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# *Taking the Right to Adequate Housing Seriously in Chile's Next Constitution: Building from Scratch*

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## I. INTRODUCTION

**T**HIS CHAPTER INTRODUCES the right to adequate housing as part of the right to an adequate standard of living. The first section presents the content and significance of this right in light of international and comparative law and practice. Second, the chapter explores some of the legal and policy implications of enhancing the status of the right to adequate housing in Chile's Constitution, specifically in relation to the responsibilities of housing developers, the legal recognition of the social function of housing and homeownership, and the need to protect tenants with strong habitability standards and security of tenure in the private rental sector. Taking seriously the right to housing as part of the right to an adequate standard of living can contribute to addressing the root causes of poverty and inequality in Chile.

## II. A LOOK AT INTERNATIONAL HUMAN RIGHTS LAW AND COMPARATIVE PRACTICE

Article 25 of the Universal Declaration of Human Rights proclaims in its first paragraph that:

everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The right to adequate housing is part of the right to an adequate standard of living. It is recognised in Art 11(1) of the International Covenant on Economic,

Social and Cultural Rights, Art 27(4) of the Convention on the Rights of the Child, Art 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination, and Art 14 of the Convention on the Elimination of All Forms of Discrimination Against Women. All of these treaties have been signed and ratified by Chile, and the country needs to abide by them in good faith as a matter of international law; internal law is no justification for any country's failure to abide by international human rights obligations (Arts 26 and 27 of the Vienna Convention on the Law of Treaties).

In accordance with Art 34 of the Charter of the Organization of American States, countries agree to dedicate every effort to achieve 'adequate housing for all sectors of the population'. In order to achieve such goal progressively, 'by legislation or other appropriate means', states must 'adopt measures, both internally and through international cooperation, especially those of an economic and technical nature' (Art 26 of the American Convention on Human Rights).

In Europe, Art 31 of the Revised European Social Charter of 1996 proclaims the right to adequate housing. The European Committee of Social Rights monitors states' compliance with the European Social Charter in its different versions and with its additional protocols. Among other things, this committee has established that the legal, social and economic protection of families includes the adequate provision of housing, which extends to security from unlawful evictions where legally established rules are not being respected or where the rights of the persons concerned are not being sufficiently protected.<sup>1</sup>

Although not explicitly mentioned in the African Charter on Human and Peoples' Rights (Banjul Charter), the African Commission on Human and Peoples' Rights has interpreted that the right to adequate housing is implicit in the Banjul Charter, as the substance of the right can be inferred from other rights recognised therein, including the right to health, the protection of family, and the right to property.<sup>2</sup>

The right to housing is indeed closely linked to the right to private and family life, and the corresponding right to home. Proclaimed also in the current Chilean Constitution of 1980 (Arts 19(4) and 19(5)), the right to home should be interpreted in light of international human rights law, including Art 17 of the International Covenant on Civil and Political Rights, ratified by Chile. In interpreting this provision, the UN Human Rights Committee has established that the prohibition on 'arbitrary interference' with the enjoyment of one's home 'is intended to guarantee that even interference provided for by law should

<sup>1</sup> European Committee of Social Rights, *European Roma Rights Centre v Greece*, Collective Complaint No 15/2003, Decision on the Merits of 8 December 2004, paras 24 and 51.

<sup>2</sup> African Commission of Human and Peoples' Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Communication No 155/96, Ruling of 27 May 2002, para 60.

be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances'.<sup>3</sup>

Housing is much more than a roof over one's head, and much more than a mere commodity. Housing, as observed by the UN Committee on Economic, Social and Cultural Rights (CESCR), 'should be seen as the right to live somewhere in security, peace and dignity'.<sup>4</sup> The CESCR has identified seven criteria to determine the adequacy of housing: (1) legal security of tenure, including protection from forced evictions, irrespective of the type of property and tenure (homeownership, rental, informal settlement, etc); (2) availability of services, materials, facilities and infrastructure, including access to natural and common resources, all of which is essential for health, security, comfort and nutrition; (3) affordability, including protection from unreasonable rent levels and increases, so as not to compromise or threaten the attainment and satisfaction of other essential needs and rights; (4) habitability, in terms of protection from cold, damp, heat, rain, wind and other threats to health and safety; (5) accessibility, paying particular attention to the requirements of groups and individuals at greater risk of harm, disadvantage and discrimination; (6) location, allowing access to employment, healthcare services, schools, transport and other facilities, bearing environmental concerns in mind as well; and (7) cultural adequacy, using materials and tools that recognise and express appropriately the cultural identity and diversity of the population.<sup>5</sup>

