

Slums, The Right to Adequate Housing and the Ban on Discrimination

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Introduction

This brief article notes the absence of general commentary by international bodies on discrimination in the field of housing. It sets out some exploratory ideas as to challenges in providing holistic content to the anti-discrimination norm in the field of housing by examining potential discrimination issues in slum creation and maintenance. Finally it assesses critically the doctrine of *restitutio in integrum* as a valid basis for remedy in this area.

L.R. et al. v. Slovakia

In March 2005, the United Nations Committee on the Elimination of Racial Discrimination (CERD) found Slovakia in violation of international law for racial discrimination against Roma in the field of housing.² In the case of *L.R. et al. v. Slovakia*, the CERD Committee held that Slovakia violated international law as a result of the actions of the municipality of Dobšiná, which agreed to cancel a social housing project which would have benefited Roma in the town. The cancellation followed a petition campaign against Roma receiving such housing, mounted by local non-Roma and ultimately garnering circa 2,700 signatures locally. The CERD held that this act of capitulation by the municipality was racially discriminatory, and therefore illegal.

The CERD ruling in *L.R. et al. v. Slovakia* (the Dobšiná case) applied the ban on discrimination in access to housing included in the International Convention on the Elimination of All

Forms of Racial Discrimination (ICERD Article 5(e)(iii)). The definition of discrimination included in the ICERD at Article 1(1) bans acts “based on race, colour, descent, or national or ethnic origin” which have the “purpose or effect” of nullifying or impairing fundamental human rights, thereby eliding the distinction between direct and indirect discrimination. The ICERD also includes at Article 3 a ban on racial segregation, a distinct and particularly serious form of harm, but the CERD Committee chose not to find a violation of Article 3 in the Dobšiná case. The Committee did however find that the lack of a domestic remedy for housing discrimination in the instant case gave rise to a violation of ICERD Article 6, requiring remedy for Convention harms.

Considering the centrality of adequate housing to individual dignity, it is at least somewhat striking that key expert authorities have to date remained silent as to the content of the ban on discrimination in the field of housing. Neither the Committee on the Elimination of Racial Discrimination nor the Committee on the Elimination of Discrimination Against Women have issued General Comments or General Recommendations on discrimination in relation to housing. The silence of the former is particularly noteworthy given that, of all of the many areas covered by the ICERD ban on discrimination, as listed in Article 5, only relatively few could be areas to which the Article 3 ban on racial segregation could apply, and such a list would surely include housing. Approaching the issue from another normative angle, the Committee on Economic, Social and Cultural Rights (CESCR)

has not yet issued any general commentary on discrimination, although a number of the CESCR general comment documents -- including General Comment 4 on the right to adequate housing, General Comment 13 on the right to education and General Comment 15 on the right to water, to name only three -- are steeped in the discourse of equality.

What accounts for this silence? Perhaps one answer may lie in the plurality and complexity of cases at issue when the non-discrimination norm intersects with housing. Housing is an immensely rich field. The form and content of housing may be different in different parts of the globe, and rules regulating housing may be very different, depending on the type of housing, the type of tenancy, the situation of the person(s) concerned, as well as a range of other factors. In addition, housing issues frequently intersect with land rights, spatial planning issues, as well as property and other considerations, and may also engage rights to freedom of movement and/or basic security and protection.

In considering the range of issues which need to be addressed by those seeking to examine issues included in the ban on discrimination in housing, it may be useful to examine one small sliver of the broader pie: discrimination issues implicated in the housing (and/or failure thereof) of Roma in rural communities in Slovakia, i.e. racially segregated rural slums and the broader context surrounding the Dobšiná case.

Slums

The context of *L.R. et al. v. Slovakia* is the failure of Slovak authorities to provide housing to persons currently living in extremely sub-standard rural slums for reasons of belonging to a pariah ethnic group. The Committee engaged with the facts in *L.R. et al. v. Slovakia* at least in part for formal reasons; the

municipality had first decided to construct social housing for these slum dwellers, and then reversed the decision when put under pressure by locals acting out of malicious motive. Thus, the discriminatory “decision” was particularly evident in the facts as they transpired in Dobšiná. However, there is no particular reason why this case alone might engage the non-discrimination regime or be distinguished from the many other types of decisions at issue in racially segregated slum housing.

