 40.000 dwellings (in ownership or rent) to its users. The trust model has been adopted in Europe by Belgium. The trust structure relies on community-based non profit-organisations, which exercise a common "stewardship" over building

34 See *P. De Decker*, Social Rental Agencies, An innovative housing-led response to homelessness, Brussels 2012: FEANTSA, https://www.feantsa.org/download/2012_06_22_sra_final_en-2–2292903742234225547.pdf.

35 See e.g. *I. Balmer*/ *T. Bernet*, Selbstverwaltet bezahlbar wohnen? Potentiale und Herausforderungen genossenschaftlicher Wohnprojekte, in B. Schönig/J. Kadi/S. Schipper (eds.), Wohnraum für alle?!, 2017, 259.

36 See *S. Nasarre-Aznar*, Collaborative housing and blockchain, Administration 2018, 59.

37 *S. Nasarre Aznar*, Los anos de la crisis de la vivienda, 2020, 532.

land, which is typically bought with public aids or private donations. The stewardship covers the funding and building of dwellings and the control of their use; even regular information and education of the users may be included. The trust is usually administered in tripartite fashion, with the representatives being made up by one third of the residents in the trust itself, by another third of residents of other "service areas" of the same trust organization (i.e. a State or any territorial sub-unit) and the last third by public representatives or other stakeholders. The trust offers to its users 99 years-leases of its dwellings, thus guaranteeing its affordability. To enable the user to move, the contract includes a resale option to the trust itself or a third party.

All categories of intermediate tenures may undergo **further diversification**. In particular, they may be combined with land and housing governance instruments[38] such as zoning requirements (e.g. on the prevention of gentrification), social conditions for building permits (imposing e.g. that an adequate share of new dwellings to be built need to be used for social housing), measures against short-term use for tourist accommodation ("tourism gentrification in the case of platforms such as Airbnb),[39] anti-speculation and similar compensation measures (e.g. levies to cover public costs of land development; taxes levied on "planning gains" when land is converted into building land and therefore multiplies in value).[40] Finally, housing tenures may also be combined with other policy features such as housing-related objective and subjective subsidies as well as tax benefits[41] and privileges.

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38 These options may also be used to close the gap between social housing and market housing: *J. Hoekstra*/*P. Boelhouwer*, Falling between two stools? Middle-income groups in the Dutch housing market, International Journal of Housing Policy 2014, 301–313.

39 See *W. Korthals Altes*/*R. Kleinhans*/*E. Meijers*, Relational versus local values of cultural heritage: Tourism gentrification and governance in context, Socio.hu. 2018, Special issue 6, 22 p., https://doi.org/10.18030/socio.hu.2018en.1

40 *W. Korthals Altes*, Taxing land for urban containment: Reflections on a Dutch debate, Land Use Policy, Altes 2009, 233–41; *M. Oxley*, The Gain from the Planning-Gain Supplement: A Consideration of the Proposal for a New Tax to Boost Housing Supply in the UK, European Journal of Housing Policy 2006, 101–113, *T. A. D. H. Crook*/*S. Monk*. Planning Gains, Providing Homes, Housing Studies 2011, 997–1018, DOI: 10.1080/02673037.2011.619423; *B. Fernandez Milan*/*D. Kapfer*/*F. Creutzig*, A systematic framework of location value taxes reveals dismal policy design in most European countries, Land Use Policy 2016, 335–49.

41 See for a comparison of a number of countries and optimal taxation of owner-occupied housing *M. Haffner*/*S. Winters*, Homeownership taxation in Flanders: moving towards 'optimal taxation'?, International Journal of Housing Policy 2016, 473–490, DOI: 10.1080/14616718.2015.1085214; See also for a comparison among several countries: *M. Haffn*er, Dutch Personal Income Tax Reform 2001: An Exceptional Position for Owner-occupied Housing, Housing Studies 2002, 521–534;

3. A European acquis of best practices among alternative housing options

In sum, the described categories of intermediate tenures may be said to form part of a **European acquis of alternative housing options**. Within this acquis, the interest of compiling and comparing alternative and intermediate tenures lies in singling out, in an approach similar to the so-called open method of coordination, **best practice models**, potentially capable of being used beneficially also in other EU States. Of course, the relevant criteria for national housing options to qualify as best practice models are not easy to determine in abstracto. Provisionally, as a kind of working hypothesis, one may look at the soundness and security of the legal structure, economic implications such as the cost-benefit ratio and the need for, and attractiveness of, the specific housing option in certain market situations and housing systems. Yet, as will be shown now, the use and transnational exchange of best practice models is not only a voluntary endeavour but may to a limited extent also be derived from the right to housing.