The persistent non-payment of rent and other serious breaches of contractual obligations can justify the need for an eviction. However, in the words of the UN CESCR, such eviction 'should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality'.<sup>6</sup> The committee has added that the eviction of people living in rental accommodation may be compatible with international human rights law, but only when 'the eviction is provided for by law and is carried out as a last resort, and (when) the persons concerned have had prior access to an effective judicial remedy, in order to ascertain that the measure in question is duly justified'.<sup>7</sup> An eviction related to a rental contract between individuals can, therefore, affect and potentially infringe socio-economic rights the state is bound to respect, protect and fulfil.<sup>8</sup>

<sup>3</sup>UN Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, UN doc HRI/GEN/1/Rev.1 at 21 (1988), para 4.

<sup>4</sup>UN CESCR, *General Comment No 4: Right to Adequate Housing*, UN doc E/1992/23 (1991), para 7.

<sup>5</sup>*Ibid*, para 8.

<sup>6</sup>UN CESCR, *General Comment No 7: Forced evictions*, UN doc E/1998/22 (1997), paras 11 and 14.

<sup>7</sup>UN CESCR, *Ben Djazia and Naouel Bellili v Spain*, Communication No 5/2015, UN doc E/C.12/61/D/5/2015 (2017), para 15.1.

<sup>8</sup>*Ibid*, para 14.2.

### The proportionality test

entails examining not only the consequences of the measures for the evicted persons but also the owner's need to recover possession of the property. This inevitably involves making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions'.

These factors should be borne in mind when ruling on the possible postponement or suspension of an eviction.<sup>9</sup> Furthermore, before an eviction is executed, public authorities must ensure that nobody will be rendered homeless or vulnerable to human rights violations as a result of the eviction.<sup>10</sup>

In *Ben Djazia and Bellili v Spain* (2017), the UN CESCR recommended that Spanish authorities should adopt measures 'to ensure that in judicial proceedings in relation to the eviction of tenants, defendants are able to object or lodge an appeal so that the judge might consider the consequences of eviction and its compatibility with the Covenant'.<sup>11</sup> Eviction orders can only be carried out 'once the State has taken all essential steps, to the maximum of available resources, to ensure that evicted persons have alternative housing'.<sup>12</sup> States must also ensure an adequate level of 'coordination between court decisions and the actions of social services which can result in an evicted person being left without adequate accommodation'.<sup>13</sup> The proportionality test may require that an eviction order is made conditional on the 'requirement that administrative authorities intervene and assist the occupants in order to mitigate the impact of the eviction'.<sup>14</sup> It may also require postponing 'an eviction while the competent authorities negotiate with the persons concerned regarding the available alternatives'.<sup>15</sup>

International comparative practice shows that the enhancement of the right to adequate housing can result in specific policies that, in turn, can improve the living conditions of particularly vulnerable people. Starting with the proportionality assessment in the case of evictions, for example, in Scotland the law distinguishes between mandatory and discretionary grounds for eviction, and in the latter case the homeowner is required to prove that certain circumstances make the eviction justifiable, and a judge will determine the necessity of the eviction under those circumstances, before authorising it.<sup>16</sup> Similarly, both Germany

<sup>9</sup> UN CESCR, *López Albán v Spain*, Communication No 24/2018, UN doc E/C.12/66/D/37/2018, para 11.5.

<sup>10</sup> UN CESCR, *General Comment No 7: Forced evictions* (n 6), para 16.

<sup>11</sup> UN CESCR, *Ben Djazia and Naouel Bellili v Spain* (n 7), para 21.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> UN CESCR, *Gómez-Limón Pardo v Spain*, Communication No 52/2018, UN doc E/C.12/67/D/52/2018, para 9.6.

<sup>15</sup> *Ibid.*

<sup>16</sup> Private Housing (Tenancies) (Scotland) Act 2016.

and the Netherlands give their judges the power and the responsibility to pay attention to the personal circumstances of tenants taking into account the legitimate interests of landlords and tenants.<sup>17</sup>

In the case of England, the Homelessness Reduction Act 2017 gives local authorities additional responsibilities to those that have existed since the 1970s. Similar legislation exists in Scotland and Wales. UK law requires social services of local authorities to evaluate the causes and context in which the loss of a home may potentially arise in a given case, including the circumstances and needs of household members, particularly when children are involved. Local authorities must intervene at least 56 days in advance of the date when the loss of the home is likely to occur, often as a result of an eviction in the private rental sector.<sup>18</sup> Social services can offer financial assistance to pay the rent, or they may look for alternative housing options in the public or private rental sector in the area.

