

Special Rapporteur on the right to adequate housing

Mr. Balakrishnan Rajagopal

Embargoed for media: 27 May 2022: 19:00 CET

Dear participants, dear friends,

Thank you for inviting me to this congress on the affordability of housing and its financialization. I regret that I cannot be in person with you today.

As Special Rapporteur on the right to adequate housing, my role is to promote the full realization of the right to adequate housing and to identify practical solutions, best practices, challenges, obstacles and protection gaps in relation to the right to adequate housing.

Berlin, one of my favourite cities, has seen both worrisome and promising developments - including the emergence of a new social movement defending the right to adequate housing that resulted in a recent referendum - so it is very appropriate to speak to you today.

First I would like to explain that increased unaffordability of housing is a global concern, not only in Germany or Berlin. Second I would like to make some brief comments on how I see the challenges to protect and fulfil the right to adequate housing in Germany, including the tension inherent between the protection of the right to adequate housing and private property.

Dear participants,

The right to adequate housing is enshrined not only in the Universal Declaration of Human Rights, but also in international human rights treaties, including in article 11 of the International Covenant on Economic, Social and Cultural Rights, ratified by 171 States. All EU-States have ratified the Covenant, including Germany. They are therefore bound to respect, protect and fulfil this right.

The right to adequate housing is more than having a roof over one's head, it is the right to live in safety and dignity in a decent home. One of the core components of this right is that housing must not only be accessible and habitable. It must also be affordable, in particular for persons and groups at risk of marginalization.

This brings us to one of the most pressing issues globally: the increasing unaffordability of housing, affecting millions not only in Berlin, but in many parts of the world: in Lagos, Seoul, Barcelona, Melbourne, Barcelona, or Rotterdam. Housing costs have risen dramatically, while average incomes have only marginally increased. And housing ownership has become more and more concentrated in the hands of corporate landlords and large scale global corporate real estate investors have emerged, such as Blackstone, Akelius or Deutsche Wohnen.

Housing has been increasingly disassociated from being a human right and become more and more a tool for speculation and generating returns on investment. This has been ongoing since the 1990s, when the World Bank published its report on 'Housing: Enabling Markets to Work'. At the same time there has been a trend towards financialization, home ownership as an ideology to the exclusion of other forms of tenure, and debt-driven consumption, with real estate and housing emerging as major, and in many cases the most predominant sectors of the economies of many

countries. The emergence of major private equity firms as corporate landlords, leveraging investments from pension funds and other major institutional investors, has driven housing ownership to become more concentrated in the hands of few and is thus a major driver of increased inequality world-wide undermining equal opportunities for all, equal enjoyment of rights and democratic governance.

The consequences of neoliberal ideology and the mistaken belief in the early years of the millennium that housing problems have largely been solved, have also resulted in a shrinking role of the State, of local Governments and of non-profit public housing providers as a backbone to guarantee the right to adequate housing for all.

While housing markets may provide high quality housing for the more affluent, it is a myth that an unregulated housing market could provide adequate housing for all, in particular for persons living in poverty.

The data for Germany is telling. While there were still above 2 million social housing units in Germany in the year 2007, there were just 1,13 million of such units 13 years later. And despite widespread acceptance that this trend needs to be reversed, every day additional social housing units drop out of the preferential housing market and become part of the private housing market. In my view there is not only a need to construct more social housing. In such a situation one should also consider extending the period in which social housing units must remain as part of the social housing stock.

There is overall acceptance that there is a lack of supply of housing in cities and bigger towns. The Government has announced the plan to build every year 400,000 housing units; however only 293,000 homes were constructed in 2021, 4.2 percent less than the year before. And I am not only concerned about the actual number of housing units built, but whether sufficient homes are built for those particularly needing housing: large families, single parent families, refugees from countries like Ukraine and the increasing number of persons experiencing homelessness in Germany.

In 2020, approximately 20% of Germany's population lived in households which were overburdened by housing costs – i.e. they spent more than 40% of the total disposable household income on housing. The housing cost overburdened rate in Germany was thus twice as high as the EU average of 10%.¹

Berlin is a particular case. In no other major German city rents have increased as dramatically as in Berlin. This is touching a very large proportion of its population, as 86 percent of all Berliners are renters. In 2016 one could still rent an apartment in Berlin for an average price of nine Euros per square meter, now new rental contracts trade at 12,80 euros per square meter and more, an increase of 42 percent in just about five years.²

¹ <https://www.destatis.de/Europa/EN/Topic/Population-Labour-Social-Issues/Social-issues-living-conditions/HousingCosts.html>

² <https://www.rbb24.de/wirtschaft/beitrag/2021/08/berlin-immowelt-angebotsmieten-angestiegen-mietendeckel-wohnungen-mieten.html>

Dear participants and friends,

The former City Government of Berlin has tried to halt the unaffordability crisis by a rent cap, a five year freeze on rents. It meant that rents for 90% of Berlin's apartments were frozen for five years at the level they were at in June 2019. New rental contracts could not be above that level, and as of November 2020, any existing rents that were still above that level had to be reduced. This policy drew international attention as globally many big cities are struggling with similar problems.

