

HOUSING AS A HUMAN RIGHT



Realising the Human Right
to Housing in Scotland

Tatora Mukushi



AUTHOR: TATORA MUKUSHI

Abstract: A paper considering the current context, practicalities and realities of incorporating the right to housing as defined under Article 11 of the International Covenant on Social, Cultural and Economic Rights.

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EXECUTIVE SUMMARY

In recent years there has been considerable development of a human rights culture in Scotland. The engine of the First Minister’s Advisory Group on human rights and the Scottish Human Rights Taskforce has galvanised state and civil society in the pursuit of a broad national legislative basis to establish human rights.

The incorporation in Scotland of the United Nations Convention of the Rights of the Child was a bold pioneering act, particularly as it received unanimous political support. In this positive spirit, the ambition to incorporate other economic, social and cultural rights is no longer a question of ‘if’ but instead a question of ‘how’.

We must acknowledge first that fluency on human rights sits mostly with professional stakeholders. Because of limited public understanding and perception of international human rights, the incorporation agenda is going to have to lead with education. It is going to have to be implemented in the way that best captures the public’s knowledge, experience and imagination. The fact that there are four UN covenants being incorporated simultaneously leaves enormous space for engagement and, unfortunately, for misinterpretation. There can be no doubt that the change is seismic, particularly because it refers to the foundations upon which we will found both our existing legal protections and those to come. The founding human rights concept must not be allowed to become jargon but instead be folded into the understanding of the law and the question of ‘why’.

In simple terms, the only way to implement these changes is to do so on the large scale that is absolutely necessary to their success. The human right to adequate housing sits within a basket of rights that affect the day to day living of every being in Scotland. Human rights discussions are full of great concepts such as universal, inalienable and indivisible, and costly policy initiatives. But underneath these lie the real human experience of housing, health, and education. Of survival and enduring in order to find and preserve human dignity. The international human rights framework combines these concepts and experiences, based on the national context. The delicate balancing of apparently competing rights formulations in designing such a rights framework is facilitated by decades of collective wisdom sourced and developed globally. A human rights-based approach, as evidenced here, is the ideal recipe for simultaneously empowering rights holders and holding duty bearers to account.

This goes further than the Human Rights Act 1998, which has shouldered most of the burden of conscience for our legal system this century, more so since Brexit. It should not be surprising to know that the right to adequate housing has invoked the right to life, freedom from inhumane and degrading treatment, freedom from arbitrary detention, and other explicit rights in the European Convention. Explicit incorporation of the International Covenant on Economic Cultural and Social Rights (ICESCR) offers an opportunity to relate all these rights together, along with strong direction on the interests of important social groups. Having all of these expressed simultaneously shares the load and, more importantly, puts human rights in terms that people can relate to and therefore participate in. That such an endeavour involves examining and aligning our accountability, scrutiny, budgeting and monitoring mechanisms is natural. A closer alignment with international standards to which we contribute enthusiastically is warranted. Given our current housing law framework, there is a lot of positive groundwork and engagement to build on. Regardless of the specific variations where other rights are concerned, the values and systems required to respect, protect and fulfil human rights in Scotland need to be established fundamentally. The people of Scotland deserve to have this done correctly.

Scotland will be committing to incorporating the right to adequate housing on a progressive basis. The mechanics of this require us to establish that the minimum core elements of the right are met immediately and only ever improve. Thanks to the work of the UN Committee on Economic, Social and Cultural Rights, we have an authoritative definition of the minimum core elements of adequate housing. The challenge is in determining to what extent they exist, and whether they exist in the context of non-discrimination and progressive realisation. A consistent reference to human rights standards and a functional accountability mechanism are required to establish where we are in relation to the right and what is required to advance it further.

In addition, such a system needs to establish parameters of reference to the rest of the political and financial context in order to show our commitment specifically in relation to our maximum available resources. This is the same for all rights named in Art 11 of ICESCR. The state will need to demonstrate how effective we are at fulfilling our human rights obligations: to its people to whom the obligation is owed, to the courts as these rights become justiciable, and to parliament, the United Nations and others who monitor progress and hold them to account.



SCOTLAND WILL BE COMMITTING TO INCORPORATING THE RIGHT TO ADEQUATE HOUSING ON A PROGRESSIVE BASIS. THE MECHANICS OF THIS REQUIRE US TO ESTABLISH THAT THE MINIMUM CORE ELEMENTS OF THE RIGHT ARE MET IMMEDIATELY AND ONLY EVER IMPROVE.

It is clear therefore that the maximalist approach to incorporation recommended by the Human Rights taskforce, i.e. providing the widest protection possible within devolved competence, is the most favourable way to give practical effect to these rights. The inclusion of specific human rights commitments in the National Performance Framework creates an avenue for domestic policy makers to integrate this into Scotland's overall ambition. This in turn is tied to the Sustainable Development Goals; another human rights-based initiative that Scotland is committed to.

Of course, there can currently be no greater commitment than that to the environment in the face of man-made climate change. Meeting our goals requires thorough examination of how we can lower our impact on the planet through our buildings, transport, energy generation and resource use. The quality and sustainability of housing is integral to this and will naturally be affected by an increase or decrease in resources matched to policies here. The Housing to 2040 paper has set the tone for the future of housing in Scotland.¹ The Scottish Government's programme for government 2021-22 outlines a number of initiatives in relation to housing including an additional £50 million allocated over the parliament to tackle

homelessness, and building 110,000 affordable homes alongside climate related housing commitments. Recent initiatives such as the 20-minute neighbourhood concept places housing at the centre of a sustainable living pattern engaging health, education, work and leisure. The Scottish Government announced a fund of £20 million to fund rehabilitation placements in Scotland, intrinsically linked to health provision.

It cannot be made clearer that the interdependent human rights framework described in ICESCR is natural: the state response should meet that obligation and the consequences for all rights and all people are dire if implementation is poor.

This paper acknowledges that Scotland does not start from zero in terms of the components of the right to adequate housing. Chapter 2 examines the existing legal framework in Scotland and the ways in which it incorporates the right to adequate housing. The necessity of this mapping belies a deficiency in the clarity of the legal framework as it relates to human rights protections. Nevertheless, there is substantial legal protection, for example against arbitrary eviction and unlawful discrimination. Legislative provisions exist requiring the provision of essential services to ensure habitability and to ensure the accessibility of housing.



IT CANNOT BE MADE CLEARER THAT THE INTERDEPENDENT HUMAN RIGHTS FRAMEWORK DESCRIBED IN ICESCR IS NATURAL: THE STATE RESPONSE SHOULD MEET THAT OBLIGATION AND THE CONSEQUENCES FOR ALL RIGHTS AND ALL PEOPLE ARE DIRE IF IMPLEMENTATION IS POOR.

However, there are aspects of the minimum standards that need to be addressed such as the cultural adequacy of housing where contextual protections fall short. The shortage of legal aid representation to enable challenges to breaches of the rights weaken all legal protections including those based on the Equality Act. The introduction of compulsory meaningful participatory decision-making by housing providers could greatly improve the quality of decisions made around housing. And there is no clarity on whether there is continuous progression of housing policy or whether this has been considered in the context of maximum available resources. It is this paper's position that immediately interpreting all housing provisions in the context of the right to adequate housing would improve outcomes while specific contextual detail is enacted in order to realise the rights in full.

The Covid-19 pandemic necessitated innovative solutions around the problem of homelessness in a public health crisis. It is hoped that enduring solutions emerge from this period as well as an acknowledgement that future crises will present challenges that not only endanger life but also compound existing inequality. The State's role in protecting life must encompass economic, social and cultural rights alongside civil rights as people's ability to claim one without the other being respected are jeopardised. The incorporation agenda should explicitly affirm their inclusion and parity. The corresponding incorporation of the UN Convention on the Rights of Persons with Disabilities

(CRPD), the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) should reinforce the regard that the state is required to give to endemically disadvantaged groups. The totality of the endeavour should be the use of international human rights standards to provide the strongest protections against abuse and in the interests of upholding human dignity in every meaningful way possible.

Finally, it would be prudent to acknowledge the arguments made before the Supreme Court in respect of the UN Convention on the Rights of the Child (Incorporation)(Scotland) Bill. The process of legal challenge underlines the fact that regardless of the issue or rights at stake, Scotland is still in a complicated constitutional situation. Without pre-judging the outcome of the case, it highlights issues that will be faced by any attempt at incorporation of human rights, including the right to adequate housing. Again, this is a facet of the multiple dimensions of housing that necessarily will impact upon areas that are reserved to Westminster. A decision that incorporation needs to be reconsidered should be seen as an opportunity to re-examine the methodology of incorporation so that it does not breach the constitutional boundaries yet retains its maximalist characteristics as far as possible. Elements such as Human Rights Budgeting and the institutionalisation of a human rights-based approach need not be delayed.