Between 2013 and 2017, several regions in Spain reformed their housing laws to include fiscal incentives and/or punitive measures targeted at dwellings kept deliberately empty by the owners for a long period of time. Legislation in these regions established that homeownership must serve a social function, namely, the satisfaction of a housing or habitation need. Houses kept out of the market do not meet the legally recognised essential content of homeownership.<sup>19</sup> Spain's constitutional court concluded that these regional laws were a constitutionally permissible and a fair instrument to develop the right to adequate housing while respecting the right to private property at the same time, both of which are recognised in Spain's 1978 Constitution.<sup>20</sup>

In relation to equality and non-discrimination, which are core principles of international human rights law, two examples are worth noting. In the application of international and comparative law and practice, in June 2020, the Supreme Court of Mexico urged the national institute of statistics to generate and compile disaggregated information about the population living in informal settlements. The Mexican Supreme Court observed that such data would provide more sophisticated information about the extent of poverty in those settlements, and about the impact that the allocation of public resources and other poverty alleviation measures might be having on the population.<sup>21</sup> In the same vein, the UK's Equality Act 2010, in force in England, Wales and Scotland, requires public authorities to have due regard to the need to eliminate discrimination,

<sup>17</sup> M Vols et al, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany' (2015) 2 *European Journal of Comparative Law and Governance* 156.

<sup>18</sup> Housing Act 1996, Pt VII: Homelessness, modified by Homelessness Reduction Act 2017.

<sup>19</sup> Spain's Constitutional Court, Judgments 93/2015, 14 May (Legal Justification No 13), 16/2018, 22 February (Legal Justification No 5), and 32/2018, 12 April (Legal Justification No 7).

<sup>20</sup> Spain's Constitutional Court, Judgment 16/2018 (Legal Justification No 17).

<sup>21</sup> Mexico's Supreme Court, *Techo Mexico v INEGI*, Amparo en Revisión 635/2019, Judgment of 17 June 2020.

harassment and victimisation, advance equality of opportunity, and foster good relations. Judicial and quasi-judicial bodies monitoring compliance with this legal duty regularly require the gathering of disaggregated data as a means to end direct and indirect discrimination.<sup>22</sup>

### III. CONSTITUTIONALISING THE RIGHT TO ADEQUATE HOUSING IN CHILE: WHAT IT MEANS IN PRACTICE

As observed by the former UN Special Rapporteur on Adequate Housing, Leilani Farha, specific policies implemented in the last four decades around the world favoured the retreat of public housing, its privatisation, the deregulation of construction and market, and the expanding role and unprecedented dominance of financial markets and corporations, all of which resulted in the disconnect of housing from its social function and its treatment primarily as a financial asset instead.<sup>23</sup> The commodification of housing, ie treating housing as a mere commodity and not as a human right, had significant consequences in Chile. We cover some of them in this section.

#### A. The State and Private Housing Developers: Building Blocks of Inequality

Housing is not only a human right; it is also the physical space where individuals develop their personality, where families grow and share their lives. The right to housing is closely interrelated with other human rights. A home's location affects access to several other rights and services, including education, work and health.

Chile faces extreme levels of economic and social inequality.<sup>24</sup> The average income of the richest 10 per cent of the population is 27 times that of the poorest 10 per cent, exceeding the average of OECD countries.<sup>25</sup> The income Gini coefficient for Chile in 2017 (latest available data) was 0.47, which places it as the second most unequal country in the OECD.<sup>26</sup>

Household wealth is even more unequally distributed than income. Research published in 2019 shows that Chile was the sixth most unequal OECD country

<sup>22</sup> Equality Act 2010, s 149.

<sup>23</sup> UN Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Report on the financialization of housing (2017), UN doc A/HRC/34/51, para 1.

<sup>24</sup> UN Special Rapporteur on Extreme Poverty and Human rights, Report on his mission to Chile, UN doc A/HRC/32/31/Add. (2016), para 13.

<sup>25</sup> A Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Politics* (Cambridge, Cambridge University Press, 2016).

<sup>26</sup> 'Income inequality', OECD Data: [data.oecd.org/inequality/income-inequality.htm](https://data.oecd.org/inequality/income-inequality.htm).

in terms of concentration of wealth: the richest 10 per cent of people owned nearly 60 per cent of the wealth (data from 2015–16).<sup>27</sup>

Regional inequalities are at least as acute as income and wealth inequalities. After his official mission to the country, the former UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, observed that Chile experiences a 'large geographical inequalities between regions and within cities';<sup>28</sup> people living within the same area experience significant differences in their income and wealth levels.