IV. The Right to Housing as a Right to Adequate Housing Options

The following analysis aims at endowing citizens with the capacity to challenge, under the right to housing, bad housing options of their state, thus encouraging the use of better foreign tenure models. To this end, an extensive interpretation of that right will be developed in three steps: First, it will be shown that social rights should be directly enforceable on account of their significance for democracy and citizenship (1). However, as judicial review may interfere with the prerogatives of the legislative and executive powers, restrictive, "deferential" criteria for such a review need to be developed (2) and then applied to the right to housing. Assuming that this right extends to state duties, in particular the duty to administer a reasonable housing policy, it may be condensed into a right to adequate housing options (3).

M. Oxley/M. Haffner, Housing taxation and the subsidies: international comparisons and the options for reform, York 2010: Joseph Rowntree Foundation, Housing Taskforce.

1. The Judicial Enforceability of a Social Right to Housing

A first obstacle is provided by the traditional doctrine, spelt out famously in Thomas H. Marshall's seminal *citizenship and social class*[42] and predominant in most EU States, according to which social rights are not directly enforceable by citizens, but have the status of programmatic objectives to be realised only as far as possible by political institutions.[43] Under the classic separation of powers doctrine, the institutions should be granted wide discretion in doing so. Moreover, social rights are alleged to be too vague as to determine precise legal entitlements; to be subject to *gradual* implementation only, depending on political feasibility; and finally, to be dependent on the available public resources.[44]

These arguments are discussed at great length since decades, which renders it impossible to restate the whole discussion exhaustively. However, it is argued that the democratic virtues of the judicial enforceability of social rights outweigh the limitations of the prerogatives of the executive and legislative powers. This is so for two main reasons.

First, **effective, judicially enforceable human rights, including social rights, are constitutive of a democratic system**, which needs a strong indivi-

42 Th. *H. Marshall*, Citizenship and Social Class and other Essays, Cambridge 1950: Cambridge University Press.

43 See *A. Fischer-Lescano*/*K. Möller*, Der Kampf um globale soziale Rechte, 2011, 52 et seq.; English version: Transnationalisation of Social Rights, 2016, 11, 31.; see in the same volume also *S. Lorenzmaier*, Enforcement of Transnational Social Rights: International and National Legal Aspects, 83, 94.

44 See from the huge literature on the justiciability of social rights: *K. V. Boyle*/*E. Hughes*, Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights, International Journal of Human Rights 2018, 43–69; *I. de Paz González*, The Social Rights Jurisprudence in the Inter-American Court of Human Rights, Cheltenham/Northam**p**ton 2018: Edward Elgar Publishing; M. Langford/C. A. Rodríguez Garavito/J. Rossi (eds.), Social Rights Judgments and the Politics of Compliance, Cambridge 2017: Cambridge University Press; *K. Lukas*, Social Rights Jurisprudence: Recent Cases under the European Social Charter of the Council of Europe, European Yearbook on Human Rights 2017, 329–342; Ch. Binder/J. A. Hofbauer/F. Piovesan/A.-Z. Steiner/E. Steiner (eds.), Social Rights in the Case Law of Regional Human Rights Monitoring Institutions, Neuer Wissenschaftlicher Verlag/Intersentia 2016; A. Diver/J. Miller (eds.), Justiciability of Human Rights Law in Domestic Jurisdictions, Berlin 2016: Springer; *G. Kecskés*, Individual Complaints within the Field of Economic, Social and Cultural Rights, Hungarian Yearbook of International Law and European Law 2015, 93–113; M. Langford/B. Porter/R. Brown/J. Rossi (eds.), The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary, Pretoria 2016: Pretoria University Law Press; *M. Ssenyonjo*, Economic, Social and Cultural Rights in International Law, 2nd edition, Oxford 2016: Hart Publishing; H. A. Garcia/K. Klare/L. A. Williams (eds.), Social and Economic Rights in Theory and Practice, London 2015: Routledge; *S. Fukuda-Parr*/*T. Lawson-Remer*/*S. Randolph*, Fulfilling Social and Economic Rights, Oxford 2015: Oxford University Press.

