The right to housing in France and South Africa

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ABSTRACT

If current national and international declarations on human rights tend to recognise a "right to housing", the exact meaning of such provisions remains a controversial issue. In France, the Constitution of 1958 does not proclaim such a right. The constitutional judge considers "the possibility for any person of having decent housing" as "an objective of constitutional value". However, this norm is mostly interpreted as a goal of general interest. It gives a basis to public intervention aimed at building social housing, but also aimed at acting on the private market of housing (especially by regulating leasing agreements, for example, prohibiting the owner from freely putting an end to the lease or obliging him to provide a decent dwelling). Therefore, the constitutional objective of allowing any person access to decent housing does not allow an applicant to claim housing in court. On the contrary, while interpreting section 26 of the Constitution of 1996, the South African Constitutional Court emphasised the obligations lying directly on the state. According to the jurisdiction, section 26 imposes the adoption of a co-ordinated and comprehensive state housing programme, which must meet with short, medium and long term needs. This position is closer to an efficient concept of the "right to housing" than the French one. Such a right must be based on national solidarity, so that only the state can implement it. The measures taken in France concerning leasing agreements are necessarily limited: they can restrict the owners' rights, but not violate them. Furthermore, they are useless for people who do not already have a roof over their heads. It appears that the obligations deduced from a constitutional "right to housing" can be fulfilled only by direct public intervention (consisting in giving land, housing or financial means for dwellings). On that point, doubts exist about the share of competences between the state and non-central state organs. This issue could be at stake in future constitutional case law.

The way in which the declarations of rights tackle the question of housing evolved during the second half of the 20th century. Initially, no explicit provision was devoted to housing, reference was only made to housing in an indirect way. On a world level, the Universal Declaration on Human Rights of 1948, followed by the Covenant on the Economic, Social and Cultural Rights, treat access to housing only indirectly, as a component of the right to a sufficient standard of living.[1] On the level of the Council of Europe, the "right

1 Universal Declaration on Human Rights, art 25, § 1; Covenant on Economic, Social and Cultural Rights, art 11, § 1.

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to housing" does not appear in the initial version of the European Social Charter, adopted in 1961. It made its entry only at the time of the recasting of the text in 1996, with article 31.[2]

In France, a first draft of the Constitution in April 1946, rejected by referendum, put forward a declaration of rights of which articles 22 to 38 acknowledged "social and economic rights". But the question of housing was not tackled there. Neither was it mentioned in the preamble to the Constitution of October 1946, which text served as a form of compromise after the rejection of the text of April. This preamble only presents in a synthetic way the principal rights proclaimed by the first project. This apparent disinterest, despite the difficulties of housing in France of post-war period, undoubtedly reflects the conceptions then prevalent in Europe. The stress is indeed laid on the rights to social protection. The programmed generalisation of social security must protect individuals against social risk and, thus, must guarantee permanence of income in order to satisfy the individual's fundamental needs, the first of which is housing. In a simplistic way, one can say that the economic crisis and the consequent rise of unemployment challenged this vision of things. The limits of a system of rights depending on stable and durable wage-earning appeared. Thus emerged concepts of "new poverty", "precariousness" and especially "exclusion": as many terms describing the "growing flow of those which are rejected from normal socialization by paid work and which, consequently, see themselves privated from social protection".[3] *The need for guaranteeing every person's right of access to the basic needs, and to housing in particular, regained its acuity.*

The majority of declarations of rights in the last part of the 20th century represent these socio-economic evolutions. In Europe, recent constitutional amendments significantly sanction the "right to housing," including the constitutions of Portugal,[4] *Spain*[5] *and Belgium, according to article 23 inserted by the constitutional revision of 1993. In France, the legislator initially appeared to move toward such a recognition. Then, in 1995, the Constitutional Council judges, on the basis of the preamble of 1946, still in force owing to its inclusion in the current Constitution of 1958, held that "the possibility for any person of having a decent housing constitutes an objective of constitutional value".*[6] *Whether or not the housing shortage reaches the same proportions as in South Africa, the comparison between the two countries is nevertheless interesting. In South Africa, social rights were entrenched in the Constitution of 1996. The right to have access to adequate housing has been the subject of two judgments of the Constitutional Court.*[7] *The two*

2 European Social Charter (revised), part I, art 31: "Everyone has the right to housing"; part II, art 31: "With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1 to promote access to housing of an adequate standard; 2 to prevent and reduce homelessness with a view of its gradual elimination; 3 to make the price of housing accessible to those without adequate resources".

3 R Lafore 1989: 567.

4 Art 65 of the Constitution of 1976.

5 Art 47 of the Constitution of 1978.

6 C.C., note 94-359 DC of 19 January 1995, *Diversité de l'habitat*, cons. note 7.

7 CCT 11/00, 4 October 2000, *Grootboom and others*; CCT 55/00, 29 May 2001, *Kyalami Ridge Environmental Association*.

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jurisdictions are thus facing the same difficulty in defining the contents of provisions of which the binding effect is still sometimes disputed. This question takes on a particular complexity for housing, access to which can be concretised by a policy with varied instruments. In addition to the exact determination of the basis of such a policy (I), it is thus advisable to examine the contentious problems which may arise through the constitutional control of its implementation (II).