The relationship between public policies concerning housing and structural inequality is undeniable. As noted by the former Special Rapporteur on Adequate Housing, Leilani Farha, three historical conditions have influenced the housing situation in Chile: (1) the fact that laws and regulations from the time of the military regime are still in force; (2) the blind reliance on private market solutions; and (3) 'the resultant geographic segregation of the population based on socioeconomic status, with the poorest living on the outskirts of cities or in precarious conditions'.<sup>29</sup>

In this regard, most social rights from international human rights instruments are not adequately incorporated in the 1980 Constitution. The right to health, the right and freedom to education and the right to social security are weakly entrenched,<sup>30</sup> both in relation to the content of the rights and to the mechanisms available to hold authorities to account. The right to adequate housing is not included in the constitutional bill of rights.

Moreover, the 1980 Constitution was adopted in a context of the radical privatisation of social benefits promoted by Pinochet.<sup>31</sup> Four decades later, in line with that spirit of privatisation, private developers play a central role in the provision of housing, while the state has a subsidiary role.

Despite the lack of constitutional entrenchment of the right to adequate housing, in the opinion of the former UN Special Rapporteur on Adequate Housing, 'Chile has successfully managed to address a significant portion of its quantitative housing deficit, and to some extent also its qualitative deficit, and has put in place programmes to diversify tenure systems'.<sup>32</sup> However, public policies concerning housing provision have been developed with an exclusive

<sup>27</sup> OECD, *Society at a Glance 2019: OECD Social Indicators* (OECD Publishing, 2019) 98–99.

<sup>28</sup> UN Special Rapporteur on Extreme Poverty and Human Rights, Report on his mission to Chile (n 24), para 14.

<sup>29</sup> UN Special Rapporteur on Adequate Housing, Report on her mission to Chile, UN doc A/HRC/37/53/Add.1 (2018), para 21.

<sup>30</sup> R Bustos, 'Nueva constitución y derechos sociales: Hacia un nuevo paradigma' in E Chía and F Quezada (eds), *Propuestas para una nueva constitución (originada en democracia)* (Santiago, Fundación Igualdad, 2015) 229.

<sup>31</sup> D Lovera, 'Derechos Sociales en la Constitución del 80 (... y del 89, y del 2005)' in C Fuentes (ed), *En nombre del pueblo debate sobre el cambio constitucional en Chile* (Santiago, U. DP and Fundación Böll, 2010) 226.

<sup>32</sup> UN Special Rapporteur on adequate housing, Report on her mission to Chile (n 29), para 18.



focus on private property and overreliance on the private market.<sup>33</sup> Such structure has proved to be unsuccessful so far in fulfilling the right to adequate housing in light of international human rights standards.

Under the private market, housing becomes an asset that responds to supply and demand logic, thus low-income groups tend to be segregated from such system. In Chile, the private market approach to housing, as well as other factors, impacted on housing prices, which increased 37.2 per cent between 2011 and 2019, while in the same period wages rose by only 24.7 per cent. Hence, the property prices index average is 7.6, which means, on average, a family must allocate their full salary for 7.6 years to buy the home where they live.<sup>34</sup>

The increased prices of housing and real estate assets have also contributed to enhance wealth inequality and exclusion. Concerning Chile, the appropriation of land by large-scale investors and speculators ‘has meant that inner-city redevelopment has displaced many traditional residents, exemplifying “the intertwined roles of the state and assorted holders of economic capital in the production, distribution and representation of urban exclusion and segregation”’.<sup>35</sup>

Chile’s housing public policy has historically been focused on providing solutions for particularly vulnerable groups. However, under this paradigm, the state has also acted as a financier of the private real estate market through public subsidies. Private real-estate builders, developers and financial institutions are the main actors in the housing sector.<sup>36</sup>

Public subsidies are economic contributions from the state to low and middle-income families who need support to finance the purchase of their first home. The applicant families are required to pay a proportion of the cost out of personal savings, and the state ‘covers the difference’, while middle incomes groups ‘require larger savings and a mortgage to help finance the cost of the unit and the State pays a smaller subsidy ... Private builders are contracted to build the units’.<sup>37</sup> The model ‘constitutes an incentive for segregation, because it continues to promote density of subsidized housing built on cheap land, usually located at the periphery of cities and without services or employment opportunities’; the model contributes to further discrimination, segregation, and exclusion of vulnerable groups, such as the poor, migrants, indigenous people, and women.<sup>38</sup>

<sup>33</sup>I Silva et al, *Habitar en dignidad: hacia el derecho a la vivienda en la nueva Constitución* (Santiago, Techo-CHILE, Fundación Vivienda y GI-ESCR, 2020) 30.