Chapter 1

Explores the definition of adequate housing, its historical context and where it sits in relation to the wider international human rights pantheon.

Chapter 2

Is an examination of the current framework of legal protections in Scots Housing Law, notifying where these are influenced and reinforced by human rights law and the law of the United Kingdom.

Chapter 3

Is an analysis of the report of the Human Rights taskforce with specific reference to the right to adequate housing.

Chapter 4

Presents comparisons with other jurisdictions in relation to the incorporation of international human rights and specifically the right to adequate housing.

Chapter 5

Considers the necessary framework for the incorporation and implementation of the right to adequate housing including human rights budgeting and scrutiny, and the importance of a human rights-based approach.

Chapter 6

Explores the impact of the Covid-19 pandemic on housing and human rights; the wider progressive context including the sustainable development goals agenda and the concept of Build Back Better.

INTRODUCTION

On 12 March 2021 the National Taskforce on Human Rights Leadership published its recommendations for an Act of the Scottish Parliament to incorporate four United Nations treaties², thereby creating locally justiciable rights in the areas of social, cultural and economic rights.

Each of the four treaties recognises the right to adequate housing as a component of the right to an adequate standard of living. Considerable research and policy work has been conducted in order to give substance to the recommendations. This paper seeks to practically assess the right to housing in the context of Scotland and to equip policy-makers with the necessary contextual guidance to incorporate the right in a manner that is accessible, accountable and which reflects the fundamental importance of housing as a human right linked to other rights.

I commend the following papers:

1. Shelter Scotland (2019), Housing is a Human Right³
2. UNHCR Factsheet No. 21: The Right to Adequate Housing⁴
3. ALACHO (2021), The Right to Adequate Housing⁵
4. Scottish Government (2021), National Taskforce for Human Rights: leadership report⁶
5. Social Renewal Advisory Board (2021), If not now, when?⁷
6. SHRC (2020), Covid-19: Implications for the Human Right to Adequate Housing in Scotland⁸

The first of these contains comprehensive contextual background to housing as a human right in Scotland in an ideal format. The second document authored by the United Nations gives a detailed international background to the right. The third expresses the outcome of extensive research, analysis, public consultation and engagement on the right to adequate housing. The fourth document is the seminal human rights policy statement of the Scottish government in 2021. The fifth document directs the reader to the current Scottish social context of housing. Document number six is an analysis of housing as affected by the Covid-19 pandemic. Reference will be made to these documents and their esteemed authors both in order to avoid repetition and to affirm our common basis. These are deemed accurate, insightful and authoritative as a foundation to this paper.

The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights. At p18 the Shelter Scotland report places it in the context of the ICESCR. ICESCR was signed and ratified by the UK in 1976. It was considered for incorporation in the UK after the passing of the Human Rights Act 1998. However, amongst other socio-economic rights it was dismissed as it was felt the principles were non-justiciable.

Socio-economic rights at UN level are subject to the limitation of maximum available resources. The economic and financial implications of these rights therefore eclipse the social and cultural implications. Without a robust accountability mechanism this triangulation remains nebulous and the rights fail to be enforced. Although a complaints mechanism has been established, international reticence keeps participation in this to a minimum, specifically excluding the United Kingdom. General Comment 4 on the right to adequate housing notes the irony of universal acceptance of the right alongside universally problematic implementation.⁹

Although Scotland has long been lauded as having one of the most favourable legal frameworks for housing, it is not specifically underpinned by the UN Human Rights Framework. It therefore lacks the comparative reference point of the United Nation’s Committee on Economic, Social and Cultural Rights (CESCR) and the benefit of precedents that this entails. The symbiotic relationship that exists between treaty bodies and member states enables broad international cooperation and consolidation in the establishment of rights.

The underpinning clarity of the Respect, Protect and Fulfil duties of member states set the direction of travel and comparative minimum standards for duty bearers to be mindful of. Not to state what is already known regarding regression in the past decade, incorporation of a justiciable right to housing requires a wholesale reconsideration of our legislative framework in order to embed the culture and organisational infrastructure within the government and private sector partners. Economic, social and cultural (ESC) rights have not succeeded because they are the embodiment of the principles of universality, indivisibility, inalienability, interdependence and interrelatedness; requiring the main engines of the state to function in a manner that conceives all of these rights.

This paper seeks to marry the goals of the Scottish housing system with the ambition of incorporating the right to adequate housing as a component of the human right to an adequate standard of living.



INCORPORATION OF A JUSTICIABLE RIGHT TO HOUSING REQUIRES A WHOLESALE RECONSIDERATION OF OUR LEGISLATIVE FRAMEWORK IN ORDER TO EMBED THE CULTURE AND ORGANISATIONAL INFRASTRUCTURE WITHIN THE GOVERNMENT AND PRIVATE SECTOR PARTNERS.



DEFINING THE RIGHT TO ADEQUATE HOUSING

I refer to Shelter Scotland’s contextualising of Article 11 of ICESCR. ICESCR states that everyone has a right to adequate housing, and that this should be ensured to all persons irrespective of income or access to economic resources. 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.

We find the most authoritative interpretation of Article 11 at General Comments 4 and 7 of the CESCR. General Comment 4 is the most important reference point for the international right to adequate housing. In the Committee’s expert opinion, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or where shelter is viewed exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity.

All ESC rights are said to derive from the inherent dignity of the human person. This will be expanded upon in a later chapter. However, within General Comment 4, this concept is the embodiment of the three themes of the comment. Universal physical access to shelter irrespective of income or wealth; the adequacy of that shelter, and the suitability of that shelter for the purposes and characteristics of its inhabitants. Seven key criteria are established as being essential to adequate housing.

‘Adequate shelter means... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost’. There is sufficient room for States to apply a local standard depending upon their circumstance and it is clear from a plain reading of the covenant that adequacy is to allow the rights-holder to benefit from the right without sacrificing any other rights and their inherent dignity. The Committee breaks the concept down into key areas that are mandatory regardless of available state resources.¹⁰

Legal security of tenure: regardless of the form of possession of a home.

Availability of services, materials, facilities and infrastructure: i.e. natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

Affordability: personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised, and tenants should be protected by appropriate means against unreasonable rent levels or rent increases.

Habitability: adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.

Accessibility: adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources.

Location: adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres, and other social facilities.

Cultural adequacy: the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.

The Committee explicitly endorses comprehensive application of the Health Principles of Housing prepared by World Health Organisation (WHO) which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses. This cannot be overemphasized, and detailed consideration of other jurisdictions reveals the centrality of adequate housing to public policy management. Some contemporary consideration of the issue in the Scottish jurisdiction projects the same emphasis.

As part of the International Bill of Rights, ICESCR holds a vaulted position alongside the International Covenant on Civil and Political Rights (ICCPR). The tension between the two covenants, according to the Committee, is natural and necessary based on mutual dependence. The Committee holds that Civil and Political rights such as freedom of expression and freedom of association are crucial to the practical realisation of the right to adequate housing. The immediacy of intrusion on one's home and all that is within is subject to the highest protections considering, as we should, the impact on private and public dignity. In common terms, the extent to which homelessness is an automatic indicator of poverty reminds us of the fundamental role that housing plays here. The Committee endorses a multi-dimensional concept of poverty to define it as 'a complex state of material and non-material deprivations that leads the individual to exclusion.'¹¹

The difference between the 1966 treaties is well-trodden ground in terms of the standard of obligations contained in each. Countless commentators have asserted that economic, social and cultural rights was the poor relative in 1966. The starkly obvious difference being Article 4(2) of ICCPR which has no equivalent in the ICESCR, and the language of Article 2(1) of the ICESCR which takes a considerably different approach to States in their implementation of rights. There is unlikely to ever be a philosophical consensus amongst commentators on the relative positions of economic, social and cultural rights and civil and political rights.

One way in which the two types of rights has been compared is in terms of liberty rights, involving a corresponding obligation on the part of others to respect that right, and welfare rights which impose a positive obligation on the state to ensure an outcome that does not rely on the recipient's actions.

