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HOMELESSNESS AGAINST THE PRINCIPLE OF INDIVISIBILITY OF HUMAN RIGHTS

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Abstract. The main aim of this study is to present homelessness against international human rights law, whilst assessing the state of regulations in force and pointing out whether they sufficiently protect homeless persons as a group which requires special legal protection. At the same time, the analysis will confirm or falsify the research hypothesis which asks us to ponder on whether (and if yes – why) homelessness violates the principle of indivisibility of human rights in a particular way and whether it should be examined as such. Does homelessness *per se* – violating inherent human dignity – negate the essence of human rights and *de facto* exclude the possibility of exercising some of them? Formulation of this hypothesis implicates a question about the relationship between homelessness and indivisibility of human rights. Verification of the above hypothesis will outline the scope of further reflections carried out on the basis of the analytical method and by interpretation of the law in force, supported by the statistical method.

Keywords: homelessness, human rights, international protection of human rights, principle of indivisibility of human rights

INTRODUCTION

Among various grave problems that are a challenge in the 21st century both for states and for the international community, particular attention needs to be given to the problem of homelessness which *in genere* escapes the regulations in force. Therefore, it is not without a reason that the issue in question has not been the subject of quantitatively extensive scholarly analyses in law in general and in research addressing international (including European) protection of human rights in particular. The difficulties in specifying the normative nature of the occurrence of homelessness is additionally affected by the fact that in legal writings it is most often juxtaposed with the right to housing or the right to protection against social exclusion [Ploszka 2015, 50], which is difficult to recognize as a precise and sufficient way of describing the analysed issue. Even though on the one hand the discussed manner of presenting the problem of homelessness in the discourse about human rights raises – *de lege lata* – a number of doubts, thus complicating the description of the legal nature of homelessness, on the other it still remains the only way to make the issue in question a reality under international human rights law.

The above findings allow us to outline the framework of this study among many contexts in which homelessness may be and is presented in the Polish and international literature alike [Robson 1994; Stoner 1995; Pawlik 2015; Luba, Da-

vies, Johnston et al. 2018] – special focus will be given to locating (associating) the phenomenon in question in the system of international human rights protection. Thus, the occurrence of homelessness *per se* will be placed in the category of human rights, which will allow for it to be perceived as a problem of a juristic character leaving its economic, social, ethical and other determinants beyond the scope of the analysis. Additionally, focus will be given to the European aspect of the phenomenon in question, at the same time using international determinants only in a subsidiary scope, always where the conducted research requires certain completion. This will make it possible to draft the research area and bring its scope down solely to the ground of international (European) law, leaving out the analysis of the subject-matter of domestic law.

The adopted research scope allows for a clarification that the main aim of this study is to present homelessness against international human rights law and at the same time to assess the state of regulations in force and to point out whether they sufficiently protect homeless persons as a group which requires special legal protection. At the same time, the analyses will allow a confirmation or falsification of the research hypothesis which asks us to ponder on whether (and if yes – why) homelessness violates the principle of indivisibility of human rights in a particular way and whether it should be examined as such. Does homelessness *per se* – violating inherent human dignity – negate the essence of human rights and *de facto* exclude the possibility of exercising some of them? Formulation of this hypothesis implicates a question about the relationship between homelessness and indivisibility of human rights.

Verification of the above hypothesis will outline the scope of further reflections carried out on the basis of the analytical method and through interpretation of applicable law, supported by the statistical method.

1. HOMELESSNESS – INTRODUCTORY OBSERVATION

Statistics that directly or only indirectly address homelessness leave readers with no doubt as to the great scale and certain universality of the phenomenon in question. When one takes into account the fact that on the basis of national reports it is cautiously estimated that "no less than 150 million people, or about 2 percent of the world's population, are homeless" while "about 1.6 billion, more than 20 percent of the world's population, may lack adequate housing" [Chamie 2017], then the social gravity of the problem of homelessness cannot be questioned any more.