<sup>34</sup>F Hurtado, ‘Índice de acceso a la vivienda (Price Income Ratio)’, Cámara Chilena de la Construcción, August 2019, [www.cchc.cl/uploads/archivos/archivos/INDICE\\_DE\\_ACCESO\\_A\\_LA\\_VIVIENDA\\_-\\_28\\_agosto\\_2019.pdf](http://www.cchc.cl/uploads/archivos/archivos/INDICE_DE_ACCESO_A_LA_VIVIENDA_-_28_agosto_2019.pdf).

<sup>35</sup>UN Special Rapporteur on Adequate Housing, Report on the financialization of housing (n 23), para 36.

<sup>36</sup>UN Special Rapporteur on Adequate Housing, Report on her mission to Chile (n 29), para 24.

<sup>37</sup>Ibid, para 26.

<sup>38</sup>Ibid, paras 29–30.

In the 2010s, the state introduced public policies that enabled low and middle sectors to access housing through public housing programmes, such as the lease programme (*programa de arriendo*), or the housing choice solidarity fund (*fondo solidario de elección de vivienda*), which contributed, to some extent, to reduce the quantitative deficit in houses. According to official data, the housing deficit decreased by a quarter between 2002 and 2017, from 521,957 to 393,613 houses.<sup>39</sup>

Research shows that 'the lowest income quintile did not necessarily receive more housing subsidies than the other quintiles'.<sup>40</sup> Also, the state has imposed other requirements on the granting of subsidies for homeownership, such as a permanent residence permit, which have an impact on the access of the immigrant population to this type of benefit.<sup>41</sup> Only 2.2 per cent of housing subsidies for homeownership were awarded to immigrants between 2015 and 2019.<sup>42</sup> The UN CESCR recommends that public policies and legislation should 'not be designed to benefit already advantaged social groups at the expense of others'.<sup>43</sup>

Although public policies promoted by the state may have helped to reduce the housing deficit,<sup>44</sup> the number of informal settlements has increased dramatically since 2011, which has led to 81,643 families living in 969 informal settlements in 2021, the highest number since 1996.<sup>45</sup> Despite the growth in the homebuilding sector, housing remains unaffordable for many people, raising questions about the extent to which the private market, on its own, can provide the necessary resources and mechanisms to satisfy access to adequate housing.

Chile 'lacks national urban planning policy guidelines based on human rights'.<sup>46</sup> This further impairs the full enforcement of the right to adequate housing, since this deficiency 'appears to have caused fragmentation and inconsistency in the decision-making processes about land, creating strong incentives for some local governments to prefer a concentration of high-income residents'.<sup>47</sup> The current paradigm on housing and homeownership urgently requires a review, since it positions housing as a commodity, stripping it of its human right status.

<sup>39</sup> Chile's Minister for Housing and Urbanism, Public Account 2019, [www.minvu.cl/wp-content/uploads/2019/06/CUENTA-PUBLICA-resumen-ejecutivo-2019-2.pdf](http://www.minvu.cl/wp-content/uploads/2019/06/CUENTA-PUBLICA-resumen-ejecutivo-2019-2.pdf).

<sup>40</sup> A Casgrain, 'La apuesta del endeudamiento en la política habitacional chilena' (2010) 25 *Revista Invi* 155, 164.

<sup>41</sup> P Roessler et al, *Informe 3: Acceso a la vivienda y condiciones de habitabilidad de la población migrante en Chile* (Santiago, Servicio Jesuita a Migrantes, 2020) 3.

<sup>42</sup> Ibid, 2.

<sup>43</sup> UN CESCR, *General Comment No 4: Right to Adequate Housing* (n 4) para 11.

<sup>44</sup> Casgrain (n 40) 157.

<sup>45</sup> F Vergara et al., *Catastro Nacional de Campamentos 2020–2021 Report* (Santiago, Techo-Chile, 2021), [www.ceschile.org/wp-content/uploads/2020/11/Informe%20Ejecutivo\\_Catastro%20Campamentos%202020-2021.pdf](http://www.ceschile.org/wp-content/uploads/2020/11/Informe%20Ejecutivo_Catastro%20Campamentos%202020-2021.pdf),

<sup>46</sup> UN Special Rapporteur on Adequate Housing, Report on her mission to Chile (n 29) para 34.

<sup>47</sup> Ibid, para 34.

The constitutionalisation of the right to adequate housing can help reduce material inequalities in Chile. But the constitutional recognition of rights is not enough. The state should also adopt other practical measures to ensure the fulfilment of this right. An active role and commitment of the state is required to address the root causes of housing segregation, including via the public provision of housing for people who cannot afford it in the private sector on their own, as well as the recognition of the social function of homeownership.