The modern prevailing view is that the realisation of economic, social and cultural rights is essential for the prevention of degrading and unfair treatment; an issue fundamental to the Universal Declaration of Human Rights (UDHR).¹² For example, youth homelessness in Colombia made affected individuals vulnerable to predators. They were unable to participate politically and beyond the reach of state and non-governmental monitors and assistance.¹³

European Convention on Human Rights (ECHR) jurisprudence¹⁴ has been credited with the integrated approach to human rights. This approach is based on the idea that the enjoyment of social rights is a necessary condition to the protection of civil and political rights. Maintaining a 'holistic human rights conception', the integrated approach understands that social rights are as important as civil and political rights, and that the violation of

the former may give rise to a breach of the latter. As a result, 'strong judicial protection of civil rights will be of little relevance to individuals who live in extreme poverty'.¹⁵ This asserts that interdependence and indivisibility of rights operates across classes of rights, bringing into question the practical purpose of the philosophical classifications.

The Taskforce Report recommends a holistic approach to human rights incorporation recognising the co-dependency of rights. This is necessary for two reasons: one that the rights already cross-refer and have the same moral basis, and two that in order to interpret the rights, authority is often drawn from another covenant. For example, non-discrimination provisions are placed in all of the treaties. In ICESCR's case specific reference is made to the rights of older people.¹⁶ In order to recognise where a group is being discriminated against, we can look at a covenant that deals with that group specifically. Common reference points are CERD, CEDAW and the Convention on the Rights of the Child (CRC). These covenants in turn contain provisions mandating the state to meet economic, social and cultural obligations, referencing the international bill of rights.



THE MODERN PREVAILING VIEW IS THAT THE REALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IS ESSENTIAL FOR THE PREVENTION OF DEGRADING AND UNFAIR TREATMENT.

The right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights – such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision making – is indispensable if the right to adequate housing is to be realised and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.¹⁷

At General Comment 9, the committee underlines the importance of effective accountability mechanisms to create remedies for breach of rights. ‘Domestic remedies may include administrative remedies that are accessible, affordable, timely and effective as long as administrative authorities are competent in what standards are associated with applying the right.’¹⁸ A well-resourced system of civil justice is required in order to fulfil economic, social and cultural rights, failing which the state also directly breaches the civil and political rights of its people.

The most important difference between the two treaties is the caveat in ICESCR that States are to meet their obligations to the extent of the maximum available resources. As said above, this consideration tends to obscure genuine enquiry into why state parties have fallen short of their obligations. In General Comment 4 the Committee is adamant that there are steps that can be taken to facilitate this right that could not be inhibited by this requirement under any circumstances. They cite comprehensive analysis to establish that at the bare minimum states can abstain from certain practices, commit to enabling rights holders to advance these rights themselves and establish effective monitoring mechanisms. As iterated earlier, even wealthier states are repeatedly falling short of fulfilling the right to housing. Shelter Scotland’s description of the Special Rapporteur’s (SR) observations is a case in point.

Alongside the maximum available resources commitment is the obligation towards progressive realisation. The SR’s observations go directly to this. A justiciable human rights framework would make it possible for such regression to be challenged. A progressive government would therefore be inclined to design a sustainable framework to avoid regression under any circumstances.

This is advocated in General Comment 4 at paragraph 12:

‘This will almost invariably require the adoption of a national housing strategy which, as stated in paragraph 32 of the Global Strategy for Shelter,



defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time frame for the implementation of the necessary measures”.

Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives.

Furthermore, steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies (economics, agriculture, environment, energy, etc.) with the obligations under article 11 of the Covenant.’

The Committee does not prescribe the measures that duty bearers are required to take to meet the obligations in respect of the right to adequate housing. Rather it interprets the standard to give it practical application and create the context for its realisation. Particular socio-economic circumstances invite different routes to achieving the standard. For example, Scotland has an overly complicated intersection between housing and drug rehabilitation that leads to inadequacies in the provision of both and places the dignity of individuals in dire jeopardy. This is of acute concern given the consistently high rate of deaths due to drug use in Scotland.

In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the maximum of available resources.

In order to do so, policy makers should take into account all of the factors in the socio-political environment that will play a part in the fulfilment of human rights.

This ranges from the establishment of a pluralistic monitoring framework to ensuring that the government instituting the rights framework is well resourced and functionally capable. Perhaps most importantly, a government must have constitutional safeguards ensuring that it is held to account when it fails to progressively realise human rights domestically.¹⁹

In conclusion, the right to adequate housing depends upon pragmatic government policy which implements an appropriate legal framework. The principles need to be made compatible in each context and states must do the work involved to accomplish this following a human rights-based approach. The most appropriate way to do this is to follow a human rights-based approach at every stage of constructing this. A tool such as the PANEL approach can embed human rights values at every stage from consultation to determining the role of the courts and should be used consistently regardless of the scale of decision-making.²⁰



PERHAPS MOST IMPORTANTLY, A GOVERNMENT MUST HAVE CONSTITUTIONAL SAFEGUARDS ENSURING THAT IT IS HELD TO ACCOUNT WHEN IT FAILS TO PROGRESSIVELY REALISE HUMAN RIGHTS DOMESTICALLY.

2.

CURRENT SCOTTISH HOUSING LAW FRAMEWORK

CESCR Comment 1 states the objective of conducting a comprehensive review of national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant. This was to be done as an initial step in implementing the convention and benchmark against which progressive realisation could be monitored.

A systematic methodology to measure progress and a framework to commit States to clear and transparent information gathering remains outstanding. If the right to housing is to be realised, then it requires both the initial audit and a systematic and transparent accounting methodology to track progress. The inception of this proposed framework is an ideal opportunity to carry out this audit.

We should note that the Taskforce has recommended that there should be provision within the new framework that nothing within it shall affect any provisions from domestic law or international law which are more conducive to the realisation of the rights within the framework. Therefore, rather than abolish existing housing law it should be enough to interpret it in a manner consistent with the obligations enacted to give effect to the right to housing. Another recommendation is that the framework is interpreted in alignment with international standards including decisions, General Comments and Concluding Observations from treaty bodies, as well as judgements, decisions, declarations or advisory opinions of the European Court of Human Rights and other sources.

To this end it is necessary to establish what Scotland's legal framework is for housing.

Scots housing law must be interpreted in accordance with the European Convention on Human Rights. Although this does not contain a direct provision pronouncing a right to adequate housing, some of its provisions have been used to interpret such a right where it has been proffered.

Article 8 is the provision closest to providing a right to adequate housing: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. The concept of home in Article 8 is fluid and depends upon the fact of sufficient continuous attachment to a dwelling²¹ regardless of whether habitation is lawful.

Breaches of this right include eviction, destruction of the home, and compulsory purchase among others. These may occur despite an assertion of proportionately justified interference in pursuance of a legitimate aim.



IF THE RIGHT TO HOUSING IS TO BE REALISED, THEN IT REQUIRES BOTH THE INITIAL AUDIT AND A SYSTEMATIC AND TRANSPARENT ACCOUNTING METHODOLOGY TO TRACK PROGRESS.

Article 8 has also been held to apply positive obligations upon the state such as those to provide housing assistance to an individual suffering from a severe disability, because of the impact of such refusal on the private life of the individual.²² Additionally, Article 8 has been engaged in relation to toxic smells and other contaminations.

In *Moldovan and Others v. Romania*, the ECHR concluded that apart from burning the applicants' houses and failing to provide them with alternative dwellings, which amounted to a serious violation of Article 8 of a continuing nature, the applicants' living conditions and the racially discriminatory manner in which their grievances were handled by the public authorities constituted an interference with their human dignity. In the special circumstances of the case, this amounted to degrading treatment within the meaning of Article 3.²³

The UK Supreme Court has affirmed both the inter-related nature of the rights in Article 11²⁴ and their relation to Article 8 ECHR.

Article 1 of Protocol 1 of the convention concerns property rights. In this context, an interest in a tenancy has been found to be a possession. This is a protection in the vein of security of tenure that already has direct effect. Interference with Article 1 is qualified in the same way as Article 8. In the Scottish context that would allow the state to effect compulsory purchase of property without necessarily compensating its owner to full market value.

ECHR jurisprudence can give effect to a right to adequate housing through these channels. Here, the right is focussed on the individual's outcome rather than the right itself. The ECHR has given little judicial protection to the rights to housing of those seeking domestic violence.

The Council Directive 2000/43/EC of June 2000 promotes the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin (excluding non-citizens of EU states). The Gender directive of 2004 did the same for women and men.