Reports addressing homelessness in Europe, with particular emphasis on the European Union countries, emphasize that in 24 of them the level of homelessness has gone up in the last decade, in some even quite significantly (a rise by 16 to 389%). The only EU Member State in which homelessness has decreased significantly in the last couple of decades is Finland, while three countries (Croatia, Poland and Portugal) display mixed models [Baptista and Marlier 2019, 13]. The

fact that Poland stands rather stably against other EU states does not undermine the problem since in 2019 30,330 people were diagnosed as homeless in Poland, of whom 83.6% were men (25,369 people) and 16.4% were women (4,961 people).[1] Despite the general statistics and the accompanying trends this still proves (especially given it is the 21st century) the great scale of the occurrence.

However, it needs to be emphasized that the above presented statistics are not reliable and cannot constitute a full quantitative image of homelessness. A direct reason for this is the absence of one universal and generally accepted definition of the concept of homelessness, which results from the fact that the research conducted on homelessness is based not only on a different methodology, but mostly on different definitional elements which provide the construct for the adopted definitions. It is the case, for instance, with the exceptionally essential – from the perspective of the concept in question – temporal aspect. If one were to assume in short that homelessness is "a relatively permanent situation of a person deprived of a roof over their head or who does not have their own housing" [Porowski 1995, 433–34], then such understanding of homelessness requires specification what this "relatively permanent" situation is. On the scholarly ground it is rightly emphasized that "houselessness" is a wider term which includes those who are living in emergency and temporary accommodation provided for homeless people, such as night shelters, hostels and refuges. It also covers people who reside in long-term institutions, for example psychiatric hospitals, simply because there is no suitable accommodation for them in the community. Another group in this category are households staying in bed and breakfast hotels and other places which are unsuitable as long-stay accommodation [Fitzpatrick 2000, 33].

The number of the above-mentioned situational categories, classified under the term homelessness, shows a significant degree of complexity of the analysed matter. Moreover, this allows two ordering reflections. First of all, from the perspective of human rights, a specification of the semantic scope of the analysed conceptual category which, as pointed out by Kaźmierczak–Kałużna, involves "exact" understanding of homelessness and bringing down the essence of the problem to absence of "a roof over one's head" or not having "one's own" housing [Kaźmierczak–Kałużna 2015, 21], without going into detail, needs to be considered especially significant. From the legal and personal perspective, homelessness as such is problematic. Homelessness as a social question is not easy to regulate formally [ibid.] which is why it is a special conceptual category in its nature. By escaping classic methods of defining concepts, due to its vague nature and difficulty in specifying the meaning of individual definitional elements, the way it is understood depends strictly on a certain research perspective adopted in the course of the definition-giving process. Secondly, homelessness in legal and human terms, understood as a conceptual category, does not have an independent character. In order to explicate its meaning, it is necessary to demonstrate other

[1] See https://www.gov.pl/web/rodzina/wyniki-ogolnopolskiego-badania-liczby-osob-bezdomnych-edycja-2019 [accessed: 22.10.2020].

conceptual and factual categories (i.e. right to housing, social exclusion, etc.), which will be addressed below.

2. HOMELESSNESS – NORMATIVE APPROACH

As pointed out at the outset, the subject of special interest to this part of the study will consist in – referring to the discussed homelessness – regulations of international law, including European law, adopted on the legal and human ground. By default, regulations of domestic law, which do not fall under the outlined scope of analysis, will not be addressed.

Therefore, in the universal system of human rights the issues of homelessness can be interpreted from the provisions of Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, signed in New York on 19 December 1966.[2] Pursuant to them, parties to the Covenant recognize the right of everyone to an adequate standard of living for himself and his family (including adequate food, clothing and housing) and to the continuous improvement of living conditions. Indicating, by means of the said provisions, that everyone has the right to housing is crucial from the perspective of further reflections. It is difficult to look for a clearly worded obligation to combat homelessness in the framework of positive obligations of states, which from the perspective of national legal systems should be significant enough so that "the legal tile to housing is not considered sufficient protection against homelessness" [Kaźmierczak–Kałużna 2015, 21]. If having a title to housing does not exclude the state of homelessness, then giving "homelessness" the status of a normative category by including it in the framework of the "right to housing" is certainly not a legally perfect manoeuvre, though – *de lege lata* – the only one. Confirmation of the above may be found in the position of the Committee on Economic, Social and Cultural Rights (2019).[3] The Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies.