dual counterweight to majoritarian decision-making. Therefore, rendering legally irrelevant basic guarantees for human existence such as the right to food, water and housing, and excluding an at least residual competence of courts to monitor the core of such guarantees, does not constitute a legitimate solution.[45]

Second, the **judicial enforceability of social rights has positive influence on European citizenshi**p, which is another important component of European democracy. Social rights promote social inclusion and democratic participation and thus constitute a core element of citizenship, both national and European. Housing being a basic human need, it is only when it is satisfied that citizens are able to focus on the development of their other talents and contributions to society and democratic self-governance. Specifically, social rights may enrich citizenship in both the democratic process and the content of policy choices in the field of housing.

With respect to **process**, social rights promote the narrative of a dialogic and deliberative citizen,[46] who gets empowered by the EU to second-guess choices of the national legislator:[47] Under a right to adequate housing options (see below), citizens are entitled to request reasons as a justification from their State if housing options proven successful in other States are not considered at home. European citizenship is thus endowed with a "transnationally deliberative and reflective" element, in that important regulatory choices of other EU states' legislators need to be reflected in a State's housing policy choices. Following Joseph Weiler's famous distinction between Eros and Civilization[48] – Eros representing the irrational, ethnicity-related aspects of citizenship rooted at national level, and civilization the dialogic and rational aspects, which may be assigned to the European level – such an understanding is particularly suitable for European citizenship.[49]

As regards the **substance of citizenship**, social rights contribute to a "re-embedding" of the housing market into the social sphere. This concept is borrowed from Karl Polanyi's seminal 1944 *The Great Transformation*, which among

45 See *A. Fischer-Lescano*/*K. Möller*, loc. cit.

46 See *K. Mahendran*/*I. Jackson*/*A. Kapoor*, Public Narratives of European Citizenship – the dialogical citizen in the European Public Sphere, in: K. Mahendran, G. Bucken-Knapp, R. H. Cox (eds.), Discursive Governance in Politics, Policy and the Public Sphere, 2015.

47 This idea of the deliberative legitimacy of supranational law and governance was elaborated by *Ch. Joerges*, see e.g. his: Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu ei nem Recht-Fertigungs-Recht für das Mehrebenensystem der EU, EUI Working Paper LAW 2003/2.

48 *J. H. H. Weiler*, To be a European citizens – Eros and civilization, Journal of European Public Policy 1997, 495.

49 Similarly, on the layered resp. multi-level character of European citizenship, *U. Davy*, How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights, Washington University Global Studies Law Review 2014.

grand theories probably explains best the current political crises about the Euro, transnational labour competition and land and housing markets. According to Polanyi, labour, money and land (and thus also housing) are so-called fictitious commodities, which should not be fully exposed to the market mechanism ("disembedding") even if legislators may be tempted to do so. Otherwise, adversely affected societies will resort to countermeasures to socially re-embed the market. Housing rights thus empower a socially committed, *Polanyian* citizen.

If all these considerations show that judicial review of the right to housing is legitimate and democracy-reinforcing, the decisive question lies in balancing the adequate scope of judicial review vs. the legitimate prerogatives of the executive and legislative powers.

2. General conditions for legitimate judicial review of social rights

The scope of the right to housing is necessarily vague and open-textured and therefore needs to be rendered more concrete in judicial interpretation. Yet, a simple case-by-case approach is hardly persuasive on account of legal certainty. What is needed is therefore an interpretative model capable of guiding judicial review and rendering its results more foreseeable. In the last decades, the scope and intensity of human rights-based judicial review has been debated in particular with respect to the relationship of the European Convention of Human Rights and national legal orders.[50] Its starting point is that democratic legislators must be given wide discretionary powers in their lawmaking functions, in the area of social rights also with a view to counteracting the "*gouvernement des juges*" objection against the justiciability of these rights.[51] With respect to international adjudication over national law, Robert Howse[52] has addressed the higher legitimacy of national legislators with the term "global subsidiarity".