The EU charter protects the right to social and housing assistance.²⁵ The Charter treats the right to housing as a principle upon which law and policy are made. The right to adequate housing is therefore not directly applicable.

Scotland is internationally lauded as having strong protections for people experiencing homelessness.²⁶ According to the law, access to settled housing in Scotland is almost universal with no statutory priority need codified in the housing legislation where a local authority has decided not to consider intentionality. Taking all current legal provisions, we can consider how far they achieve an ideal system for fulfilling the right to adequate housing. An ideal system is one that is balanced between individually enforceable entitlements and the liberty for duty bearers to solve problems of both an individual and structural nature within the system.

For instance, in Scotland the Housing (Scotland) Act 1987 provides a right to accommodation for eligible homeless persons, including a right to temporary accommodation for all homeless persons who may be eligible, and a right to long-term accommodation for broadly defined categories encompassing the majority of homeless applicants. This right is enforceable in the civil courts which may order in appropriate cases that accommodation be provided to homeless persons.

Some argue that a housing system based on legal entitlements and reliant on litigation for redress is regressive in that it redirects power and resources from communities and towards legal practitioners and introduces inequities between those who can access legal advice and those who cannot. However, there is considerable evidence that such systems protect low income tenants from abuse. Additionally, establishing the legal right to adequate housing by default creates a stake for the rights holder, as opposed to leverage for the housing provider challenging the dignity of the rights holder.

Establishing legal protections serves to facilitate the consistent interpretation of housing according to legal norms. For example, the term 'vulnerable'²⁷ while having an ordinary meaning could be applied in different legal contexts quite differently. Using legal interpretative tools makes it possible to ensure that this is done with consistent internal logic.

The Law

This section sets out parts of the current Scottish housing legal framework relating to the right to adequate housing.

The Housing (Scotland) Act 1987 defines a local authority's duty to people experiencing homelessness, i.e. to satisfy themselves that a person is homeless. Section 24 defines homelessness for the purposes of the Act as follows. 'A person is homeless if he/ she has no accommodation in the UK or elsewhere. A person is also homeless if he/ she has accommodation but cannot reasonably occupy it, for example because of a threat of violence. A person is potentially homeless (threatened with homelessness) if it is likely that he/ she will become homeless within two months. A person is intentionally homeless if he/ she deliberately did or failed to do anything which led to the loss of accommodation which it was reasonable for him/ her to continue to occupy.'

The assessment of homelessness has moved progressively away from intentional homelessness and being based on priority need, at least nominally, with the removal of the priority need test in 2012 and a commitment to amend the legislative arrangements for intentionality.²⁸

Where an unsatisfactory decision is made following an assessment of the homeless application, s35A of the 1987 Act allows for an internal review to be conducted in relation to some but not all types of decision. This constitutes an alternative statutory remedy in terms of the bar to judicial review²⁹ and therefore is an important legal step. Reviews are independent and requesting a review without legal assistance may be a pointless exercise if the decision-maker is not clear on the defects in the original decision, particularly if there are defects in law. It is important therefore that this be seen as a quasi-judicial process which ought to be serviced by freely available legal advice. Whilst legal aid advice and assistance is available for a s35A review, there is no explicit requirement for this in the 1987 Act or any other legislation.

On the basis of the right to a fair trial contained in the ECHR, a substantial argument exists that failure to provide legal advice in any forum, the consequences of which could be a loss of human rights, requires the state to provide support in a manner that addresses the unequal power opposite the individual.

S29 of the Housing (Scotland) Act 1987, as amended by s3(2) Housing (Scotland) Act 2001 sets out that a local authority has a duty to provide interim accommodation pending a homelessness decision, during a review of a decision, and for eligible individuals until permanent housing is provided. An issue arises here relating to access to justice in that judicial review proceedings are required for challenging instances where a local authority may have failed to provide this accommodation, which are costly and require input of both solicitor and advocates.

The Housing (Scotland) Act 2001 introduced duties to provide housing for non-priority groups and extended the period for which a person could be considered 'at risk' of homelessness from 28 days to two months. Furthermore, this act imposed duties upon local authorities to give reasonable preference to all homeless households in their allocations policies and to provide accommodation to statutorily homeless households referred by the local authority within six weeks.



A SUBSTANTIAL ARGUMENT EXISTS THAT FAILURE TO PROVIDE LEGAL ADVICE IN ANY FORUM, THE CONSEQUENCES OF WHICH COULD BE A LOSS OF HUMAN RIGHTS, REQUIRES THE STATE TO PROVIDE SUPPORT IN A MANNER THAT ADDRESSES THE UNEQUAL POWER OPPOSITE THE INDIVIDUAL.

One of the most important measures introduced in the 2001 Act was the Scottish Secure Tenancy (SST). This prescribed a broad range of default terms to social housing and protections. In a move away from strictly contractual agreements, the SST focusses on tenant entitlements to a home and an interest in property beyond the pecuniary. With succession rights and the rights of occupants detailed, the Act also gives parties recourse to courts to determine any disagreement regarding the contract.

It also introduced the Short Scottish Secured Tenancy (SSST), a time limited form of tenure for use where the tenant has exhibited anti-social behaviour in the last three years, or where temporary accommodation is required in certain circumstances. This was amended in the 2014 Act and is discussed further below.

The 2001 Act severely curbed the Right to Buy policies. This could be seen as an effort to preserve social housing stock which has been a positive outcome. However, a negative outcome is that tenants, although maintaining their interest in their homes in perpetuity via their tenancy agreements, cannot increase this stake and may always be subject to eviction. Accepting that a balance needs to be struck, this can be regarded as fair provided there are appropriate safeguards to avoid financial exploitation and unreasonable behaviour by both landlords and tenants. This act contains such safeguards as the prohibition on increasing rent on account of improvements made to the property

(s31) and statutory grounds for eviction (s16). Right to Buy was abolished in the 2014 Act.

Section 53 of the 2001 Act requires social landlords to implement tenant participation strategies including consultation and management agreements. This is particularly significant as part of a human rights-based approach but also an area where recent evidence has shown social landlords to be lacking. The Scottish Human Rights Commission assisted local authority tenants in Leith in challenging the inadequacy of the City of Edinburgh Council's participatory measures. What the project revealed was that the rights contained in the legislation had failed to be implemented in a manner that translated to real positive outcomes.³⁰

S69-81 granted powers to the Scottish Ministers extensive authority to regulate the social landlords' functions, including both housing associations and local authorities. This is through inspections, monitoring and information gathering.

S89 concerns the requirement for local authorities to submit a housing strategy to the Scottish Ministers. This includes a requirement to consider the duty to advance equal opportunities, now superseded by the Public Sector Equality Duty.

The Homelessness Etc (Scotland) Act 2003 set an end date of December 2012 for the assessment of priority need.

The Housing Scotland Act 2010 was focussed on regulation and monitoring of social landlords. It introduced the Scottish Housing Regulator, responsible for safeguarding and promoting the interests of tenants and would-be tenants of social housing by monitoring the performance of social landlords. Although it has the title of regulator, in reality it has limited powers when compared for example to the Care Inspectorate or Her Majesty's Chief Inspector for Prisons in Scotland.

The Scottish Social Housing Charter sets out the standards and outcomes that all social landlords should be aiming to achieve for their customers and what tenants can expect from landlords.³¹ The Scottish Housing Quality Standards are now incorporated into this charter. All registered social landlords and local authorities were required to bring homes up to the standard by April 2015.

The Housing (Scotland) Act 2014 extended landlords' powers with regard to SSSTs for anti-social behaviour. This form of tenancy may be seen as an attempt by the government to balance the needs of the community with those of the individual. By making it easier to eject people from their homes, whether by granting a SSST or converting a secured tenancy into one, it deals with the reality of recidivism and the risk of entrenching anti-social characters in a community over whom they have no control. There is flexibility to extend a SSST in order to reflect a positive outcome or an ongoing need for residence in a home.

The criteria for the use of this model are stipulated in the 2014 Act. It is clear that the statute attempts to streamline the process, relying on statutory notices and existing court orders such as anti-social behavioural orders or other triggers. While expedient, this risks inadequate procedural safeguards against interference in the right to adequate housing. However, procedural safeguards were amended into the SSST regime as a result of the 2019 Act with reasons required to be given in the Notice of Proceedings and a right review of decisions relating to the imposition of a SSST,³² and ultimately a recourse to the Sheriff Court.