Therefore, placing rights such as i.a. the right to food, housing and water, and also the right to the highest possible standard of health (Articles 10–12) [Kędzia 2018, 14] under the material scope of the right to an adequate standard of living may be considered as a form of application of the issues of homelessness to the provisions of the Covenant.

European law focuses mainly on three legal aspects which outline – in the context of the described homelessness – the appropriate standard of the right to housing. First of them is the European Convention for the Protection of Human Ri-

[2] International Covenant on Economic, Social and Cultural Rights, signed at New York on 16 December 1966, United Nations, Treaty Series, vol. 993.

[3] *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant). Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23)*, https://www.refworld.org/docid/47a7079a1.html [accessed: 22.10.2020].

ghts and Fundamental Freedoms signed on 4 November 1950 in Rome under the auspices of the Council of Europe,[4] for which Protocol 4 was signed on 16 September 1963 in Strasbourg.[5] Article 2(1) of this Protocol (which stipulates everyone's right to freedom to choose his residence on the territory which he legally resides in) and Article 8(1) of the Convention (which treats – under the right to respect for one's private and family life – also about respect for one's home) address the issues of the right to housing differently to the way they are referred to in the said Covenant. Not only does the Convention assume by default that this right is afforded to everyone (without exceptions and without personal exclusions), but it also expands the material scope of this right to include the choice of residence as such and an obligation resting with state authorities to respect housing. Only that the last of the cited regulations is rather related to the already acquired ownership of a house, marginally protecting homeless persons by default deprived of such ownership.

Compared to the European Convention, the issue is more precisely regulated in another legal act of the Council of Europe, that is the reviewed version of the European Social Charter.[6] Pursuant to its Article 31, *in extenso* addressing the right to housing, with a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: firstly, to promote access to housing of an adequate standard; secondly, to prevent and reduce homelessness with a view to its gradual elimination; and finally, to make the price of housing accessible to those without adequate resources. The provision in question may be considered as the fullest wording of the right to housing on the normative ground, which in its essence is a legal form of protection against homelessness. A statement – by means of international law regulations – that the right to housing is afforded to everyone and also that implementation of this right is an obligation of state authorities is of fundamental importance in the context of protection of natural persons against homelessness and the related social exclusion.

However, it is worth adding that a direct reference to the premise in question, by juxtaposing it not only with the right to housing, but also with poverty and social marginalization, can be found in the Charter of Fundamental Rights[7] signed in Lisbon on 13 December 2007 appended to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon.[8] When it comes to the first aspect (of the right to housing), the Charter provides in Article 34(2) that everyone residing and moving legally wi-

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, signed at Rome on 4 November 1950, ETS 5.
[5] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, ETS No. 046.
[6] European Social Charter (Revised), signed at Strasbourg on 3 May 1996, ETS 163.
[7] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.
[8] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

thin the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. This means that in the adopted approach residence is treated as a *sine qua non* condition to enjoy other benefits. Absence of a formal possibility to prove one's place of residence – which by default affects homeless persons – is of great importance in the context of the research hypothesis formulated in the beginning. Absence of residence as such predetermines that a homeless person cannot enjoy – in the context of the analysed provisions – any social rights the exercise of which requires residence and in the long-run leads to discrimination. When it comes to the second aspect (poverty and social marginalisation), the Charter stipulates in Article 34(3) that in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing support to ensure, in accordance with principles established in the Union's law and national legislations and practices, life in human dignity. Three issues seem particularly interesting from this perspective: firstly, the fact that the European Union allows housing support as a form of combating social exclusion and poverty; secondly, reference in the cited provision to dignity as a value that underlies all human rights and freedoms; and thirdly, associating homelessness with the indivisible nature of human rights, which we will return to later.

3. HOMELESSNESS – JURIDICAL APPROACH

The above brief analysis of regulations in force demonstrates certain trends which allow for the discussed homelessness to be placed in the system of international (European) protection of human rights. This makes it valid to reach for the case-law basis so as to demonstrate by examples from the European Court of Human Rights that the essence of the adopted regulations is reflected in the judicature.