In the ECHR context, the corresponding doctrine of the "(national) margin of appreciation" has been counterbalanced by concepts of "evolutive jurispru-

50 See e.g. the contributions in S. Sonelli (ed.), La Convenzione Europea dei Diritti dell'Uomo e l'Ordinamento Italiano, 2015.

51 In Spain such a problem has materialised during the financial crisis in a sort of "Robinprudence", i.e., judges trying to help parties in need by overstepping legal limits and constraints. See *S. Nasarre*, Robinhoodian courts' decisions on mortgage law in Spain, International Journal of Law in the Built Environment 2015, 127–147.

52 *R. Howse*, Adjudicative Legitimacy and Treaty Interpretation in International Trade Law, in: J. Weiler (ed.), The EU, the WTO and the NAFTA, 2000, 35.

dence" and "living constitution",[53] which indirectly advocate judicial activism. According to judge Grabenwarter,[54] a margin of appreciation is typically granted by the Court when (1) a common European standard of protection is absent in a given field, (2) the situation under review is uncertain, complex and exposed to fast development and changes in economy and society, (3) unusual national or regional specificities (e.g. the political, economic and social consequences of German reunification) are at stake.

These guidelines may be sharpened normatively through the **multi-level governance theory** elaborated in political science by Fritz Scharpf[55] and others.[56] Following its key parameters of effectiveness and legitimacy, human rights-based legal review should adopt a "reflexive"[57] or "procedural"[58] approach, and sensitively account for the national legal system's autonomy, integrity and the social and political constraints under which it operates. For human rights adjudication, this means that it should ensure the functioning of the essential national democratic and judicial infrastructure without which no effective protection of human rights is possible in the first place. However, beyond these basic standards, the courts should as far as possible abstain from balancing competing substantive

53 *S. Greer*, The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights, Human Rights Files No. 17, Council of Europe, 2000 (with more references in Fn. 4); *U. Prepeluh*, Die Entwicklung der Margin of Appreciation-Doktrin im Hinblick auf die Pressefreiheit, ZaöRV 2001, 771; *G. Letsas*, The ECHR as a Living Instrument: Its Meaning and Legitimacy, ssrn No. 2021836.

54 *Ch. Grabenwarter*, Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen, EuGRZ 2006, 487.

55 *F. Scharpf*, Community and autonomy: multi-level policy-making in the European Union, Journal of European Public Policy 1994, 219.

56 First steps in this direction were undertaken in *Ch. Schmid*, The Relationship between the European Convention on Human Rights and National Legal Systems: A Reconstruction based on Multi-Level Governance Theory, in: S. Sonelli (ed.), La Convenzione Europea dei Diritti dell'Uomo e l'Ordinamento Italiano, 2015, 183; see also *P. de Stefani*, The European Court of Human Rights: A New Actor of Multi-level Governance? in: L. Bekemans (ed.), Intercultural Dialogue and Multi-Level Governance in Europe, 2012, 604; a sociological approach is applied to the ECtHR by *M. R. Madsen*, The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence, in: M. R. Madsen/J. Christoffersen (eds.), The European Court of Human Rights between Law and Politics 2011; idem, Sociological Approaches to International Courts, in: K. Alter/C. Romano/ Y. Shany (eds.), Oxford 2014: Oxford University Press, 388–412.

57 See again *G. Teubner*, Law as an Autopoetic System, 1991, 138f.

58 See on the notion of procedural law, *Th. Vesting*, Prozedurales Rundfunkrecht, 1997; *G.-P. Callies*, Prozedurales Recht, 1999.

values or human rights but guarantee the integrity of procedures,[59] and enable, support and control effective democratic self-determination at national level. Such a **procedural approach** is also preferable in terms of legitimacy, as consensus is usually easier to achieve on fair and non-discriminatory procedural treatment than on the balancing of competing substantive values or human rights.