1 THE CONSTITUTIONAL BASIS OF THE HOUSING POLICY

The fundamental rights and freedoms codified in 1996 in South Africa's Constitution are part of the basis of the new constitutional and political order. For this reason, it appeared essential to provide them concrete and effective guarantees. The system of judicial review retained appears as a "compromise"[8]: without barring the intervention of the ordinary jurisdictions, which can be called upon, if necessary, to protect the rights of individuals, it ensures the Constitutional Court the final capacity to decide on all questions of constitutionality.[9] This Court was quickly asked to give its interpretation of the "right to have access to adequate housing". It deduced from it the obligation of a co-ordinated programme of housing, and thus the obligation to provide relief to people in desperate need. In France, the Constitutional Council has exclusive competence for the control of constitutionality of laws. Although the ordinary jurisdictions sometimes have occasion to apply constitutional norms, they may not make judgments on matters concerning the constitutional objective of access to decent housing, as this objective is not considered to entrench a directly justiciable right. This position consolidates the case law of the Constitutional Council, which interprets the objective as one of general interest, establishing a housing policy but not conferring justiciable rights to individuals.

1.1 The position of the constitutional judges

The reasoning of the two Constitutional Courts is founded on similar premises, with regard to the bond between access to housing and other constitutional principles, as well as the margin of appreciation devolved to the public authorities to guarantee it. The constitutional nature of the standard of decent or adequate housing forces, however, the imposition of some limits. Nevertheless, the case law of the Constitutional Council remains vague, and seems to dissuade radical questioning of the social housing policy. The South African Court, on the contrary, exerts tighter control on the reasonable character of the measures taken, having led to the affirmation of an obligation on the state to provide at least minimal services.

1.1.1 *Similar premises*

The acknowledgement of the need for housing in the case law of the Constitutional Council was made in two stages. In a decision of 29 May 1990,

8 X Philippe 1997: 472.
9 Cf ch 8, ss 163(3)(a)-(c) and 168.

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the High Court declared that "promoting the housing of the underprivileged people . . . answers to a requirement of national interest".[10] Then in another case of 19 January 1995, it affirms that "the possibility for any person of having a decent housing is an objective of constitutional value".[11] Whereas the Constitutional Council often confines itself to a literal application of the texts, it founds this second assertion on a dynamic interpretation of several constitutional principles. Indeed, the objective is initially deduced from the principle of human dignity. However, this last principle was established by the Council, in the *Bioethics* decision of 1994.[12] It was used here for the first time in the field of the socio-economic rights, whereas some authors restricted its application to the protection of the physical and psychological integrity of the person.[13] The objective also rests on subparagraph 10 of the preamble to the Constitution of 1946, which guarantees to the individual and to the family the conditions necessary to their development, and its subparagraph 11, which sanctions material security and the right to receive suitable means of existence from society.[14] The Constitutional Council thus confirms the interdependence of the socio-economic rights and the central place of the principle of dignity in the current recognition of fundamental rights.

The *Grootboom* decision begins by referring to tasks assigned by the preamble to the Constitution: "the attainment of social justice" and "the improvement of the quality of life for everyone". It also points out the founding values of human dignity, the achievement of equality and the advancement of human rights and freedoms. These principles inspire the Bill of Rights, which binds all public authorities according to section 7(2) of the Constitution.[15] The Court concludes from it that the justiciability of the right to adequate housing, which is part of the Bill of Rights, cannot be denied. The reasoning is thus based on a systematic interpretation of the constitutional text. The principle of dignity in particular appears essential to evaluate the range of the official obligations as regards housing.[16]

Another similarity in the reasoning of the two constitutional jurisdictions lies in the assertion of the priority competence of the public authorities, legislative and executive, to concretise the constitutional standard of

10 C.C., note 90 274 DC of 29 May 1990, *Droit au logement*, cons. note 13.

11 C.C., note 94-359 DC of 19 January 1995, *Diversité de l'habitat*, cons. note 7.

12 C.C., note 94-343-344 DC of 27 July 1994, *Bioéthique*, cons. note 2. The principle of human dignity is based on the preamble to the Constitution of 27 October 1946: "In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrate humanity, the people of France proclaim anew that each human being, without distinction of race, religion and creed, possesses sacred and inalienable rights".

13 B Mathieu 1996: 285; V Saint-James 1997: 62.

14 § 10 of the preamble to the Constitution of 27 October 1946: "The nation shall provide the individual and the family with the conditions necessary to their development"; § 11: "It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society".

15 § 20 of the judgment.

16 Cf § 83 of the judgment.

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decent or adequate housing. Thus, the French Constitutional Council decision of 1995, after having established the objective of constitutional value, adds that it "falls as well to the legislator as to the government to determine, in accordance with their respective competences, methods of implementing this objective". This expression is usual on social matters. It is employed in particular in connection with subparagraphs 10 and 11 of the Preamble to the Constitution of 1946, in that they are founding the access to social security benefits[17]. The public authorities then have an important margin of appreciation in the implementation of the constitutional principles.

