

## **Enshrining the right to adequate housing in a constitution: The case of California**

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<https://challengeinequality.luskin.ucla.edu/righttohousing/>

Many thanks for inviting me and several of my predecessors to this panel discussion. There is an ongoing debate in California whether or not to enshrine the right to adequate housing in its State Constitution. In 2019 a bill was introduced to the California Assembly by Assembly Member Bonta to amend the State Constitution of California by adding an article 25 on the right to housing. Bonta proposed the following:

*The fundamental human right to housing is hereby declared to exist in this state. This right ensures access to adequate housing for all Californians. This right is exclusively enforceable by a public right of action. It is the shared obligation of state and local jurisdictions to respect, protect, and fulfil this right through progressively implemented measures, consistent with available resources, within an aggressive but reasonable time frame.<sup>1</sup>*

To my knowledge it would be the first time that a US-State would enshrine the right to housing in its constitution. Worldwide several countries have incorporated the right to adequate housing in their constitutions or in their national law, however there has been some kind of exceptionalism in relation to endorsing this right as a human right in the United States. This applies not only for the right to adequate housing, but as well for other internationally recognized economic, social and cultural rights.

For example, the United States of America is one of the few States that have only signed the International Covenant on Economic, Social and Cultural Rights of 1966, but to date not yet ratified it. In the meantime, worldwide 171 States have become members of this international human rights treaty that contains in its article 11, the right to adequate housing. Only 26 States have not done so, but except for Bhutan, Cuba, Mozambique, Saudi Arabia, South Sudan, the United Arab Republic, and the United States, most of them are small Island States in the Pacific and Caribbean. The United States is also one of the few countries, that have not ratified the Convention on the Rights of the Child, the Convention against the Elimination of all Forms of Discrimination against Women and the Convention of the Rights of Persons with Disabilities, all of which, refer as well to the right to adequate housing in their texts.<sup>2</sup>

That does not mean that the United States has formally not recognized the right to adequate housing. The US for example has recognized the right to adequate housing contained in Article 5 (e) of the

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<sup>1</sup> See

[https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201920200ACA10&showamends=false](https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200ACA10&showamends=false)

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<sup>2</sup> For ratification status of the respective international human rights treaties see: <https://indicators.ohchr.org/>

International Convention against all Forms of Racial Discrimination, to which the US is a State party. The US has also recognized the protection of the home and privacy from arbitrary State interference as contained in Article 17 of the International Covenant on Civil and Political Rights. However, judging from the ratification of UN human rights treaties only, formal support for the right has been in the United States rather limited or to date at best moderate.

The reluctance of the United States to be bound by many widely accepted international human rights treaties has raised many questions, in particular as human rights are so much part of the own self-understanding, public discourse and American public culture, to which the civil rights movement has strongly contributed.

There may be different explanations for this exceptionalism: The American ideology of individualism, freedom and capitalism, that sees housing more as an expression of the right to own property not as a human right. The misguided assumption that economic, social and cultural rights are inherently linked to socialism or even communist ideology. The wrong belief that economic, social and cultural rights would not be essential to ensure the enjoyment of many civil and political rights without discrimination. Neo-liberal concepts in economic policy thought that argue for a weak State, with minimal regulatory interference into markets, including housing markets. The assumption that prosperity and happiness for all would be best produced by individual accumulation of wealth and prosperity. The American exceptionalism ignores that other States that combine individualistic, liberal ideology with democratic governance, social norms and equality such as for example Scandinavian countries tend to be very successful and safe, if not among the happiest places of the world. It is maybe no surprise that one of the few countries that have been actually able to reduce homelessness to marginal proportions has been Finland.<sup>3</sup>

Many academic studies have been published that ratifying international human rights standards, including reference to human rights norms in constitutions or national laws does not automatically result in a better protection of human rights.<sup>4</sup> However, this should not speak against enshrining human rights norms in constitutions per se. There are many intervening variables: the legal culture of the country, whether acceding to a human rights norm, is more for lip service than undertaken in the belief that all people in the territory actually should enjoy such a right.

This however should not be seen as an argument against incorporating the right to housing in the constitution in California. Doing this would mean indeed an actual commitment to this right, not a lip service to please other States or the United Nations as an international organization.

An important question is, how this right is enshrined in a constitution: would it be merely a reference to the right to housing as goal of public policy, or is the public administration actually bound as well by the right, obliged to protect, respect and progressively fulfil it? And most importantly, can as well the right to housing be claimed, if needed? Are individuals and affected communities able to challenge state policies that would not respect the right to housing?

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<sup>3</sup> For the significant reduction of homelessness in Finland see: [https://www.ara.fi/en-US/Materials/Homelessness\\_reports](https://www.ara.fi/en-US/Materials/Homelessness_reports).