A compilation of statistics drawn up by the author on the basis of the HUDOC database search demonstrates that the ECtHR has addressed the "homeless" category in 105 judgments which *explicite* include the analysed category in their content. And although the said statistics of judgments cannot be recognized as a fully reliable source of information on statistical determinants of homelessness, they outline the trend mentioned above, thus allowing a conclusion that the number of references is significant and their substantive determinants and place in the international (European) context of human rights are diverse.

The first group of the analysed ECtHR judgments includes those in which the Court – addressing homelessness – refers to obligations of local authorities towards the homeless. Pointing to domestic legislations concerning pregnant women and new-borns, social security and raising children as well as accommodation for homeless persons, it pointed to the category of persons who require special protection from the state. In the last context the requirement of accommodation is associated not only with the requirement to ensure housing, but, what is

more, the Court sees this obligation as a requirement to ensure "secure accommodation."[9] In other judgments the Court refers, also in personal terms, to the status of persons unintentionally homeless who have a minor child[10] or to the situation of unaccompanied minors who are homeless.[11]

The second group of selected judicial decisions is associated with the issues of homelessness of[12] and homelessness of asylum-seekers. In this context the Court points out that many homeless asylum seekers, mainly single men but also families, illegally occupy public places. The Court also emphasizes that having permanent residence is a requirement to obtain a tax identification number, which excludes a homeless person from the labour market. Moreover, according to the Court, health care authorities, often unaware of their obligation to provide asylum-seekers with free medical care or of the existence of any other additional health risks such persons are vulnerable to, fail to implement the rights of homeless and destitute persons or other basic forms of social assistance.[13]

In the context of social assistance, the Court developed its earlier case-law in another judgment pointing out that in the face of a choice between an uncertain life of a homeless person and the relative security offered by social assistance homes, disabled persons (in the Central and Eastern European countries) may opt for the second solution only because the national system of social assistance did not offer them any alternative services. However, this does not mean, in the Court's opinion, that the stakeholders freely expressed their consent to be placed in such institutions.[14]

Free will is also noticed in other Court judgments, though in a completely different context. It is because the Court addresses the issue of homelessness juxtaposing it with the essence of deprivation of liberty. By asking a valid question whether a given person may renounce their right to freedom, the Court states that situations in which the person is not *de facto* deprived of their liberty need to be excluded. A homeless person or a vagrant entering police headquarters asking for

[9] Judgment of the European Court of Human Rights of 18 January 2001, Chapman v. the United Kingdom, Application No. 27238/95; judgment of the European Court of Human Rights of 18 January 2001, Lee v. The United Kingdom, Application No. 25289/94; judgment of the European Court of Human Rights of 18 January 2001, Beard v. The United Kingdom, Application No. 24882/94.
[10] Judgment of the European Court of Human Rights of 27 September 2011, Bah v. The United Kingdom, Application No. 56328/07.
[11] Judgment of the European Court of Human Rights of 28 February 2019, Khan v. France, Application No. 12267/16.
[12] Judgment of the European Court of Human Rights of 23 November 2000, The Former King of Greece and Others v. Greece, Application No. 25701/94.
[13] Judgment of the European Court of Human Rights of 21 January 2011, M.S.S. v. Belgium and Greece, Application No. 30696/09.
[14] Judgment of the European Court of Human Rights of 17 January 2012, Stanev v. Bulgaria, Application No. 36760/06.

a place to sleep, whose wishes are met by placing him in a prison cell, is not deprived of liberty if he can leave the cell at any point he wishes to.[15]

Moreover, the Court analysed cases where homelessness occurred as a result of action or negligence of state authorities, citing situations in which a person becomes homeless due to a few-week or a few-month long delay between a given person reporting at the immigration department of relevant police headquarters and registering his application.[16] Such a line of judicial decisions orients the process of thinking about homelessness towards positive obligations of states which, by creating a minimum standard of protection against homelessness, should contribute to limiting the discussed problem.