Analysing article 26 of the Constitution, the South African Court notes that the second paragraph specifies the obligation weighing on the state by providing that this one "must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right." It adds that the contours and content of the measures to be adopted are primarily a matter for the legislature and the executive.

The two jurisdictions thus recognise a broad margin of appreciation to the public authorities in the concretisation of the right. Such a margin could not, however, be without limits, as an unlimited margin would inevitably negate the constitutional principle of access to decent or adequate housing. However, it is in the analysis of the extent to which the obligations stemming from the right of access to adequate housing and the objective of providing decent housing weigh on the state that the attitude of the two courts differs.

1.1.2 *Different conclusions*

In the *Grootboom* decision, the Court notes that paragraph 2 of section 26 establishes a limit to the discretionary power of the public authorities : the adopted measures must be reasonable. It is on the basis of this criterion that it will exert its control. It makes the point that the Constitution imposes the adoption of a co-ordinated and comprehensive state housing programme, implying the various levels of government; national, provincial and local. Such a programme is required, according to the circumstances, to meet with short, medium, and long term needs. In this respect, "a programme that excludes a significant segment of society cannot be said to be reasonable".

The examination of the legislation, in particular of the national law of 1997 and the law of the province of the Western Cape of 1999, then leads the Court to assess the extent of the accomplished efforts. Further, it indicates that, put aside from the Cape Metro land programme adopted after the eviction of the Grootboom group, no measure facilitates access to temporary help for people in desperate need – people who have no access to land, no roof over their heads, people who are living in intolerable conditions, who are in crisis because of natural disasters or because their homes are under threat of demolition. The jurisdiction will conclude from

17 Cf, eg, C.C., note 86–225 DC of 23 January 1987, *Amendement Séguin*, cons. note 17.

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it that, compared to the local situation of acute shortage of housing, the state violated the obligations assigned by section 26, paragraph 2 in that no provision was made for relief to the categories of people in desperate need.

Several remarks can be made concerning this reasoning. The Court started by rejecting the idea developed in the decisions of the United Nations Committee of the Economic, Social and Cultural Rights, according to which states must satisfy at least the minimum core of socio-econmic rights, determined by having regard to the needs of the most vulnerable group. However, one can wonder whether its analysis does not lead to the definition of such minimal contents[18]. Even limited to the concrete case, the official report of violation seems to establish "the obligation for the public power to act in the most serious situations"[19]. It is true, on the other hand, that the constitutional jurisdiction refuses to acknowledge in a general way the right of any applicant to claim housing immediately. In this respect, the right established by section 26 can be distinguished from other social rights whose effective realization implies in theory that each holder benefits from an official service, like the right to elementary instruction or the right to social help. It results rather in an overall policy including, in addition to access to emergency assistance, the construction of residences, measures facilitating the access to land, the supply of certain services etc. The South African Court refuses, however, to leave the whole determination of the content of the right of access to housing to the public authorities. It thus specifies the content of the constitutional standard, an acknowledgement of deficiency exposing public authorities to censure.

Surprisingly, the principles of the control exerted by the French Constitutional Council on the state concerning housing are much vaguer. According to the above-mentioned expressions, the High Court returns to the legislator and the government, within the framework of their respective competencies, the care to determine the methods of implementing the constitutional objective. The only limit laid is not "to deprive it of legal guarantees". The expression means prohibiting the total absence of concretisation. But the Constitutional Council does not specify its content and does not exert any control over the state's implementation of the right. Social housing policies and measures aimed at regulating private housing, for example, the institution of a tax on vacant residences[20] or regulation of leasing agreements, form part of stateploicy aimed at fulfilling the right.[21] Such measures prevail in the French constitutional case law. The objective of decent housing appears then to justify, say, the restriction of the rights of the owner in order to stabilise the situation of the tenant. It is rather used in this situation to justify the legislative provisions. Moreover, it serves to justify the legislative provisions.

18 D Bilchitz 2003: 9.

19 X Philippe 2001: 402.

20 C.C., note 98-403 DC of 29 July 1998, *Taxe d'inhabitation*, cons. note 20.

21 C.C., note 2000-436 DC of 7 December 2000, *SRU*, cons. note 56.

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Regarding social housing, however, the judgments of the Constitutional Council appear to limit the actions of the legislator. For example, in a decision of 1995, it was called upon to consider a provision which sought to reduce finance allocated to social housing. It judged that this reduction was not "likely to challenge the objective of constitutional value relating to the possibility for any person of having a decent housing"[22]. This decision seems to sanction a manifest regression. But one could raise the "formal" aspect[23] of the exerted control. Only significant state disengagement from its social housing policy seems, according to the current case law, to expose itself to the censure of the French constitutional judge.