## **B. The Social Function of the Right to Property and Homeownership**

Article 19(24) of the Constitution of 1980 recognises the right to private property. Also, it states that only the law can set ‘limitations and obligations that derive from its social function’, which includes the general interests of the nation, national security, the public utilities and health, and the preservation of the environment. Thus, while the Constitution sets the social function as a possible limitation to the right to private property, it does not define what it is meant by *social function*. Instead, it only provides a list of elements that *could* be considered as constitutive of such social function.

Despite how broad the elements may seem, the Chile’s Constitutional Court has interpreted them restrictively.<sup>48</sup> For instance, it has held that the general interests of the nation include those:

legal interest[s] that are directly related to the whole nation, and never, however important it may be, to a sector of it, and that relates, basically, to the superior benefit of the political society as a whole, without any reference to social, economic or other categories or groups.<sup>49</sup>

Moreover, the 1980 Constitution includes provisions that allow fundamental rights guaranteed therein to be amended by law, as long as the law does not affect or restrict the essence of the right of property. Article 19(24)(3) provides that:

no one can, in any case, be deprived of his or her property, the assets affected or any of the essential faculties or powers of the domain, but by virtue of a general or special law that authorises expropriation for public utility or national interest, *qualified by the legislator*. (emphasis added)

This means that an absolute majority of deputies and senators in office must vote in favour of such law. Article 19(26) establishes that ‘the assurance that the legal precepts which, by mandate of the Constitution, regulate or complement the guarantees that it establishes or that limit them in the cases that it authorises it, shall not affect the rights in their essence’. The Chilean Constitutional

<sup>48</sup> Chile’s Constitutional Court, Judgment 334/2001, 21 August 2001 (Legal Justification No 21).

<sup>49</sup> Ibid (Legal Justification No 22).

Court, taking into consideration both provisions, has held that the rights to use, enjoy and dispose of goods are inherent or essential prerogatives derived from private property, and cannot be restricted by law.

The right to property, in the Chilean constitutional doctrine, stands as a practically absolute right subject only to a few limitations provided by law under restrictive circumstances. Thus, 'the initiatives that emerge from the State to democratise the use of land are incessantly slowed down by the legal dogma of private property'.<sup>50</sup>

In the words of the former Special Rapporteur on Adequate Housing, Raquel Rolnik, 'property has a vital social function including adequate housing of the urban poor'.<sup>51</sup> A new constitution for Chile should contribute to redefining the meaning of homeownership and housing. Housing has a social function that can be part of the content of the right to private property when it affects homeownership. Legislators and policymakers should consider exploring different alternatives deriving from the social function of property, such as tax incentives and penalties to large and/or corporate homeowners who keep properties deliberately empty and out of the residential rental market.

### **C. Secure Tenancy and Habitability Standards in the Housing Rental Sector**

Chilean authorities have not paid sufficient attention to housing affordability. Over the years, the price of rents has significantly increased, affecting smaller homes. It has been said that 'the real cause of rising rents would be the increasing concentration of homeownership acquired for rental purposes ... with rental charges that ensure the profitability of these investments'.<sup>52</sup>

The current legislation does not include any provision concerning protection from unreasonable rent levels and increases. In contrast, the state introduced public policies that enabled low and middle classes to access rental housing through temporary housing benefits. Beneficiary families receive an amount which is paid monthly with a maximum limit and may be used consecutively or fragmented over a period, according to the geographic location of the district where the leased housing is located.<sup>53</sup> As in the case of subsidies for the purchase

<sup>50</sup> F Alarcón et al, 'Derecho a una vivienda adecuada en Chile: Una mirada desde los campamentos' in T Vial (ed), *Informe Anual sobre Derechos Humanos en Chile* (Santiago, Universidad Diego Portales, 2016) 111.

<sup>51</sup> UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, UN doc A/HRC/25/54 (2013), para 5(4).

<sup>52</sup> E López and N Herrera, 'Arriendos por las nubes: efecto de la creciente concentración de la propiedad', *Ciper* (July 2018), [www.ciperchile.cl/2018/07/25/arriendos-por-las-nubes-efecto-de-la-creciente-concentracion-de-la-propiedad/](http://www.ciperchile.cl/2018/07/25/arriendos-por-las-nubes-efecto-de-la-creciente-concentracion-de-la-propiedad/).

<sup>53</sup> Decree 52, which approves regulations for the housing rental subsidy program of the Chile's Minister for Housing and Urbanism, 10 June 2013.

of housing, in the rental subsidy the applicant families are required to pay a proportion of the rental cost out of personal savings, and the state covers the difference.