The Berlin rent cap was challenged before the Constitutional Court of Germany. The Constitutional Court in Karlsruhe ruled against the rent cap, considering however only whether the State of Berlin had the proper competence to pass legislation that would override federal laws regulating rents. Limiting its enquiry largely to the question of whether the Federal Government of Germany or the Senate of Berlin had appropriate competence under the system of concurrent law making, it ruled that the Berlin Rent Cap Act is incompatible with Germany's Basic Law.

The Constitutional Court refrained from analysing the consequences of its decision, whether in the specific case of Berlin there may be a State obligation to act and to protect renters from unprecedented rent increases in order to protect a minimum standard of living enshrined for example in article 1 of the Basic Law referring to the inherent dignity of the person. Nor did it discuss Article 14 of the Basic Law specifying that property entails obligations as well and shall also be used to serve the public good.

The Constitutional Court which has often defended the rights of the socially disadvantaged, did in this particular case not elaborate whether the Berlin rent cap could potentially be necessary and legitimate to ensure that the State fulfils its obligations under the International Covenant on Economic, Social and Cultural Rights in which the right to adequate housing is enshrined. One potential reason for the absence of such debate, is that the right to adequate housing is not explicitly specified in Germany's Basic Law.

Only some State constitutions, such as the Constitution of the Land of Brandenburg, have an article referring to the right to adequate housing. Article 47 of the Constitution of Brandenburg says: "Within the framework of its powers, the Land shall be obliged to provide for the realisation of the right to adequate housing, in particular through the promotion of home ownership and through social house-building schemes, tenant protection and rent subsidies."

The Constitution of Brandenburg also includes clear provision prohibiting evictions into homelessness which I very much welcome. It says: "Eviction from a place of abode may only be executed if alternative accommodation is available." Such language should in my views also find its way into the German Grundgesetz.

It would do Germany as a nation committed to human rights very well to enshrine the right to adequate housing properly in its Federal Constitution and counterbalance its somewhat exclusive property focus.

Dear friends,

Let me conclude with some remarks on the referendum that was held in Berlin on 26 September 2021 in which 59.1 percent of participants voted for expropriating large-scale corporate landlords controlling over 240.000 apartments in Berlin.

First it is a positive example of the exercise of the right to public participation in a democratic society. One core aspect of the right to adequate housing is that it should always be realized with public participation of those affected.

While the referendum is not legally binding, it has resulted in the establishment of an Expert Commission chaired by the former Minister of Justice, Ms. Herta Däubler-Gmelin, with thirteen experts. Not all parties, including those currently ruling in Berlin's town hall, appear to be completely in favour of the outcome of the referendum. Some doubt that it is the most effective policy to achieve the goal of affordability. There is as well concern that any effort to expropriate large-scale landlords by the State of Berlin would potentially not survive a likely further challenge before the German Constitutional Court.

In this context it should be noted that the right to property has neither been included in the International Covenant on Civil and Political Rights, nor in the International Covenant on Economic, Social and Cultural Rights. That does not mean that the right to property should be disregarded as it is for example enshrined in European human rights treaties. One characteristic of the right to property is however that it may be limited, both under the German Basic Law, but as well under international human rights law. So the question should be what limitations to the right to property are in the particular context of Berlin necessary, proportionate and reasonable so that the State can fulfil its obligation to ensure affordable and adequate housing for all without any discrimination. Property also has a social function, not merely an economic one, an idea which has been prevalent in German legal thought since the 19th century, and now has reverberations around the world in many Latin American countries for example. This established notion of the social function of property is highly appropriate to remember during our contemporary era.

It is my sincere hope that the expert commission established will also consider thoroughly the right to adequate housing when discussing how the popular vote should find its expression in laws and regulations of the Land of Berlin. Eventually this issue would have to be considered by Germany's Constitutional Court should it again be approached. While the question who has competence to regulate a particular matter is important in all federal systems of Government, the core human rights issue is not about this. The question is: Have measures and regulations adopted at the Federal, State or local levels been sufficient and effective to ensure that housing is affordable to all who need it and cannot provide for it by own means.

Human rights law does not prescribe in detail through which laws and policies affordability and adequacy of housing should be guaranteed. However, one obligation is clear: States and local Governments must act towards that goal. They must adopt appropriate laws, regulations and policies when more and more people are not able to find a home that is adequate and affordable. No one should be left behind.

Many thanks.