The different attitudes of the two judges deserve to be moderated. Such different approaches are also due partly to the methods and moment of control, factors outside their control. In South Africa, citizens' *concrete* requests were submitted *a posteriori* to the Constitutional Court asking for clarification on what the individual could claim on the basis of section 26 of the Constitution. Here the Court took care to note that reasonableness must be determined on the facts of each case. On the contrary, French control is exclusively abstract and *a priori*. Moreover, more cases linked to the regulation of private law relationships and the right of ownership have been submitted to and decided by the Constitutional Council compared to cases related to social housing. However, the French Council seems to adopt an attitude of *self-restraint*. For example, a decision of 1998 concerned a provision of law which provided that, before the police force could execute a court order of eviction, the administrative authority had to make sure that an offer of accommodation, taking into account the family structure, was made to the expelled people. The Constitutional Council invalidated this provision because it was likely to challenge the separation of powers: the execution of a court order should not depend on a preliminary administrative step, the administration is able to refuse the execution of a decision of eviction only in case of exceptional circumstances linked to the safeguarding of public order.[24] The Council did not take this opportunity to establish the existence of a state duty to aid people likely to find themselves without a roof.

The decisions of the Council suggest that the constitutional objective provides the basis of a state policy, but does not create a prerogative directly invocable by the individual. This could be interpreted as a refusal on the part of the Constitutional Council to sanction a true "right to housing". Indeed, this category has allowed the Constitutional Council to establish standards not directly written in the Constitution, but which relate to the safeguarding of public order, respect of the freedom of others, protection of public health, the fight against tax evasion, pluralism, accessibility and intelligibility of the law.[25] The absence of direct applicability of the objective relating to housing is confirmed by an examination of the case law of the ordinary jurisdictions.

22 C.C., note 95-371 DC of 29 December 1995, *Loi de finances rectificative pour 1995*, cons. note 6.

23 X Pretot 1997: § 73.

24 C.C., note 98-403 DC of 29 July 1998, *Taxe d'inhabitation*, cons. note 47.

25 L Favoreu and L Philip 2003: 607 608.

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1.2 The position of the French ordinary courts

Currently, an individual cannot claim a "right to housing" in any of the French ordinary courts, neither on the basis of the Constitution, nor one of the international treaties.

1.2.1 *The absence of direct applicability of the consistutional objective*

The inability of an individual to avail himself of his constitutional right to decent housing was asserted in a very clear way by the *Conseil d'Etat* in a case of 2002. The case was submitted to the highest administrative court within the framework of an emergency procedure of *référé liberté*, aiming at protecting "fundamental freedoms". According to a law of 2000 that came into effect in 2001, the administrative judge can pronounce on an issue regarding the protection of a fundamental freedom, but three conditions need to be fulfilled. One needs initially a serious and obviously illegal attack against a fundamental freedom. Secondly, the attack must be that of a legal entity ruled by public law or an organisation ruled by private law, in charge of the management of a public utility. Lastly, the petition must be justified by emergency. The legislator did not define the concept of "fundamental freedom" and did not give any list. It is thus administrative case law which has to define the ambit of this concept.

In the 2002 case, a social assistance association could not accommodate families arriving in its centres since it was not authorised to accommodate children. It asked the Administrative Court to enjoin the administrative authority to take measures likely to ensure the "right to housing" of these families: by granting to the association necessary subsidies, permanent hiring of hotel rooms, and requisitions. The "Administrative Court" (court of first instance) having refused the application, an appeal was referred back to the *Conseil d'Etat*. However, it held in a ruling of 3 May 2002, *Association de réinsertion sociale du Limousin*, referring explicitly to the constitutional case law, that the conditions for application of the law were not fulfilled. It made the point that this case law established a mere objective of constitutional value, "and not a right to housing having standing of constitutional principle.[26] The administrative judge refused to acknowledge a minimal obligation placed on public powers to aid people in situations of distress. This judgment is based on the widely accepted idea according to which an "objective of constitutional value" is not a fundamental right nor a fundamental freedom. It does not confer on the individual any justiciable right. Jan criticised this absence of direct applicability by recalling that in its first decision of 1995, the Constitutional Council stated that the implementation of the objective was a function of the legislator *and the government*. He argues that this expression "should be interpreted as obliging the administrative authority to respect this objective" which would allow "citizens to rely upon it usefully in front of the administrative

26 C.E., ord. réf., 3 May 2002, *Association de réinsertion sociale du Limousin et autres*, fn 245697; cf E Seschamps 2002: 818–821; P Jan 2002: 15–19.

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courts".[27] On the contrary, the constitutional and administrative jurisdictions both agree to interpret the objective as a standard entitling (or obliging) the state to follow a housing policy. But they do not give the objective a specific content, other than the one the legislation gives it. The Council does not make it possible for an individual to claim a service which is not established by the law. In contrast, the South African Constitutional Court, by controlling the reasonable character of the adopted measures, reserves the possibility of giving its own interpretation of the constitutional standard and to sanction the non-realisation of certain requirements. The *Conseil d'Etat* reiterated its refusal to apply directly the constitutional objective in a second case of *référé liberté*, judged a few days after the first one. In the *Fofana* decision of 22 May 2002, families occupying legally unhealthy private residences asked to benefit from social housing during the time necessary to rehabilitate of their private residences. The *Conseil* answered soberly that the circumstances of the case did not show "any serious and obviously illegal attack against a fundamental freedom".[28]

Currently, such a fundamental right results neither from the constitutional case law nor from the international treaties of which France is member.