Housing benefits can play an important role in facilitating access to housing for people who may otherwise have no access in the private sector. However, without adequate regulation, housing benefits can also result in rising inequalities, as they effectively constitute a transfer of resources from public accounts to private landlords. This can be particularly problematic when dealing with corporate landlords or with large landlords, namely, landlords owning a large number of residential properties, who tend to be in the upper end of society in terms of income and wealth distribution. The transfer of public resources from the State to wealthy or relatively wealthy private landlords is also problematic when the private rental sector law does not guarantee an adequate degree of security of tenure for tenants, and when housing law does not include habitability standards. That is, in fact, part of the problem in Chile.

The right to private property is protected through an emergency constitutional remedy. According to Art 20 of the Constitution, anyone who suffers deprivation, disruption or threat in the legitimate exercise of the right to private property by arbitrary or illegal acts or omissions may file a claim before the court of appeals, which shall immediately take measures to restore the rule of law and ensure the due protection of the affected party. This constitutional device has been successfully used by tenants suffering harassment from landlords: courts have accepted claims and have stopped landlords from expelling tenants and from taking their notion of justice into their own hands.<sup>54</sup>

The rights of tenants are also preserved by a series of regulations and other legal instruments. In light of statute no 18.010, of 1982, amended in 2003, in contracts in which the rental term has been agreed month by month, and in those of indefinite term, homeowners can put an end to the residential lease anytime through eviction. Evictions can only be carried out judicially or by personal notification made by a notary. The eviction notice is two months, and the period will be increased by one month for each full year that the tenant has been in the property; the said term plus the increase may not exceed six months in total.

Eviction orders are carried out with no analysis of reasonableness and proportionality, which is contrary to the international human rights standards voluntarily accepted by Chile. As indicated earlier, as a matter of international human rights law, everyone at risk of eviction should be entitled to have the proportionality and reasonableness of such eviction examined by an independent actor, a judge, on a case-by-case basis.<sup>55</sup>

<sup>54</sup>Supreme Court of Chile, *Apelación de recurso de protección* 21072-2019, Judgment of 8 August 2019; Court of Appeals of Santiago Chile, *Recurso de Protección* 637462-2019, Judgment of 25 September 2019.

<sup>55</sup>UN CESCR, *General Comment No 7: Forced evictions* (n 6); UN CESCR, *Ben Djazia v Spain* (n 7).

The UN Special Rapporteur on Adequate Housing lamented that, when an eviction is about to be carried out, Chilean authorities do not ensure that 'alternative accommodation is available or comply with other international human rights obligations'.<sup>56</sup> This is contrary to international human rights law: the state must ensure that no one is rendered homeless as a result of an eviction.<sup>57</sup> Alternative temporary accommodation must not put personal safety at risk, cannot become a long-term solution, must not separate family members, and must provide space to respect individuals' privacy.<sup>58</sup>

The current legal framework in Chile does not require landlords to ensure habitability standards that are adequate for residential purposes. Unless both parties agree otherwise, Art 1924 of Chile's Civil Code only includes the general rule that the landlord must keep the property in the state of being used for the purpose for which it has been rented.<sup>59</sup>

The lack of legal framework to ensure habitability in the private rental sector has resulted in the abuse of particularly vulnerable communities and low-income households. Migrants are particularly affected by lack of protection of their rights in the private rental sector.<sup>60</sup> Some migrants have denounced being 'exploited in the private housing market by landlords who overcharged or who offered costly but precarious living conditions'.<sup>61</sup> The UN Special Rapporteur on Extreme Poverty and Human Rights observed during his mission to Chile in 2015 that 'migrants often live in overcrowded, unsanitary and unhygienic conditions'.<sup>62</sup>

The UN Special Rapporteur on Adequate Housing recommended Chile in 2018 to 'modernize legislation regarding rental accommodation to better protect the rights of tenants and set in place adequate regulation for private landlords',<sup>63</sup> as well as to 'ensure the accountability of private actors with regard to their human rights obligations'.<sup>64</sup>

<sup>56</sup> UN Special Rapporteur on adequate housing, Report on her mission to Chile (n 29) para 52.

<sup>57</sup> UN CESCR, *General Comment No 7: Forced evictions* (n 6) para 16.

<sup>58</sup> UN CESCR, *El Goumari and Tidli v Spain*, Communication No 85/2018, UN doc E/C.12/69/D/85/2018 (2021), para 9.