<sup>4</sup> See among others: Wade J. Cole: Human Rights and Myth or Ceremony? Re-evaluating the Effectiveness of Human Rights Treaties, 1981-2007, American Journal of Sociology, 2012, Vol. 117, No. 4, <https://doi.org/10.1086/662706>; Eric Neumayer: Do International Human Rights Treaties Improve Respect for Human Rights? Journal of Conflict Resolution, 2016, Vol. 49, No. 6; <https://doi.org/10.1177/0022002705281667>.

A right that would only exist on paper, is not necessarily helpful; it must also be possible for individuals to be able to rely on it and if needed to claim it.

Since the UN established the function of a Special Rapporteur on the right to adequate housing over 20 years ago, all my predecessors - including those here with me on the call – have worked hard to convince Governments that it is not enough to include the right to adequate housing in constitutions, the right must as well be justiciable, it must also inform State legislation and policy, including by-laws and regulations at local and community level.

Having a right to housing incorporated in a State constitution would certainly be helpful to trigger such legislative reforms or at least allow the judiciary to rely on the State constitution when interpreting other state law. What must and should follow is a review of State laws to ensure that they protect effectively against forced evictions, or laws such as the UK Housing Act<sup>5</sup> or the French DALO-Act making the right to housing enforceable (“Droit a un logement opposable”)<sup>6</sup>. While not perfect they provide at least persons at risk of homelessness or already in such situation a right to access housing, by giving them priority access to public and social housing.

Having a right to housing inserted in a State Constitution would also likely trigger further constitutional amendments to fully realize it. For example, the provisions that protect private property rights are often amended in countries which seek to protect housing rights more robustly – the South African Constitution has witnessed robust debates over the appropriate relationship between the right to property and the right to housing. In the case of California, we would need to amend Article 1, Sections 1 and 19. Section 1 may need to be amended to clarify that ‘acquiring, possessing and protecting property’ is to be exercised in manner which balances the economic function with the social function of property, including the obligation to use property in ways which does not undermine the achievement of collective or common good. Similarly, Section 19 in Article 1 may also need to be amended to suitably clarify that the definition of ‘pubic work or improvement’ includes measures taken to protect the right to adequate housing including public and/or affordable housing.

Some may argue: Why California? Should there not be as well an amendment of the bill of rights at federal level? I think there are good reasons why especially California should move ahead. One reason is very obvious: the housing crisis in this state: Hardly any other State of the US has such a high percentage of its population in situation of homelessness.<sup>7</sup> The situation is recognized as critical by most citizens and leaders – for e.g., the mayor of Los Angeles has declared a state of housing emergency.<sup>8</sup> Housing affordability is one very strong concern in many cities of this State. So there is a strong and good reason for California and Californians to act, and for people to support that this marvellous State will go into US history as a State that has exercised human rights leadership, by recognizing the right to adequate housing in its constitution.

Secondly, California would not be the only example of a State in a federal system of government to recognize the right to housing in its constitution, while such a right may not be explicitly found in a corresponding federal constitution. For example, the Constitution of the Land of Brandenburg in

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<sup>5</sup> See Housing Act 1996, as revised available at: <https://www.legislation.gov.uk/ukpga/1996/52/contents>

<sup>6</sup> See Loi n° 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale (1), avialble at : <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000271094>

<sup>7</sup> See U.S. Department of Housing and Urban Development, The 2021 Annual Homelessness Assessment Report (AHAR) to Congress, p.8, available at: <https://www.huduser.gov/portal/sites/default/files/pdf/2021-AHAR-Part-1.pdf>

<sup>8</sup> See <https://mayor.lacity.gov/news/mayor-karen-bass-declares-state-emergency-homelessness>

Germany has recognized the right to adequate housing, while such a provision is still completely absent from the Federal Constitution of Germany (known as Basic Law).

The article 47 of the Constitution of Brandenburg says: (1) The State shall be obliged to ensure, within the limits of its powers, the realization of the right to adequate housing, in particular by promoting home ownership, by measures of social housing construction, by tenant protection and rent subsidies. (2) The eviction of a dwelling may only be enforced if substitute housing is available. When weighing the interests, the importance of the dwelling for leading a dignified life shall be given special consideration.<sup>9</sup>

In particular, the provision prohibiting evictions into homelessness of the Brandenburg Constitution is noteworthy.

Of course enshrining the right to housing in a State constitution in a Federal State may have its own limitations. For example, States in a federal system of Government may not have the competency to regulate on all housing related matters, as certain areas of law making may fall within the exclusive competency of the Federal Government, some under a system of shared competency, while others would be reserved to the exclusive competency of the Sub-national Government.