1.2.2 *The absence of a "right to housing" directly invocable on the basis of international treaties*

Section 55 of the French Constitution provides that "treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement, to its application by the other party". In a decision of 1975, the Constitutional Council decided that it was not competent "to consider the consistency of a statute with the provisions of a treaty or an international agreement".[29] This task belongs to ordinary jurisdictions, which can apply a treaty rather than an Act of Parliament which conflicts with that treaty. However, the possibility of availing oneself of a "right to housing" on the basis of international provisions also seems excluded: the treaties proclaiming socio-economic rights in general are not regarded as directly applicable. The *Conseil d'Etat* adopted this position with regard to, *inter alia*, the European Social Charter[30] and the the United Nations Covenant on Economic, Social and Cultural Rights.[31] The ruling of 3 May 2002, *Association de réinsertion sociale du Limousin*, seems to adopt a position of principle concerning the questions of housing. Having rejected the existence of a "right to housing" of constitutional value, the *Conseil d'Etat* adds that "the stipulations relating to the access of the private individuals to housing that are contained in certain International Conventions ratified by France create obligations

27 P Jan 2002: 19.

28 C.E., 22 May 2002, *M. et Mme Fofana et autres*, note 242193.

29 C.C., note 74-54 DC of 15 January 1975, *I.V.G.*, cons. note 7.

30 C.E., 20 April 1986, *Melle Valton*.

31 C.E., Ass., 5 March 1999, *Rouquette*

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only between the States members of those conventions and do not produce a direct effect concerning the private people".[32] Deschamps notes, however, "that it would be more logical and advisable to study individually the effect of these stipulations".[33]

Taking into account this case law, one might wonder whether the right to housing is likely to be protected on another basis, in particular on the basis of the European Convention on Human Rights, which the French ordinary courts apply regularly. This text does not establish any social rights. However, European case law has considered housing conditions in two ways. In the case *Lopez Ostra against Spain* of 9 December 1994, the European Court held that the right of the applicant to respect for her home and her private and family life had been violated because of a waste-treatment plant near her home which released gas fumes and noxious smells.[34] The Court held that the Spanish state had failed to fulfil its obligation to guarantee positively the rights set out in article 8 of the Convention, and that Spain was therefore in violation of the Convention because of the conditions which caused a danger to the applicant. Although this case appears to take into account the need for adequate living conditions, it also illustrates, however, the indirect protection of rights as regards environment more than housing. The question of housing was again considered by the European Court in a case dealing with legislation restricting the right of ownership. It held that a law regulating rent,[35] or conditions of cancellation of a lease and recovery of its property by the owner, did not violate the Convention.[36] This type of regulation interferes with fundamental rights, in particular the right of ownership and contractual freedom but such state intervention is acceptable in order to facilitate access to, and maintenance of, private housing. In the *James* decision of 21 February 1986, the European Court recognised the legitimacy of such regulations:

> eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces.[37]

In this case, the Court held that the right to respect of ownership in property was not violated by a law making it possible to force owners to sell their properties, at defined conditions and prices, to tenants of houses benefiting from long (18–99 year) leases. Professor Sudre noted that this decision analysed the question of housing in the Convention "by inversion",[38] not by the acknowledgement of a right, but by the recognition of a

32 C.E., ord. réf., 3 May 2002, *Association de réinsertion sociale du Limousin et autres*.

33 E Deschamps 2002: 820.

34 Eur. Court H.R., *Lopez Ostra v Spain*, judgment of 9 December 1994.

35 Eur. Court H.R., *Mellacher and others v Austria*, judgment of 19 December 1989, A 169.

36 Eur. Court H.R., *Spadea and Scalabrino v Italy*, judgment of 28 September 1995, A 315 B; Eur. Court H.R., *Velosa Barreto v Portugal*, judgment of 21 November 1995, A 334.

37 Eur. Court H.R., *James and others v the United Kingdom*, judgment of 21 February 1986, A 98, § 47.

38 F Sudre 1998: 472.

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legitimate goal of restriction of the right of ownership. Once again, the individual is not likely to avail himself of the European Convention on Human Rights before the French ordinary jurisdictions to claim the protection of a "right to housing". There is a noticeable similarity in the approach of the European Court and the French constitutional case law relating to the constitutional objective of decent housing.