Provisionally translated to the supranational or international review of housing law and policy, this approach means that procedural irregularities, obvious substantive irrationalities or excessive restrictions on democratic self-governance including private governance mechanisms may be challenged, whereas the balancing of competing human rights or substantive values, e.g. between the legal positions of the tenant/user and the owner/landlord, should be left to national law. However, this approach needs to be further substantiated with regard to a right to adequate housing options to be developed here.

3. The Formation and Judicial Review of a Right to Adequate Housing Options

As stated above, the traditional approach to the right of housing, which focuses on the protection of individual housing rights of vulnerable individuals and groups, is not sufficient to address modern mainstream housing problems. Instead, a "collectivist turn" in the scope and interpretation of housing rights is needed to do so. This may be realised in two steps, which are already reflected in modern activist jurisprudence: first, an extension of social rights to positive state duties (a), which, second, also include the design and implementation of a reasonable housing policy (b).

a) Social rights extending to positive State duties

As regards their scope, it is widely accepted in public international and European law that human rights in general and social rights in particular do not only contain the obligation for states to respect and protect them, but may give rise to positive duties to promote their effective implementation. This was spelt out on many occasions by the European Court of Human Rights, for example in *Marzari v Italy* in relation to the application of Art. 8 ECHR in the field of housing:

59 See e.g. *N. Trocker*, La Formazione del Diritto Processuale Europeo, 2011, 178.

> *"The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the state to abstain from such interference: in addition, to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the latter's private life."* [60]

In *Yordanova*[61] the European Court of Human Rights held that Art. 8 ECHR may in exceptional case entail the **positive obligation to secure shelter to particularly vulnerable individuals**. In some Spanish cases,[62] the European Court of Human Rights issued interim measures preventing an eviction from taking place, as local authorities had not provided sufficient evidence of the measures that would be taken to protect the occupants (especially children) to prevent their homelessness after eviction.

Similarly, the European Court of Justice (ECJ) has repeatedly derived **positive state duties** from the basic market freedoms, e.g., the duty to actively prevent national farmers from acting in violation of those freedoms by blocking borders to the import of foreign products,[63] or by blocking a highway as a measure of environmental protest.[64] In the *Grunkin* case,[65] the ECJ has derived positive duties even from European citizenship, namely a State's duty to render possible under national law keeping a name lawfully acquired in another EU State.

Finally, at the level of international law, in the case *Mohamed Ben Djazia and Naouel Bellili v Spain,* the UNCESCR has laid down even positive horizontal obligations of a State to ensure the respect of social rights in forced eviction procedures initiated by a private landlord.[66]

b) Controlling the reasonableness of national housing policy

The extension of housing rights is not limited to single positive duties, but may also be extended to the "structural" duty to design and administer a reasonable

60 Marzari v Italy: ECHR (1999) 28 EHRR CD 175.
61 YORDANOVA AND OTHERS v. BULGARIA (App. no. 25446/06).
62 (A.M.B. and others Spain and Ceesay Ceesay and others v. Spain).
63 Case C-1997/595, French Farmers' Protests, European Court Reports 1997 I-06959.
64 Case C-2003/233, Schmidberger, European Court Reports 2003 I-05659.
65 Case C-353/06, Grunkin and Paul, European Court Reports 2008 I-07639.
66 See UN Doc. E/C.12/61/D/5/2015, Committee on Economic, Social and Cultural Rights, Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015. Mohamed Ben Djazia and Naouel Bellili v Spain.

housing policy. Such an approach has already been adopted by activist jurisprudence as well. Though it was first developed by the South African Constitutional Court in its *Grootboom* decision,[67] it may be applied to any general housing rights contained in national, European or international instruments.

The *Grootboom* decision was based on section 26 of the 1996 constitution according to which, *under the right to have access to adequate housing (para. 1), the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right (para. 2).* Confronted with an eviction of poor families from land occupied by them, the Court had to decide whether the positive obligations contained in sec. 26 had been met by the State. This scrutiny was extended by the Court to the review of public housing programmes. Yet the Court emphasised that it would not enquire "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent" (para. 41). Instead, the housing programme must (only) include measures that are **reasonable** both in their conception and in implementation, considering also the available resources.