<sup>59</sup> Law 21,325, of April 2021, not yet in force at the time of writing, amended Law 18,101, of 1982, on renting of urban properties with regard to abusive overcrowding. The amendment provides that the renting of dwellings or rooms that do not comply with the minimum conditions of habitability of the General Ordinance on Urban Planning and Construction ('Ordenanza General de Urbanismo y Construcciones') will be illegal, and sets financial penalties for those who do not comply with these regulations: [www.bcn.cl/leychile/navegar?idNorma=1158549&idParte=10221475](http://www.bcn.cl/leychile/navegar?idNorma=1158549&idParte=10221475).

<sup>60</sup> Roessler et al (n 41) 1.

<sup>61</sup> UN Special Rapporteur on Adequate Housing, Report on her mission to Chile (n 29) para 63.

<sup>62</sup> UN Special Rapporteur on Extreme Poverty and Human Rights, Report on his mission to Chile (n 24) para 63.

<sup>63</sup> UN Special Rapporteur on Adequate Housing, Report on her mission to Chile (n 29) para 86(j).

<sup>64</sup> *Ibid*, para 86(n).

## IV. CONCLUDING REMARKS

The UN Committee on Economic, Social and Cultural Rights in 2015, and the Special Rapporteur on Extreme Poverty and Human Rights in 2016, expressed their concern that economic, social and cultural rights, including the right to adequate housing, are not properly recognised in the 1980 Constitution and, as a consequence, there are not adequate institutional and judicial mechanisms in place to provide remedies and reparations to people for whom the right to adequate housing remains an unfulfilled promise.<sup>65</sup>

The CESCR issued a number of recommendations to make the right to housing real in Chile, with a view to adopting a comprehensive housing strategy that would give priority to most vulnerable people, including those living in informal settlements, rural areas, or inadequate conditions; such strategy should protect against forced evictions, prohibit segregation, and allocate adequate funding, with effective monitoring and accountability.<sup>66</sup>

The adoption of a comprehensive strategy is essential. A new paradigm should switch from blind reliance on the private market towards an active role and commitment of the state in the provision of housing. The model must be based on the principle that homeownership is a special form of private property over a good that exists to serve a public function that is at least as important as its private function: apart from satisfying an investor's legitimate private interest, a house exists to give people a place to live.

Courts exercising constitutional jurisdiction should consider ways to promote spaces for litigants to be involved and participate. For a number of years, the South African constitutional court has issued 'meaningful engagement' orders urging the parties to resolve social rights disputes through dialogue.<sup>67</sup> The South African court has 'created a deliberative space in which [plaintiffs], a group with minimal political or social influence, were given a real voice in the decision-making process'.<sup>68</sup> It should be noted that, in late 2019, the Chilean Supreme Court exceptionally accepted a remedy of protection filed by a local district (neighbourhood) council against a community formed by members of an informal settlement, ordering all parties involved (which included also police, city council and administrative bodies) to take coordinated action in order to find a

<sup>65</sup> UN CESCR, Concluding Observations: Chile, UN doc E/C.12/CHL/CO/4 (2015), para 7; UN Special Rapporteur on Extreme Poverty and Human Rights, Report on his mission to Chile (n 24) paras 25–26.

<sup>66</sup> UN CESCR, Concluding Observations: Chile (n 64) para 26; UN Special Rapporteur on Adequate Housing, Report on mission to Chile (n 29) para 84.

<sup>67</sup> A Pillay, 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10(3) *International Journal of Constitutional Law* 732; S Liebenberg, 'The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence' in K Young (ed), *The Future of Economic and Social Rights* (Cambridge, Cambridge University Press, 2019).

<sup>68</sup> S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, Oxford University Press 2008) 121.

global and effective solution to the situation of the members of the community and protect their rights on the basis of equality.<sup>69</sup>

Chile has the chance to finally take seriously the right to housing. The deafening silence about adequate housing in the 1980 Constitution has contributed to a weakening of this right in the domestic order, to the detriment of the Chilean people, particularly of most vulnerable households. 'It would be naïve to think that adopting a bill of constitutional social rights would ensure their protection'<sup>70</sup> on its own, but the constitutional entrenchment of social rights 'plays a subsidiary, but important supporting role in the multi-institutional scheme of protecting social rights'.<sup>71</sup> Chile's unique and profoundly democratic constitutional moment provides an excellent opportunity to build the right to adequate housing from scratch.

<sup>69</sup>Supreme Court of Chile, Apelación de recurso de protección 22.086-2019, Judgment of 30 October 2019.

<sup>70</sup>J King, *Judging Social Rights* (Cambridge, Cambridge University Press, 2012) 2.

<sup>71</sup>*Ibid*, 18.