However, things could change on the basis of article 3 of the Convention, which provides that "no one should be subjected to torture or to inhuman or degrading treatment or punishment". In a case of 2002, an applicant complained about the violation of her property rights: she had not received a social benefit for three years because she had not applied for it according to the procedure established by Russian law. The European Court dismissed her action as inadmissible, but added at the end of its decision that:

> the Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under article 3 of the Convention which prohibits inhuman or degrading treatment. However, on the basis of the material in its possession, the Court finds no indication that the amount of the applicant's pension and the additional social benefits has caused such damage to her physical or mental health capable of attaining the minimum level of severity falling within the ambit of article 3 of the Convention.[39]

One wonders if homelessness could not be considered as a situation causing such damage to the individual's physical or mental health that it could be seen as attaining the minimum level of severity, thus placing it within the ambit of article 3 of the Convention. Without recognising the right for any applicant to claim housing immediately, maybe the European Court could concede on this basis the obligation of the state to provide temporary relief to people without a roof over their heads, according to the circumstances of each case. Whilst there is no explicit norm relating to housing in the Convention, this position would be closer to South African constitutional case law than to the French approach.

Indeed, in France, the constitutional objective is interpreted as establishing a purpose likely to be implemented by direct interventions – social housing – as well as indirect interventions – regulation of renter-tenant connections and of the private housing market in general. This attitude contrasts with that of the South African Constitutional Court, which has deduced more precise obligations from section 26, in particular the obligation on the state to establish a complete and co-ordinated housing programme implemented by the national and local authorities. The Constitutional Council's refusal to directly apply the constitutional objective has led to problems in the control of housing policies. This issue is discussed further below.

39 Eur. Court H.R., note 56869/00, *Larioshina v Russia*, judgment of 23 April 2002.

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2 CONSTITUTIONAL CONTROL OF THE IMPLEMENTATION OF HOUSING POLICY

The case law deals with the conflict between the implementation of housing policy and fundamental rights on the one hand, and the division of competences between the state and non-central state organs on the other hand.

2.1 The conflict with fundamental rights

The Constitutional Council recognised that any legislative intervention in private law relationships, primarily in favour of the tenant, concerns the implementation of the constitutional objective of decent housing. In this situation, the objective is generally used to justify restrictions on (the owner's) traditional fundamental rights and freedoms. This first aspect of housing policy thus concerns cases that delineate constitutionally acceptable limitations of certain fundamental rights, in the name of a social interest recognised by the Constitution.

Historically, this intervention especially took the form of the regulation of the lessor-lessee relationship. Much of the legislation pre-dated the recognition of a constitutional objective relating to housing. However, a law enacted in 2000 obliges the owner to deliver to the tenant, where its principal dwelling is involved, "decent housing". The expression is one used by the Constitutional Council in connection with the housing objective. If housing does not satisfy the criteria defined by the law and the decree,[40] the tenant can request that the owner take steps to bring it into line with the law, and can even submit the case to the court, who will determine the nature of work to carry out and the moment of its execution. If the owner does not fulfill its obligations, the judge can reduce the amount of the rental. The Constitutional Council held that this new obligation weighing on the owner violated neither the owner's right to property, nor freedom of contract.[41]

The most notable recent intervention concerning housing dates from the law relating to the fight against exclusions of 1998, which contains a great number of provisions on access to housing,[42] urban utilities and maintenance of housing[43]. Its provisions were especially criticised in front of the Constitutional Council on the grounds that they restricted the rights of owners. For example, in order to increase the capacity of the private market to meet the housing need, the legislator intended to dissuade owners from leaving their properties unoccupied by instituting a tax on vacant residences. The Constitutional Council admitted the constitutionality of this provision, provided that the tax is only levied on liveable residences, "whose vacancy is due only to the will of their holder".[44]

40 P Briand 2002: 357–359.

41 C.C., note 2000–436 DC of 7 December 2000, *SRU*, cons. note 56.

42 R Lafore 1999: 283–304.

43 F Barkat 1999: 305–322.

44 C.C., note 98–403 DC of 29 July 1998, cons. 16–20.

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Another measure of the law of 1998 deserves mention as it implies strong restrictions on the right of ownership: it concerns the institution of a new procedure of requisition which makes it possible to lease, for six to twelve years, a property which has been unoccupied for eighteen months. This new procedure aims to avoid the difficulties encountered in implementing the requisitions instituted by a law of 1945, and is especially conceived for periods of crisis, such as war or natural disaster. The new requisition, can be implemented by the administrative authority "in the *communes* (towns) where exist important imbalances to the detriment of people with modest incomes and underprivileged people".[45] The Constitutional Council noted the existence of many basic procedural guarantees to protect the owner. The Council declared the law in conformity with the Constitution under two conditions. Firstly, persons benefiting from the law were not entitled to occupy the premises after the end of the lease period. Secondly, a court may order the repair of any damage which exceeds that covered by the allowance envisaged by the law.[46]