S34 of the 2014 Act also requires housing support to be implemented with a view to converting the SSST into a secured tenancy. This includes assessments and referrals arranged by the housing provider. This does not include legal advice from an independent solicitor. A person may therefore not obtain legal advice until they have appealed against a review decision from the Housing Needs Review Group following a review by a senior manager.

The 2014 Act moved jurisdiction for civil cases in the private rented sector to the First-tier Tribunal (Housing and Property Chamber). This relieved pressure upon the Sheriff Courts and allowed for specialist panels to be used in determining these matters.

By allowing local authorities to make applications for the enforcement of the repairing standard, the 2014 Act brought in an additional layer of protection for those who could not themselves seek enforcement. The Act generally increased protections under the repairing standard and prescribed processes relating to it. This includes in terms of the Tenement Management Scheme where common ownership of property has been seen to encumber efforts to carry out repairs and maintain property. The 2014 Act enhances existing measures that local authorities can take in these instances.

Regulation of letting agents as provided for under this Act is a means of maintaining a continuous standard of service in the private rented sector.

In 2014 the government issued guidance to local authorities to implement local housing strategies. This comprehensive guidance includes equalities, the environment and house conditions.

Local authorities and registered social landlords are legally committed to preventing discrimination while promoting equality under the Equality Act 2010. They ought to ensure that their policies do not discriminate between

individuals on the grounds of age, disability, gender, marital status/civil partnership, pregnancy, maternity, race, religion or belief and sexual orientation.

Judicial decisions involving the right to adequate housing are heavily reliant on a proportionality assessment in weighing up the rights of private landlords and their tenants with legitimacy of aims being the determining factor. Aims such as the owner's desire to re-occupy or sell the premises are generally legally sustainable. Social housing is less reliant on these grounds since the legitimate aim is explicit in the type of housing. In order to satisfy security of tenure, principal new legislation should explicitly determine such principles and criteria.

With fairly robust protections in place Scotland still falls short when it comes to meeting demand, resulting in high numbers of households in temporary accommodation as local authorities struggle to source suitable permanent accommodation within which they can discharge their homelessness duties. There have also been significant numbers of households recorded by local authorities as not being provided with temporary homeless accommodation when they were entitled to it.³³



WITH FAIRLY ROBUST PROTECTIONS IN PLACE SCOTLAND STILL FALLS SHORT WHEN IT COMES TO MEETING DEMAND, RESULTING IN HIGH NUMBERS OF HOUSEHOLDS IN TEMPORARY ACCOMMODATION AS LOCAL AUTHORITIES STRUGGLE TO SOURCE SUITABLE PERMANENT ACCOMMODATION WITHIN WHICH THEY CAN DISCHARGE THEIR HOMELESSNESS DUTIES.

Scotland has tended to rely less on the private rented sector than England has as Scotland retains more social housing. The supply is however inadequate both in numbers and in form. Statutory housing provision must be adaptable to the needs of occupants. Some properties cannot be adapted easily as they are not purpose built and their structures prohibit alterations or make it disproportionately expensive. Appropriate houses for families are also in short supply.

These realities apply pressures to the local authorities allocating housing, housing associations providing it and to occupants in a precarious position. It becomes less likely that housing can be found in ideal circumstances such as convenient location and social and cultural suitability. With limited stock it also becomes difficult to guarantee security of tenure which can result in frequent relocation. Forming and maintaining community links becomes difficult where an applicant may be in a series of temporary placements.

The guidance on local housing strategies was issued in 2014 in the spirit of partnership, both horizontally across local authorities and vertically between central government, local government and social landlords. It is not mandatory and local authorities provide different levels of services and policies.

Bearing all these things in mind it is apparent that strong legislation is not enough to fulfil the right to adequate housing particularly where the state delegates the majority of the constituent tasks to the local authorities. In terms of the legal framework, robust scrutiny is required at a parliamentary level. In order to fulfil the right to adequate housing ministers must frame their commitments in its terms and take a human rights-based approach in delivery. For example, enacting duties upon the council must be accompanied by empowering information given to rights holders and free legal advice and support at every stage in the process of engaging with the housing system. Budgetary provision must be made according to the need for homes, amenities, transport and legal aid.

Further, an ongoing focus on prevention of homelessness at a national and local level has attempted to address the demand on homeless services and temporary accommodation.

The Prevention Review Group issued a number of recommendations as part of its report.³⁴ It can be broadly summarised as recommending a far more holistic approach to housing and is aligned with fulfilling the right to adequate housing.



IN TERMS OF THE LEGAL FRAMEWORK, ROBUST SCRUTINY IS REQUIRED AT A PARLIAMENTARY LEVEL. IN ORDER TO FULFIL THE RIGHT TO ADEQUATE HOUSING MINISTERS MUST FRAME THEIR COMMITMENTS IN ITS TERMS AND TAKE A HUMAN RIGHTS-BASED APPROACH IN DELIVERY.

For example, they recommend that Scotland implement an active preventative duty upon local authorities with regard to homelessness³⁵. Their recommendations require enquiry and action which is coordinated where necessary. Proactive duties concur with the duty to protect human rights and a variety of agents of the state would have the ability to enquire and act upon information given in this manner. The other limb of this is that assessment and decisions should be individualised, participatory and systematically empowering.

These sorts of recommendations, while not resolving the supply issue, would enable the current stock of housing to be dispensed more fairly and progressively. The legislation should guarantee that no one is without an adequate home. The question of whether the policy framework was taking account of the maximum available resources would be resolved by a human rights budgeting system, discussed later in this paper.

Some of the Prevention Review Group recommendations do however provide some cause for concern, for example a proposal to downgrade the duty to provide permanent accommodation for homeless persons with stable accommodation. Such a step would weaken the rights of homeless persons and would thereby be a regressive step in relation to achieving the right to housing.

There is an additional dimension to the legal framework that presents a challenge to the state. We can see that the statutory framework has been expanded and made flexible to accommodate particular groups such as those with a history of anti-social behaviour and those in need of temporary accommodation. However, the conjunction of devolved and reserved responsibility restricts statutory homelessness protections to those who are not subject to immigration control and without recourse to public funds (NRPF). This cohort may find themselves homeless in a situation where the Scottish central or local governments owe them no statutory duties according to the housing framework.

The NRPF cohort may be housed in instances where there are children under the age of 18 in a family unit³⁶; they have social care needs that stem from circumstances other than their immigration status³⁷; or the accommodation is a necessary aspect of their mental health treatment³⁸. In all other circumstances the state remains bound by the Human Rights Act with a duty to prevent a breach of human rights including those under Article 8 and Article 3. Any housing that these individuals receive should meet the standard of adequacy applied in the charter. The state also retains the power to advance wellbeing³⁹ which, it is arguable, extends to preventing a breach of human rights.

It is well-documented that irregular migrants, refugees and asylum seekers are particularly vulnerable to human rights abuses, including violation of their right to adequate housing. Irregular migrants are often homeless, as an inability to pay rent usually results in immediate eviction. Their lack of legal status, and the criminalization of irregular migration in many countries, means that most will be unable or unwilling to challenge discriminatory or otherwise abusive rental practices and seek legal remedies. National housing strategies rarely include migrants and will practically never include irregular migrants.⁴⁰

It may be the case that the United Kingdom government has other duties compelling it to house these groups. However, where it is apparent that a person cannot avail themselves of that facility, the fact that they reside in Scotland at the time when the risk of breach of human rights arises compels the Scottish authorities, both central and local, to act within their power to apprehend such a breach.

The most progressive measure in this regard would be for the Scottish government to set out guidance to be followed wherever such a situation arises so that the housing aspects of need can be delivered in accordance with the right and with the purpose built safeguards available to all other individuals. In the context of universal and inalienable human rights, a basic level of housing and subsistence should be available to all.

In order to operate a robust legislative housing framework, the state and local government must be resourced effectively. Training in the law, timely and accurate guidance with statutory footing to ensure compliance and accountability, and sustainable referral pathways to independent advice services are invaluable for those delivering social housing if the legislation is to deliver fundamental rights. Failure to provide these will hobble any effort at progressive realisation.



IN ORDER TO OPERATE A ROBUST LEGISLATIVE HOUSING FRAMEWORK, THE STATE AND LOCAL GOVERNMENT MUST BE RESOURCED EFFECTIVELY.



HUMAN RIGHTS TASKFORCE

On 12 March 2021, the Human Rights Taskforce published their report of recommendations to the Scottish Government for a new human rights bill incorporating four United Nations Conventions⁴¹ as well as recognising a fundamental human right to a healthy environment.