What is interesting, apart from the above personal and material aspects, the Court approaches homelessness by presenting it against procedural aspects and by invoking the "intentionally homeless" measure recognized by municipalities or the procedure where local authorities put a specific person on the list of homeless persons.[17] In its case-law the Court supplements procedural aspects with material aspects, for example by juxtaposing the right to housing (treated i.a. as an ownership right) with the principles of a fair trial interpreted from Article 6 of the European Convention. In one of its judgments, the Court emphasizes that "the deprivation of a home requires a fair and public hearing and the other procedural requirements which have developed from the jurisprudence of Art. 6 ECHR" [Kenna 2008, 193–208]. The legitimacy of such reasoning results also from the analysis of other judgments in which the Court directly refers to the obligation resting with states to protect the right of everyone to respect for his home and private and family life.[18]

4. SUMMARY – HOMELESSNESS AS VIOLATION OF THE PRINCIPLE OF INDIVISIBILITY OF HUMAN RIGHTS

These reflections legitimise the outlining of certain trends intended to place homelessness in the international law of human rights, which is being done in two ways. On the one hand, both the legislation in force and the case-law of the European Court of Human Rights guarantee everyone the right to housing by demonstrating that the obligation to implement this right rests with state authorities where absence of such implementation and being homelessness deprive one of the possibilities to exercise other human rights or at least limit these possibilities to a significant degree. On the other hand, though, homelessness is juxtaposed with

[15] Judgment of the European Court of Human Rights of 5 July 2016, Buzadji v. The Republic of Moldova, Application No. 23755/07.
[16] Judgment of the European Court of Human Rights of 4 November 2014, Tarakhel v. Switzerland, Application No. 29217/12.
[17] Judgment of the European Court of Human Rights of 18 January 2001, Jane Smith v. The United Kingdom, Application No. 25154/94.
[18] Judgment of the European Court of Human Rights of 22 February 2005 (final 22.05.2005), Novoseletskiy v. Ukraine, Application No. 47148/99.

the requirement of ensuring an adequate standard of living, respect for one's private and family life, poverty and social marginalisation.

Even though the right to housing is a social right in its legal nature, thus a second generation right, as a social human right, as Sławicki believes, it enjoys protection afforded to individual rights under other identified human rights [Sławicki 2015]. This, in turn, equips it with a special normative valour, legitimising a conclusion that the category of homelessness on the ground of human rights is not autonomous. The example of homeless persons – which is emphasized by Ploszka – proves that using first generation rights is not possible without guaranteeing the implementation of basic social rights. All human rights are universal, indivisible, interdependent and interconnected [Ploszka 2015, 44]. If the position of the cited author were to be modified a little, then going further one could say that using second generation rights will be all the more impossible if the exercise of personal rights as fundamental rights is not ensured. Homelessness does not only deprive people of their inherent dignity underlying any legal and human protection, but most of all it ruins the possibility of exercising human rights as such. Homelessness *in extensio* negates the essence of human rights.

The above observation directs the thinking about homelessness towards the concept of indivisibility of human rights which is a leading idea (if not principle) of international human rights law which ensures effective protection of rights, regardless of the category they were assigned to [Kulińska–Kępa 2017, 21]. The example of the social group described in this study, that is homeless persons doomed to be marginalised and socially excluded, exposes in a special way the fact that homelessness, understood as a phenomenon, state and process, violates the principle of indivisibility of human rights. If one were to conclude, as pointed out by the UN Human Rights Council, that "all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and must be treated in a fair and equal manner, on the same footing and with the same emphasis"[19] [ibid., 22], there is no doubt that inability to ensure personal or social rights to homeless persons violates the principle of the indivisibility of human rights *in toto*.

In the face of the 21st century growing homelessness, the analysis of regulations in force validates a view that international law acts protect homeless persons too weakly. Therefore, it still remains an open question "whether the bare minimum of rights can be protected and, in the huge and complex European housing system, how effective this approach is" [Kenna 2008, 206]. When treating homelessness as a challenge both to countries and the international community, there is no doubt that there is still a lot to do in this regard. The actions of governments, which insufficiently protect the homeless, cannot be solely assessed by the prism of inefficiency. Inability to ensure the full spectrum of human rights to homeless persons is contrary to the indivisible nature of these rights.

[19] Human Rights Council, Report of the Human Rights Council on its eighth session (UN Doc. A/HRC/8/52), 1 September 2008.

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