This decision was controversial. It should be remembered that the Constitutional Council invalidated the provision which appeared to subordinate the execution of a court order of eviction to a preliminary offer of rehousing by the administration.[47] Rousseau asserts that the second condition aims at "dissuading limitations or infringements of the right of ownership while making them more expensive for the taxpayers"[48] and that, generally, "the right of ownership appears better and more protected than the right for any person to have a decent housing".[49] Lachaume and Pauliat argue, on the contrary, that the Constitutional Council validated excessive restrictions on the right of ownership, thereby negating its status as a fundamental right.[50] In spite of these arguments, the Constitutional Council makes it clear that in order to implement the constitutional objective of decent housing, the legislator can limit the right of ownership but cannot negate it.[51] An important restriction can be accepted if it is surrounded by appropriate guarantees. The legislator must not empty the right to property of its meaning, but it is always hard to draw a line between what concerns the substantial content of a right and what does not. The Constitutional Council judged that this line was crossed in a decision of 2000. That case concerned housing subsidised by a public institution. The provision in question planned that, at the expiration of the current convention, those dwellings would continue to be administered in the same way (allocation under conditions of income, maximum rentals set by the administrative authority) even in case of transfer. The Constitutional Council judged that, even if this provision aimed

45 Cf note Laval 1999: 207 223.

46 C.C., note 98-403 DC of 29 July 1998, cons. note 32-33.

47 Cf. *supra*, 1.1.2.

48 D Rousseau 1999: 90.

49 *Ibid*, 89.

50 J-F Lachaume and H Pauliat 1999: 373-391.

51 C.C., note 98-403 DC of 29 July 1998, cons. note 7.

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at implementing a constitutional objective, it was nevertheless making excessive, and constitutionally unacceptable, inroads into contractual liberty.[52]

The circumstances in which the South African Constitutional Court considered a conflict between the right to have access to adequate housing and other fundamental rights are different. In the *Kyalami* case, the Constitutional Court found that the government decision to establish a transit camp on a prison farm belonging to the State was lawful. This decision did not place a specific burden on private owners' rights so that, contrary to the French judgment, the Court did not have to decide on the limits that the implementation of section 26 permits on other persons' rights. The main contribution as regards the right to access to housing lies in the Court's re-assertion of a constitutional state duty to provide help to people in distress.

2.2 The division of competences between the state and non-central state organs

Prior to 1990, French local initiatives as regards assistance with housing were optional and in practice rather scattered. Let us recall that according to article 72 of the Constitution then in force, prior to the constitutional revision of March 2003, local organs were "self-governing through elected councils and in the manner provided by statute". Constitutional case law had specified the guarantees of free administration: in addition to the election of the deliberating assemblies envisaged by article 72, it required in particular that the legislator would allocate to non-central state organs effective responsibilities, and would equip them with own resources. However, the Constitution did not include, and still does not include, any list of the competences allocated to the various categories of local organs. This allocation is done by law. The law of 31 May 1990 allocated certain competences to the *département* concerning social assistance and social action. It thus chose to associate, through contracts, the state and the *département* ,in order to guarantee the access of all to decent housing.

The broad outlines of the law were as follows. The law created the "departmental plans of action for the housing of the disadvantaged people", set and implemented by the state and the *département*. The other local organs and the other public institutions concerned were associated. The plan had firstly to determine the categories of people called to profit from it. The law, however, obliged the authorities to give priority to people and families without housing, those threatened with eviction without alternative accomodation and those living in slums and unhealthy, precarious or makeshifts dwellings. The plan, had to set out, according to the listed needs, the means necessary to guarantee its beneficiaries access to or maintenance of housing through centralisation of the applications, increase in the offer of residences and especially financial assistance. In order to provide proper financial assistance, the plan was required to institute mutual aid funds for housing, which would provide financial aid to tenants in difficulty (guarantees, loans, subsidies).

52 C.C., note 2000 436 DC of 7 December 2000, cons. note 52.

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The law was criticised before the Constitutional Council on two points. It provided that, in the absence of an agreement between the administrative authority and the executive of the *département*, the plan could be determined by the ministers concerned. The Constitutional Council held that this provision was not contrary to the principle of free administration of a local organs.[53] It stressed the fact that "to promote the housing of the underprivileged people . . . answers a requirement of national interest". The role given to the state seemed to be justified by this requirement. In addition, the law provided that the contribution of the *département* to the mutual aid funds for housing must be "at least equal" to that of the state. The Constitutional Council judged that the legislator could define obligatory categories of expenditure for local organs under three conditions. The obligations had to "be defined with precision as to their purpose as well as their range";[54] they should not violate their own competence nor their free administration. According to some authors, this last condition deals with "the extent of the sums put at the disposal of the local organ",[55] in other words, it introduces the idea of a "quantitative threshold"[56] that could not be to exceeded. In this case, the Constitutional Council held that these conditions were fulfilled. Let us note that in a decision of 2000, it added that the obligations, financial or otherwise, imposed on the local organs must also "answer constitutional requirements or contribute to general interest goals"[57]. This condition does not, however, raise difficulties concerning the housing policy since it meets a constitutional value objective.