A given measure was held to pass the reasonableness test when it is comprehensive and well-coordinated; is capable of facilitating the right in question albeit on a progressive basis; is balanced, flexible and does not exclude a significant segment of society; and responds to the urgent needs of those in desperate circumstances. In *Grootboom*, the latter condition was held to be violated, as in the national housing programmes "no provision was made for relief to the categories of people in desperate need", whereas the acquisition of home ownership by middle class families was promoted. According to this decision, widely received in public international law,[68] the right to housing does not generally convey an individual right against public authorities to be assigned a dwelling, but is structurally violated by a manifestly unreasonable public housing policy.

A similar reasoning was applied more recently at UN level in *M.B.D. and others* v. *Spain* of 2017.[69] There, Spain was held liable for breaching Art. 11.1 ICESCR, as it had not presented reasonable arguments to demonstrate that, despite having taken all necessary measures within existing resources, it was impossible to provide the evicted occupants with alternative housing space.

Focusing on **fair procedures and manifest (or structural) irrationalities of national housing policy**, the judicial approaches both in Grootboom and in

67 Government of the Republic of South Africa and Others vs. Grootboom 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

68 See *S. Kommer*, Menschenrechte wider den Hunger, 2015, 133 et seq.; *I. Kanalan*, Die universelle Durchsetzung des Rechts auf Nahrung gegen transnationale Unternehmen, 2015.

69 M.B.D. and others v. Spain (Communication No. 5/2015) [5.07.2017.]

M.B.D. remain with the limits of legitimate judicial review. Indeed, it has a **procedural focus** and it does not extend to balancing substantive policy choices, which remains the prerogative of the legislator. Therefore, it may in a next step be applied to alternative and intermediate tenures, which make up other important parts of housing policy:[70]

The right to housing is thus violated if a State pursues a ***manifestly* unreasonable housing policy**, which does not take into account the **European acquis of housing options** as elaborated in the previous section.[71] Though a State is not under an obligation to take over specific best practices of other States, a basic degree of tenure neutrality and diversification needs to be respected. This duty is violated for example if, as it is the case in several EU states, a national housing policy does hardly exist at all, or boils down to the promotion of home ownership without addressing the situation of those who cannot afford it. Beyond that, the right to housing may also be deemed violated if all available housing options – i.e., home ownership, social housing and market rentals together – are manifestly insufficient to meet the housing demands of vulnerable members of the society, in particular poor families, single parents and immigrants. Then, it may be argued that under the right to housing a State is bound to offer additional housing options to address their housing needs including intermediate tenures. In the face of the current housing crisis, the right to housing is thus reconceived as a – predominantly procedural – right to adequate housing options, which is judicially enforceable.

V. Conclusions

As this article has tried to show, the right of housing at the level of public international, European and national law may be plausibly extended into a right to adequate housing options. This right enables a minimal judicial control of housing policy in general and the availability of adequate housing tenures, including alternative and intermediate tenures, in particular. Furthermore, an extended social right to housing reinforces the concept of an active European citizenship, under which the legislator must give rational reasons for policy choices negatively affecting citizens.

70 On such a reflexive concept of social rights see *A. Fischer-Lescano*/*R. Christensen*, Das Ganze des Rechts. Vom hierarchischen zum reflexiven Verständnis deutscher und europäischer Grundrechte, Berlin 2007: Duncker & Humblot, 427.

71 On the conceptual difficulties of this legal review, see below sub concept.

Courts at all levels, and therefore ultimately citizens and institutions acting as plaintiffs, are thus empowered to second-guess manifest omissions and failures of the national legislator, though they should proceed cautiously by following what was called a procedural approach. Possibly, though, even the "shadow" of such judicial review, i.e. its sheer availability, may already have a beneficial "nudging" effect on legislators, who have no longer an extremely wide, if not unlimited, discretion in their social and housing policy choices.

Finally, it is true that the right to adequate housing options provides only a modest contribution to address the extremely complex European housing crisis of our time. Nevertheless, academics from all housing-related disciplines should confront politicians and legislators with similar proposals, with a view to mobilising all available resources to confront the crisis effectively.