The creation of Romani slums in Slovakia may take place in many different ways, but a number of factors are usually involved: (i) The municipality designates – formally or informally – an area which will be the “Gypsy slum”. Often – though not always -- this area is already heavily or predominantly Romani; (ii) In some cases, though not all, this designated area is an “osada” – an extremely sub-standard slum, usually in a rural area – which has developed as an agglomeration of informal housing structures, sometimes constructed entirely by the Romani slum-dwellers themselves, and sometimes made up of a composite of regular constructions and informal constructions; (iii) Where such an area is not already 100% Romani, the municipality facilitates the removal of non-Romani families from the area, for example by preferentially awarding social housing to non-Roma, while passing over Roma. This was, to name only one example, an active element in the removal of non-Roma from Košice’s Lunik IX, a very large slum in a sub-urban housing estate; (iv) The municipality studiously fails to act to challenge racial discrimination on the private housing market. Thus, as Roma attempt to leave the new ghetto area by renting private housing, they are refused by both public and private authorities, and have no housing alternatives besides housing in the new ghetto area; (v) Using new powers to evict, created by the erosion of legal protec-

tions against eviction, municipal authorities evict Roma from housing in mixed areas, or sell public housing in which Roma live to private companies, on the understanding that they will evict the Roma concerned. Alternate housing, where it is made available at all, is provided only in the new ghetto area; (vi) As in Dobšiná, efforts by parts of the Slovak government, under pressure from entities such as the European Union, to provide social housing to Roma, are thwarted following pressure by those hostile to assisting Roma in any way.

The above is an idealised example. In some cases, racial segregation is created and/or enforced through other measures. Thus, for example, in some cases, (vii) Roma are moved into “temporary” housing on some pre-textual ground or for some genuine reason (natural emergency, or renovation of existing housing), from which in fact authorities have no intention of ever removing them. In other cases, vigilante threats are used to enforce segregation. For example in the village of Svinia, (viii) locals simply decided that Roma would not move from the excluded parcel of land to which they had been relegated into town, and threatened violence if anyone tried to circumvent this community-generated norm.

In the foregoing, the complex as a whole creates the racial segregation. However, each element in and of itself may implicate different norms, or may implicate the same norms in different ways. For example, direct discrimination is evident in all of the numbered elements above. However, element (i) may not involve any formal act of any kind, and so there may be no formal act of discrimination.

Where the issues of element (ii) are present – that is, where the default situation is a rural slum settlement (“osada”), the norms infringed appear first and foremost to be those

described in UN Committee on Economic, Social and Cultural Rights General Comment 4 on the right to adequate housing.³ That is, it likely lacks legal security of tenure, is excluded from various types of infrastructure, is not accessible, may not even meet minimum standards of habitability, etc. To the extent that the non-discrimination regime is infringed, it is most evidently infringed within the ICESCR definition of discrimination. That is, discrimination is at issue because Roma have not benefited to the same extent from development as non-Roma. While this is indeed discrimination, it is a difficult standard of discrimination to invoke before a court with any degree of success, in the absence of any other more evident acts of discrimination (such as those at issue in *L.R. et al. v. Slovakia*).

However, element (ii), might also be conceptualised as direct discrimination. The omission of the authorities to act to improve the situation as it exists is the discriminatory act. The comparator is hypothetical: the authorities would not have left non-Roma in such a situation without acting to improve their housing situation.

Element (iii) involves very evident direct discrimination, although it may be very difficult to prove direct discrimination in any individual act by the municipality. Thus, although the acts concerned (moving non-Roma, but not Roma, even though both have applied to move and are otherwise in comparable situations) are directly discriminatory, it may be more convenient to regard them as indirectly discriminatory, and view the overall phenomenon of non-Roma moving out of the ghetto area while Roma stay as the unequal impact of prima facie neutral procedures (in this case, rules for allocating public housing).

In element (iv), there is direct racial discrimination in decisions by private housing providers to refuse to rent to Roma, and there is also

direct racial discrimination in the failure by the public authority to act against the direct discrimination by the private housing providers. There is in addition a more general failure of bona fides on the part of the public authority, above and beyond the racially discriminatory character of its generalised failure ever to intervene in such matters. Here, however, rigid and intensely formalistic practices in anti-discrimination enforcement in Central and Eastern Europe will mean that anyone challenging the failure of the public authority to act in such cases will find themselves faced with a range of bureaucratic barriers which will thwart all but the most determined, and in practice will thwart most of the most determined also.