This case law seems to favour the recognition of a "driving role"[58] played by the State, which results in the definition of a "national policy of housing".[59] At the same time, the need for meeting the concrete needs of the population results in recognising the important role of local organs in its implementation. Further it should be noted that the increased role of the local authorities in the implementation of the plan is one of the objectives of the law of 1998 concerning the fight against evictions. Also, the new provisions aim at concentrating on the categories of people having priority and assign as a goal the provision of *durable* access to decent housing to these categories.[60]

Another important aspect of the housing policy consists in fighting against segregation and regrouping of the most underprivileged layers of the population in certain districts. The legislator thus posed an ambitious objective of "social mixing". One of the means of realisation considered is to make all the urban *communes* (towns) offer, in the long term, a section of social housing equivalent to 20% of the number of the dwellings of the

53 C.C., note 90 274 DC of 29 May 1990, *Droit au logement*, cons. note 13.
54 Cons. 16.
55 B Genevois 1990: 676.
56 G Vedel 1991: 17.
57 C.C., note 2000-436 DC of 7 December 2000, cons. note 12.
58 E-P Guiselin 2003: 5.
59 *Ibid.*
60 R Lafore 1999: 285-289; B Wertenschlag 1998: 903-905.

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town. Set in 1991, this goal of 20% was reinforced by law *SRU* of 2000. The new provisions concern *communes* of 3 500 inhabitants or more, located in agglomerations of more than 50 000 inhabitants and including at least a town of 15 000 inhabitants. A levy on their taxes incomes is instituted – which cannot exceed 50% of the amount of their functioning real expenditures – and is allocated to the social housing construction. The *commune* determines its objective of increase in social housing over three years but the law sets a minimal percentage so that the 20% goal will be reached in 20 years. It was also expected that if the objective was not implemented, the administrative authority representing the state would penalise the *commune* concerned by doubling levies and prohibiting the approval of any plans to create new offices in that *commune*.

The Constitutional Council considered that the levy did not decrease the resources of the communes to the point of blocking their free administration.[61] On the other hand, it censured the penalty because of its systematic aspect. It estimated that by instituting such a penalty, "without distinguishing the nature or the value of the reasons of the delay"[62] of the *commune* in the achievement of its objectives, the legislator ignored the principle of free administration of article 72 of the Constitution. This censure removed the principal innovation of the text and its obligatory nature. However, a law of 11 December 2001 restored a revised penalty, bringing the law in line with the Constitutional Council decision. From now on, in the event that a *commune* fails to meets its objective, the administrative authority can raise the levy up to a maximum of twice the original levy. Importantly, the state administration must, before making this decision, take into account the importance of the difference between objectives and realisation, the difficulties possibly encountered by the *commune*, and the projects of social housing under development.[63]

From these cases, it emerges that the legislator can impose constraints, sometimes considerable, on local organs in order to implement a balanced and effective housing policy. However, the freedom of the non-central state organs is established as primary; housing policy, even to meet a constitutional aim, can only bring strictly justified restrictions to that freedom. Furthermore, a constitutional revision of March 2003 reinforced the free administration of the local authorities. It is likely that the guarantee of free administration above social rights will be the subject of constitutional case law to come.[64]

The South African experiment could be instructive since the provinces benefit from a legislative power. *The Grootboom* decision underlines the need for an engagement of the three levels of government: national, provincial and local. However, it specifies that "the national sphere of

61 C.C., note 2000-436 DC of 7 December 2000, cons. note 38.

62 Cons. note 47.

63 *Loi* note 2001-1168 of 11 December 2001, *Journal officiel de la République française* of 12 December 2001, art 24 at 19708. Cf J-P Brouant 2002: 182-185; E Deschamps 2002: 218-223.

64 X Pretot 2003: 186-193.

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government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations".[65] The Court thus, like the Constitutional Council, seems to acknowledge a "driving part" to the central level of government which consists in setting the general framework of the housing policy. The assertion of this driving role is not, however, accompanied by precise instructions regarding the responsibilities resting on local bodies, in particular when concrete requests for housing are submitted to them. This uncertainty is likely to raise difficulties in practice.

The different approaches of the constitutional courts in France and South Africa thus do not prevent the appearance of problems common to both countries.

The Constitutional Council established a mere objective which is useful primarily, within the framework of the abstract and *a priori* judicial review of laws, to justify restrictions on economic rights like the right of ownership and contractual freedom. This interpretation of the constitutional objective seems likely to bring limitations to fundamental rights, but not to their substantial content. It should be noted, however, that this approach is consistent with the case law of other European Constitutional Courts, specifically the Spanish, Portuguese and Italian Courts.[66] On the other hand, the South African Court has specified the obligations weighing directly on the public power, in particular the duty to establish a coordinated and complete programme of housing.

One notes, however, that in the two countries the constitutional standard is concretised by an overall policy, with varied instruments. In this respect, the *Grootboom* decision only draws a restricted right: aid in the most urgent situations. This decision should not negate the value of South African constitutional case law for the French lawyers, who endlessly discuss an alleged conflict between the right to private property and the "right to housing". The right to housing can only rely on national solidarity and thus requires concrete financial and other services by the state, which is the only institution able to implement this solidarity. By burdening the state with an obligation to provide services, the South African Court has shaped an operational concept of the right to housing, which makes a useful contribution to French debates.

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65 Par 40. Cf also par 66: "the national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by s 26".

66 L Gay 2003: 527-536.

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