The Report was welcomed by the Scottish Government who have since committed to the incorporation bill within their 2021-22 programme for government. The Taskforce report is likely to be the basis for the human rights agenda within Scotland for the duration of this parliament. This Chapter will analyse particular sections of the report and associated documents as relevant to housing as a human right.

Recommendations and Policy Objectives

The Report makes thirty recommendations in total. These are underpinned by detailed policy objectives. The new statutory framework would bring human rights in line with international law as opposed to being focussed on Scottish or UK legislation. As stated above, this comes with all of the developments arrived at by the various committees, decisions in international courts and fundamental human rights principles found in international law. This is particularly important with the right to a healthy environment which does not rest on a single UN Convention but can be informed by principles arising in international jurisprudence. By integrating the international human rights framework with that of Scotland, the new framework will keep abreast of developments.

Alongside this is the drive towards a maximalist approach⁴² aimed at achieving the most effective realisation of human rights in Scotland. This requires functional implementation of these rights and responsiveness to ensure that no groups receive a lesser protection. This must be inherent in the practices of all institutions so that there is complete accountability for any potential breach of these rights.

An examination of the policy objectives of the framework proposed by the Taskforce follows:

Recommendations 1-5

Recommendations 1-5 concern the incorporation of the four conventions and the right to a healthy environment. It is important to note that each of these conventions carry within them reference to a human right to housing. The most authoritative of these conventions is ICESCR.⁴³ It can be inferred that incorporating this convention will include the work of the United Nations Committee on Economic, Social and Cultural Rights which can be relied upon to guide how it is interpreted by courts in Scotland. There are UN committees that monitor implementation of each of the other three conventions throughout member states and their work will serve the same function.

**Policy Objective 1:
enjoyment of economic,
social and cultural rights
belonging to everyone.**

This is done through recommendations 1-5 as stated above. Beyond the simple stating of the rights is the unpacking of the individual right and how they are to be enjoyed through legal frameworks, enforcement and monitoring infrastructure etc. Examples of how this is done in other jurisdictions are contained in chapter 4 of this report. In brief though, this will have to be situation specific and practically make use of the structures already present in Scotland.

**Policy Objective 2:
enjoyment by everyone
of a healthy environment.**

Based on international human rights treaties, this will undoubtedly impact on the right to an adequate standard of living. In formulating this right the taskforce may be guided by the Framework Principles on Human Rights and the Environment developed by the former UN Special Rapporteur on Human Rights and the Environment.⁴⁴ Combined with such rights as that of an adequate environment and an environment conducive for their health and wellbeing which are inherent in ICESCR, this would be breaking new ground in terms of legal recognition and would require significant policy and legal development. There is a significant interplay between the right to adequate housing and the right to a healthy environment. At a state level this will require a complete re-examination of housing policy to ensure that it corresponds to an effective right to a healthy environment.

**Policy Objective 3:
full and equal enjoyment
of rights by women.**

Incorporating CEDAW at the same time as ICESCR presents an opportunity to link specific human rights with the public sector equality duty. In the case of housing, CEDAW includes a right to housing on a non-discriminatory basis, necessitating consideration to be given to the situation of women to avoid indirect discrimination. The pre-existing equality framework is enhanced by the stating of the right to housing, as each facet of that right can be juxtaposed with the requirement to implement actual equality. Again, the duties of monitoring to have regard to the impact of actions on women and the inclusion of women in impact assessments are examples of where this impacts upon the right to housing. We can consider the Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014 to be an example of taking needs that are specific to women (directly and indirectly) into consideration when considering the adequacy of housing provision.

**Policy Objective 4:
full and equal enjoyment of
rights by minority ethnic people.**

Similar to the above, CERD is to be incorporated and it contains provisions relating to housing. Aside from the current enhanced awareness of issues relating to racial discrimination, there is room for discussion regarding whether progressive realisation of this right for ethnic minorities requires an explicit recognition of the historical context in order to define the starting point.

**Policy Objective 5:
full and equal enjoyment of
rights for disabled people.**

Incorporation would emphasise the social, rather than the medical, model of disability⁴⁵ and so help remove social barriers to full participation in society. Given that our present housing framework is predicated upon the medical model of disability this would present a considerable shift in focus, assessment and resource allocation. Assisted decision-making, for example, presents different challenges to substituted decision-making and therefore will require private and social landlords to respond differently at law. Significant resources would require to be devoted to capacity building within the housing sector to engage this shift.

Recommendations 6-8

Recommendations 6-8 highlight the rights of older people and LGBTI people drawing an explicit parallel with the Equality Act. There are no specific UN treaties for these groups. The Policy Objectives can be summarised as replacing those lost protections that had been contained in the EU Charter of Fundamental Rights with an overall right to lead a life of dignity and independence and to take part in social and cultural life. This would entail specific provisions in relation to health, housing and education in line with the European Social Charter.

Bringing these rights together in a single act allows the human rights provisions to correspond to the equalities framework.

For example, an explicit right to full and equal enjoyment of the right to adequate housing by LGBTI people would require LGBTI rights to form part of any Human Rights Impact assessment undertaken by a public body and would necessitate monitors to have regard to these rights on par with other groups, including requiring data to be capture for monitoring purposes.

Recommendations 9 and 10

These recommendations outline that the rights are to be given maximum expression. This places human rights philosophy on a statutory footing and would provide important guidance to decision makers including tribunals and courts.

**Policy Objective 9:
supporting clear purposive
interpretation.**

Comparison between other jurisdictions carried out by the Bonavero Institute and analysed below highlights how central the value of Human Dignity is to the purpose and practice of the ESC rights. This allows the rights to be understood for their practical benefit in common non-technical language. Dignity has a universal quality and has been subject to considerable discussion and analysis sufficient to anchor these rights. For example, if the state were to provide housing that was squalid or situated in an area where a person's routine religious practice was verifiably unwelcome this would intrude upon their dignity. Assigning a person housing that requires a steep ascent when they themselves are mobility impaired and necessarily require assistance to access it could detract from their dignity.

**Policy Objective 10:
enable the implementation of the
framework to keep pace with
and contribute to developments
in international law.**

Through an Interpretative clause, the framework should specify that the provisions that entail the strongest protections of the stated rights should prevail whether in domestic or international law. To achieve this, it is considered that courts and tribunals should pay regard to international law. This should include decisions, General Comments and Concluding Observations from treaty bodies, as well as judgements, decisions, declarations or advisory opinions of the European Court of Human Rights and other sources. The above includes all the incorporated rights across the relevant treaties when relevant (ICESCR, CEDAW, CRPD and CERD), so as to address issues of intersectionality and apply comparative law.

Recommendations 11, 19 and 30

Several recommendations look at scrutiny, monitoring and reporting. Recommendation 11 extends the powers of the Scottish Human Rights Commission as a National Human Rights Institution scrutinising performance of human rights duties – this would allow it to function more like an ombudsman or human rights regulator. Recommendation 19 concerns scrutiny by other bodies. Recommendation 30 concerns the development of monitoring and reporting mechanisms at all authority levels.

**Policy Objective 11:
ensuring relevant organisations
have appropriate powers to
implement the statutory
framework.**

A multi-institutional approach, increasing the powers and resources of Scotland's National Human Rights Institution would strengthen that institution's role in the capacity-building of a wide range of bodies, in support of the effective implementation of the framework. Further consideration will need to be given during the Bill development on whether there are other organisations that may also require a change or extension of powers to fully effect the legislation.

Enacting these rights without regulatory and scrutiny measures would not only be impractical and doomed to failure but it would not satisfy international human rights standards. Rights must be able to be practicably realised. A body such as the Scottish Human Rights Commission must be able to impart expert knowledge and scrutiny regarding housing in order to be effective. The state can either resource the body in order that it may equip itself with the necessary knowledge or appoint a separate body for this scrutiny.

Recommendations 12-18

Recommendations 12-18 cover the functional administration of the new rights framework such as a clause indicating when the duties to uphold these newly expressed rights commence allowing time for the relevant authorities to prepare themselves.

**Policy Objective 12:
ensure the framework secures protection for rights-holders whilst allowing for adequate preparation time for duty-bearers in relation to commencement of duties.**

Although Scotland has considerable engagement with human rights by a variety of stakeholders, the Taskforce acknowledges that marrying this commitment up with knowledge and skills of strategic decision makers in organisations as well as frontline staff will require unprecedented effort. For maximum impact, their approach is to apply a duty to pay due regard on the immediate commencement of the act with full compliance triggered at a future date. This allows for the government and experts to carry out the task of building human rights capacity amongst professionals. This obviously needs to coincide with the task of public information to enable real participation.