Element (v) is also very likely directly racially discriminatory, and in Slovakia, where a comprehensive study is available on the matter, likely indirectly discriminatory. Element (v) might also be viewed as discrimination in the sense of the European Court of Human Rights *Thlimmenos* jurisprudence,⁴ because in forcibly evicting Roma, the authorities have failed to take into consideration the different position they, as a vulnerable, isolated, destitute and despised minority, are in, as opposed to other, non-Roma.

Element (vi) is purely racially discriminatory, as the CERD Committee held. In element (vii), the non-discrimination and right to adequate housing norms may actually collide, or at least abrade. Fulfilling the requirement to re-house persons made homeless (and thereby fulfilling elements of the right to adequate housing), officials undertake acts of racial segregation. If officials are indeed undertaking acts of racial segregation, then the acts of re-housing to avoid homelessness nevertheless infringe the right to adequate housing, but not in the vector at which homelessness is defined as the highest form of harm.

Finally, element (viii) calls into question the very rule of law in Slovakia.⁵ During the 1990s, the presence of abundant skinhead violence, as well as of a number of anti-Romani pogroms, seemed to indicate that Slovak authorities had lost control over the systematic abuse and violence and that, where Roma were concerned, vigilante forces had partially taken over. The Slovak government has devoted some efforts in recent years to countering this impression, for example by creating a special department in the police force to combat extremist crime. Nevertheless, due to the fact that threats of violence can succeed in this area, the possibility of utter lawlessness cannot be entirely excluded from discussion.

However, if lawlessness is at issue, it is certainly not the primary issue driving the racial segregation of Roma in Slovakia. Rather, at issue is the veneer of legality imposed over procedures which are in fact saturated with racial considerations.

Content and Remedy

As noted previously, the discussion above has aimed to look, in a non-comprehensive way, at some of the potential racial discrimination issues at issue in slum creation and maintenance, where the slum-dwellers at issue are slum dwellers due to their ethnicity. The discussion above has not looked at discrimination in housing as a whole, nor has it examined any aspect of discrimination beyond racial discrimination.

In light of the foregoing, the remedy ordered by the CERD Committee in *L.R. et al. v. Slovakia* does not give rise to overwhelming confidence that the will exists at present to provide detailed flesh to the normative bones of the ban on discrimination in the field of housing. The remedy specified by the Committee is as follows:

“... the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future.”⁶

When weighed against the plethora of forces prevailing in slum creation and maintenance in places such as Slovakia at present, it is difficult to see how an approach, derived primarily from *restitutio in integrum*, might suffice as remedy in this scenario, if indeed that common law concept is ever appropriate in a human rights context.

While there is not necessarily a direct relationship between the content of the norm and type of the remedy available, these are indeed ultimately intrinsically linked. It is difficult to imagine how a remedy which solely aims to restore conditions prior to harm could be sufficient to address all or even most cases related to racial discrimination and

slums. While this criticism might be leveled generally at the application of *restitutio in integrum* for human rights harms, *restitutio in integrum* has particularly glaring deficiencies in the context of housing discrimination, at least in those areas elucidated by examining slum creation and maintenance. As work to define the normative content of the ban on discrimination in housing takes shape in the coming years, more fruitful bases will have to be identified on which to establish the content of the ban on discrimination in housing.

Finally, as this article has benefited extensively from examination of the *L.R. et al. v. Slovakia* case, it would seem inappropriate to conclude without comment on the case itself. Despite the elapse of over two years since the decision, Slovak authorities show no signs of implementing the decision. Indeed, the Dobšiná municipality’s current primary line of defence in refusing to provide social housing to the Roma concerned is derived directly from a crass reading of *restitutio in integrum*; the municipality argues that, by providing no housing to the Roma concerned, it has restored the original condition.

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² *L.R. et al. v. Slovakia*, Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/2003, 10 March 2005.

³ United Nations Committee on Economic, Social and Cultural Rights, “The right to adequate housing (Art.11 (1))”, 13/12/91, CESCR General comment 4.

⁴ “The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.” European Court of Human Rights, Judgment, *Thlimmenos v. Greece*, (Application no. 34369/97), 6 April 2000.

⁵ Although element (viii) also arguably implicates the anti-discrimination regime, insofar as the failure of the criminal justice and law enforcement authorities to stop and penalise this criminal behaviour by private parties who attack Roma may be directly racially discriminatory. Here again the comparator would be hypothetical: the same authorities would not have failed to act were the victims of such behaviour non-Roma.

⁶ *L.R. et al. v. Slovakia*, above note 2, para. 12.