The issue has recently been highlighted in a Constitutional Court Case in Germany: The Civil Code of Germany and the rental law is a matter of federal competence in Germany. Berlin, which is like Washington DC, a Federal State of its own in the federal system of Government, had made a law freezing most rents in Berlin for 5 years, to combat the increasing unaffordability of housing in this city-State. Berlin relied mainly on the argument that it had the power to make such regulations on the basis of its own State constitution to ensure that housing remains affordable to its population.

The rent cap law was very important as in Berlin over 85 percent of all households actually live in rented accommodation.<sup>10</sup> In addition, Berlin witnessed one of the harshest rent increases globally in recent years. However, the Berlin rent cap law was challenged before the Constitutional Court of Germany which decided that Berlin had overstepped its competency by the rent cap law, as making such a regulation was in the view of the Federal Constitutional Court a matter to fall into the competence of the Federal Government. It thus declared Berlin's rent freeze law as null and void.<sup>11</sup>

The very innovative rent cap law was thus struck down, merely on arguments that Berlin had not the authority to make such a law. The Constitutional Court did not elaborate on the more interesting matter, whether prohibiting rent increases for home-owners may under certain circumstances be justifiable, on the basis of constitutional provisions that make in Germany the enjoyment of property subject to social obligations.

The Berlin example teaches us that it is important to address other constitutional barriers that stand in the way of the realization of the right to housing – usually the norms that protect property rights as I noted before and the norms that define the powers of local governments. If we take the issue of proper competence of local governments as a constitutional matter, this needs to be explicitly clarified to more effectively guarantee the right to housing. This means that, California Constitution may need to be amended suitably (in Article 11) to clarify that all local governments in California have the right to

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<sup>9</sup> See Article 47 of the Verfassung von Brandenburg [in German], available at: <https://bravors.brandenburg.de/de/gesetze-212792>

<sup>10</sup> See Senatsverwaltung für Stadtentwicklung, Berlin – wohnenswerte Stadt, [in German] available at: [https://www.stadtentwicklung.berlin.de/wohnen/wohnungsbau/download/ausstellung\\_wohnenwerte\\_stadt.pdf](https://www.stadtentwicklung.berlin.de/wohnen/wohnungsbau/download/ausstellung_wohnenwerte_stadt.pdf)

<sup>11</sup> See press summary of the Decision of the Federal Constitutional Court of Germany, available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-028.html?jsessionid=535AF8AC5B2AC41D9600BB2327DD8BA4.1\\_cid354](https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-028.html?jsessionid=535AF8AC5B2AC41D9600BB2327DD8BA4.1_cid354)

engage in measures that ensure the full realization of the right to adequate housing. Such measures include but may not be limited to rent control and stabilization, use of eminent domain by local governments including through appropriate delegation, taxation and power of levying fees and charges and power to overrule all decisions of planning boards and other authorities to ensure the full realization of the right to adequate housing.

Finally let me say something to avoid a common misunderstanding: Incorporating the right to housing in a constitution does not mean that suddenly the State or local Governments would have to provide housing for everyone. Nor would it be the end of the private housing market, nor would it put the right to property aside. For those who can afford or access adequate housing by own means, Governments have to do nothing. State and local Governments are only obliged to support those who are unable to provide adequate housing for themselves as they lack the own means to do so. Human rights law does not say what exactly States should undertake to ensure the right to adequate housing. States can provide rent subsidies to allow those that cannot afford housing to access adequate housing, they can provide support for low-income families to buy their own housing, they can offer preferential mortgage programmes for first ownership and invest in public or social housing programmes. Usually States have done a mix of these different policies to achieve the aim that nobody is left without a home or secure tenure.

As UN Special Rapporteur I will say to every Government in the world - whether it is a local Government, a sub-national Government or the Federal Government - you should enshrine the right to housing in your constitution and if this is impossible or difficult to achieve, then you are still able to modify your own laws, policies and regulations to give effect to this right.

I am here in good friendship with this position. All my predecessors have advocated for this. In addition, the UN Human Rights Council in Geneva has reiterated in unanimously adopted resolutions calling upon States to ensure that the right to housing is recognized in their legal order and incorporated in their national laws and regulations. So, from the United Nations there is a clear supportive position on this.

As I have suggested here, California is well placed to incorporate the right to adequate housing in its Constitution – as a stand-alone right, and buttressed by appropriate modifications of the provisions on the right to private property as well as the power of local governments. With this trifecta of changes, the housing rights movements which have advocated for the defence of housing rights in California will receive a real boost. Mass mobilization and legal change can reinforce each other.

This should of course not overlook that incorporating the right to housing in a constitution is only a first important step. Sub-national laws and local regulations should also ensure that the right to housing is respected, protected and fulfilled. A continuing collective commitment to the goal of protecting the right to housing is important. And finally, there must as well be effective and accessible ways for those that feel their right to housing has been violated, to claim it.

Many thanks.