**Policy Objective 13:
ensure duty-bearers understand and implement the international obligations including the duty of progressive realisation.**

While human rights are held to be self-evident truths that states are bound to respect, protect and fulfil, they are embodied in a complex system in order to build a functional consensual framework. As this paper explains, concepts such as progressive realisation convey a particular meaning based on a political history. Appreciating this, the Taskforce anticipates that human rights fluency will have to develop within the population, both to engage with the new framework but also to enable those implementing it to take full ownership of the tasks to be carried out. These include relating resources to human rights-based standards and outcomes to show that rights have been fulfilled to the extent of the maximum available resources.

Duty bearers will be under a duty to maintain certain core standards and not breach that certain lower limit of provision. In addition, they shall be under a duty to continually and sustainably improve on this standard incorporating necessary long-term strategies to do so. It is important that they appreciate this and are confident in their ability to do so without regression. The Taskforce recommends that this duty of progressive realisation be made specifically clear.

In accordance with a human rights-based approach, minimum standards are best facilitated by participatory engagement so that there is democratic legitimacy to them as well as consent and public understanding of their content.

Further consideration of this is contained in chapter 4 of this paper.

**Policy Objective 14:
enhanced pre-legislative
assessment.**

The Bonavero report reflected on practices by other nations that were useful in ensuring that the sustainability and human rights implications of laws were considered fully before legislating. A systematic process of examination and consideration by representative and expert bodies would likely improve the quality of law-making and highlight potential flaws in legislation before it is passed. This would result in more robust analysis, for example including international human rights standards and jurisprudence, leading to a better quality of law making. The Bonavero report includes a detailed analysis of a parliamentary committee in Finland that effectively serves such a function.

The obvious advantage of such a measure would be to reduce the interpretative role of the court. Such an assessment could pre-empt litigation by taking evidence and offering legal opinions on necessary amendment prior to enactment. Reduced pressure on the courts is an attractive proposition, as is the use of an authoritative and well-resourced democratic mechanism.

**Policy Objective 15:
securing implementation
in practice.**

In conjunction with laws based on human rights principles, there should be duties to enact corresponding policy enhancements that accord with these principles. In order to avoid frustrating rights-holders, such duties would guarantee proactive action by duty bearers in pursuing the objectives of these rights. This should develop systematic behaviours and policy schemes to match policy to human rights-based laws.

An effective scheme requires an initial audit, analysis and evidence of understanding where human rights arise. For example, there is no national policy guaranteeing dual housing benefit payments to persons who require residential rehabilitation. Recognition that the piecemeal provision is inadequate to meet the affordability requirement of the right to housing and requires legislative amendment or guidance clarifying existing legislation as well as sufficient resource to accompany an increased provision would form part of a human rights scheme.



**AN EFFECTIVE SCHEME REQUIRES AN INITIAL AUDIT,
ANALYSIS AND EVIDENCE OF UNDERSTANDING WHERE
HUMAN RIGHTS ARISE.**

Recommendation 16

Recommendation 16 ensures that private bodies carrying out public functions are within this new framework.

Policy Objective 16: **clarity on intended application to all public functions.**

‘It is a well-established principle of international human rights law and public international law that the state cannot divest itself of its human rights obligations by outsourcing or delegating those responsibilities to private organisations or individuals. Rights-holders should be able to have confidence and clarity that, regardless of who carries out the public function, their human rights fully apply.’

We have the prime example of *Ali v Serco* in Scotland where the Inner House determined that a body carrying out a statutory function under exclusive contract to the State was not accountable for human rights breaches carried out unless this liability was conveyed by means of the service contract.

This was in contrast with the decision of the lower court which harmonised with international standards and was broadly considered to be a dissatisfactory outcome. Such an outcome reduced access to justice by placing additional burdens on rights holders and was in fact a regressive measure.

The UN Guiding Principles on Business and Human Rights and General Comment 24 of the UN Committee on Economic, Social and Cultural Rights can usefully inform construction of this duty.

These concern the role of businesses in fulfilling human rights obligations with due diligence and their relationship with the state where they are contracted to carry out public functions.



‘IT IS A WELL-ESTABLISHED PRINCIPLE OF INTERNATIONAL HUMAN RIGHTS LAW AND PUBLIC INTERNATIONAL LAW THAT THE STATE CANNOT DIVEST ITSELF OF ITS HUMAN RIGHTS OBLIGATIONS BY OUTSOURCING OR DELEGATING THOSE RESPONSIBILITIES TO PRIVATE ORGANISATIONS OR INDIVIDUALS. RIGHTS-HOLDERS SHOULD BE ABLE TO HAVE CONFIDENCE AND CLARITY THAT, REGARDLESS OF WHO CARRIES OUT THE PUBLIC FUNCTION, THEIR HUMAN RIGHTS FULLY APPLY.’

**Policy Objective 17:
clear statutory and
non-statutory guidance.**

In addition to capacity building the state should continue to carry the burden of maintaining the requisite knowledge, interpreting international law and standards and providing this information to local duty bearers in clear and practical guidance taking account of the local context. Statutory and non-statutory guidance plays a key role in the development of a human rights-based culture as it can introduce the concepts in a familiar manner to key user groups.

There would be benefit in this guidance including practical detail around the implementation of rights for particular groups in order to overcome barriers to rights faced by care experienced people, people with learning disabilities, deaf people, people affected by imprisonment, and people in the asylum system, amongst many others. Naturally this includes those with protected characteristics under the Equality Act 2010 as the realisation of rights for these groups requires particular attention.

Given the concurrent incorporation of CERD and CEDAW the state should fully observe the UN Committee’s understanding of the systemic disadvantage faced by these groups and provide a reliable account to enable policy making that can play a role in counteracting the structural issues.

The new framework must remain aligned with stakeholder environments. Scotland is committed to an international order that includes the UN treaty system and the Sustainable Development Goals (SDGs). Rights holders in Scotland benefit from this entrenchment and it is conceivable that it contributes through experience and innovation to the evolution of international human rights. There are also tactical advantages in remaining a committed member of these national, regional and global orders. Domestically, the National Performance Framework includes ‘to respect, protect and fulfil human rights and live free from discrimination’, which should be evidenced as an outcome.



THE STATE SHOULD CONTINUE TO CARRY THE BURDEN OF MAINTAINING THE REQUISITE KNOWLEDGE, INTERPRETING INTERNATIONAL LAW AND STANDARDS AND PROVIDING THIS INFORMATION TO LOCAL DUTY BEARERS IN CLEAR AND PRACTICAL GUIDANCE TAKING ACCOUNT OF THE LOCAL CONTEXT.

**Policy Objective 18 and 19:
capacity-building to build a
human rights-based and
outcomes-oriented approach
by public authorities and human
rights capacity-building in
relation to the everyday
accountability of duty-bearers.**

In the context of housing there is already a need for consultation with stakeholders and genuine participatory processes and practices by housing providers. The essence of incorporation of the human right to housing is lost if those engaged in the field do not hold the necessary knowledge and understanding about how to practically deliver on human rights-based objectives. To this end, the government must, as part of its strategy, engage both rights holders and duty bearers on what the objectives are and how to best achieve them. The development of capacity-building through provision of clear and specific statutory and non-statutory guidance should be supported by consultation with both duty bearers

and rights holders. There is a good example of this in the Social Housing Charter which sets out standards and outcomes that all social landlords should be aiming to achieve for their customers when performing their housing activities. The Scottish Housing Regulator uses the charter to monitor and measure the outcomes of social landlords. The Regulator is therefore in a prime position to consult with stakeholders; ensure that housing providers are using human rights-based standards and hold them to account where they fail to do so.

Guidance should be accessible and contain practical application examples and details, so as to support duty-bearers to operationalise their duties under the framework. International human rights law expertise, combined with practical experience of working with public bodies and rights holders, is also essential for the development and delivery of capacity building. It is the government's responsibility to resource this exercise adequately.



THE REGULATOR IS THEREFORE IN A PRIME POSITION TO CONSULT WITH STAKEHOLDERS; ENSURE THAT HOUSING PROVIDERS ARE USING HUMAN RIGHTS-BASED STANDARDS AND HOLD THEM TO ACCOUNT WHERE THEY FAIL TO DO SO.

Recommendations 20-23

These recommendations concern the proposed framework to empower the public through knowledge, assistance, forums, legal and non-legal remedies. Recommendation 23 in particular concerns the rights of interested parties to litigate on behalf of claimants.

Policy Objective 20: **capacity-building of rights-holders to know and be able to exercise their rights.**

Rights holders should have the information that they need about their rights and should know where to go to get further advice and that advice should be freely and accessibly available. This allows rights holders to be pro-active in advocating for themselves and pre-empting problematic outcomes as the SHRC noted in their capacity building intervention in Leith, Edinburgh. This is a more impactful and less resource intensive way of managing housing issues and more empowering for rights holders than adversarial complaints and legal processes. Where issues inevitably give rise to litigation or complaints, early

information and advice assists to frame and crystallise the issue before involving the expense and burden of the legal process. In some ways the social housing sector can adapt to this more easily as information and resources are centralised. Tenants in the private rented sector are vulnerable to their landlords on an individual basis. Private landlords are less attached to legal obligations and corporate social responsibility as well as having less statutory regulation. The power dynamic between landlord and tenant is naturally oblique in favour of the landlord. One of the ways in which this can be shifted is through the provision of up to date and authoritative information. Tenants can therefore avoid making themselves vulnerable to abuses of power through readily available advance information and advice. The state can provide this directly or commission those with the necessary expertise and infrastructure to deliver this. Steps such as reduced funding to law centres and citizens advice bureaux are regressive measures in this regard. A study from Bath University found that for every £1 spent on Citizens Advice Bureaux, and other advice agencies, over £50 was retained over a five-year period.⁴⁶



RIGHTS HOLDERS SHOULD HAVE THE INFORMATION THAT THEY NEED ABOUT THEIR RIGHTS AND SHOULD KNOW WHERE TO GO TO GET FURTHER ADVICE AND THAT ADVICE SHOULD BE FREELY AND ACCESSIBLY AVAILABLE.

Recommendations 24 and 25

Recommendations 24 and 25 relate to making international law applicable and relevant to the carrying out of rights under this framework and better access to justice.

Policy Objectives 21- 26:
these objectives are concerned generally with access to justice and effective remedies with recommendations to empower rights-holders to hold public bodies to account where human rights are at risk of being breached or have been breached.

A natural and vital by-product of adequate information is the means to challenge authority when, armed with knowledge of your rights, you believe there to be a breach of those rights. As stated above, the practical benefits of early framing and crystallising issues expedite legal processes. In the majority of cases rights holders will be challenging a more resourceful and experienced party. To enable rights holders to uphold their rights, there should be adequate mechanisms to empower them to do so. Moreover, the legal system should be able to provide solutions that address the actual problems that arise in this context. This includes prompt resolution of complaints and decisions that are binding upon opponents without requiring further processes.

International human rights law treats access to justice as a priority in respect of protecting all human rights particularly to address the balance of power between state and individuals. It is for the state to make justice accessible to all both in terms of affordability and practical measures to accommodate disadvantage.

Shelter Scotland incorporates a law centre that is concerned with practical barriers to access to justice on an individual and collective basis, while the organisation's campaigns have highlighted systemic deficiencies in the housing system based on failures of the responsible authority to realise the right to adequate housing. A proper consideration of access to justice would entail detailed consultation with such organisations as to the extent that they have had to go to in order to fulfil their goals and where and how the state could best correct the deficiency. This may entail formally relying on such organisations as civil society members and engaging in transparent deliberation in order that these stakeholders can best advise on how barriers are to be reduced. This is particularly pertinent here as the barriers that are shown to exist for marginalised groups require prioritisation and specific resolution. Judicial and non-judicial remedies may both have a role to play, and this may depend upon the individual or group seeking the remedy.



TO ENABLE RIGHTS HOLDERS TO UPHOLD THEIR RIGHTS, THERE SHOULD BE ADEQUATE MECHANISMS TO EMPOWER THEM TO DO SO...IT IS FOR THE STATE TO MAKE JUSTICE ACCESSIBLE TO ALL BOTH IN TERMS OF AFFORDABILITY AND PRACTICAL MEASURES TO ACCOMMODATE DISADVANTAGE.

Existing mechanisms require strengthening by way of capacity building of duty bearers and harmonising their understanding and practice with those of inspection and scrutiny bodies in accordance with a human rights-based approach. For example, a housing authority may be required to operate a complaints mechanism which has been designed in conjunction with experts in international human rights law. Any investigation into complaints must address the housing human rights framework. Any oversight body such as housing regulators or ombudsman would operate standards based on international human rights law.

With every party operating in accordance with the same standard a complaint regarding, for example, poor quality of water in a building can always be seen through the lens of the human right to adequate housing⁴⁷ as opposed to being a building regulations issue or a health and safety issue that fails to link to the human right that is obviously relevant. If the issue is systemic then it may be indicative of a breach of a different element of the rights expression such as the local authority being required to inspect water courses annually. Non-judicial bodies can make a finding and remedy the issue without litigation being necessary nor a preferred option. Regulators that already carry out such functions can be brought into alignment with the human rights system.

Judicial standing is of particular importance to organisations such as Shelter Scotland for whom the ability to take legal action is presently limited to intervening in cases brought by others. This is a reactive form of litigation requiring such organisations to realign their work to support a particular case or to invest significant resources in a case at their own risk. The new framework should allow organisations with sufficient interest to bring cases on issues that are in the public interest or to support victims or classes of victims in bringing cases forward. This may be more cost effective and may also assist in the administration of justice by pooling resources and focussing attention on a central human rights issue.

Such organisations can play a role in designing ideal remedies beyond the merely pecuniary. The Scottish framework could be enhanced by considering more alternative remedies. Indeed, alternative processes more akin to mediation or inquiry may deal with systemic issues in a more constructive and sustainable way.



THE NEW FRAMEWORK SHOULD ALLOW ORGANISATIONS WITH SUFFICIENT INTEREST TO BRING CASES ON ISSUES THAT ARE IN THE PUBLIC INTEREST OR TO SUPPORT VICTIMS OR CLASSES OF VICTIMS IN BRINGING CASES FORWARD.

Recommendations 27-29

Recommendations are also made regarding human rights-based public engagement on the framework by Scottish Ministers and potentially expanding beyond the framework by way of an explicit right to participation.

Policy Objective 27-29: **public participation.**

The importance of participation in development, implementation and maintaining awareness of the framework by the public is a foundation to the human rights-based process. This participation should be ongoing and be about engagement and not only consultation.

The importance of public participation in decision making is already underscored in Scottish housing legislation. The value of having people contribute to the decisions that govern their lives is public ownership of decisions and increased awareness of the factors influencing them, not to mention obtaining the most relevant input. This is likely to lead to better outcomes with more contribution from the democratic decision makers.

Recommendation 30

Recommendation 30 relates to effective monitoring and reporting mechanisms at all levels and duties at both national and public authority levels.

Policy Objective 30: **the monitoring of outcomes.**

Various public reporting is undertaken on aspects of housing including the Scottish Housing Regulator through the Annual Return of the Charter by housing providers, and government publications of local authority statistical returns. These would be required to be linked to rights, and further reporting considered, to enable a consistent and effective tracking of the fulfilment of human rights housing outcomes. An essential part of this would be enabling human rights budget analysis to assess the government's progress under the commitment to use maximum available resources. This would likely require an amendment of information published to allow various actors to participate.



AN ESSENTIAL PART OF THE MONITORING OF OUTCOMES WOULD BE ENABLING HUMAN RIGHTS BUDGET ANALYSIS TO ASSESS THE GOVERNMENT'S PROGRESS UNDER THE COMMITMENT TO USE MAXIMUM AVAILABLE RESOURCES.



INTERNATIONAL COMPARISON

The Taskforce made use of a report compiled by the Bonaverio Institute, an adjunct of Oxford University.⁴⁸ This report concerns the application of the doctrine of progressive realisation by the Taskforce to economic, social and cultural rights and the question of how a treaty with this concept as its basis can be given effect by signatory parties. The report is an ideal medium to consider how the right to housing has been implemented in other jurisdictions.

To quote the Bonaverio Institute:



In broad strokes, the rights in the ICCPR have been construed as “immediately realisable”, while those in the ICESCR are said to be “progressively achieved”.

Their insight into the preparation of ICESCR suggests that this is not an intended outcome of the drafting of ICESCR and a more nuanced reading reads aspects of all rights meeting either description.

Bear in mind that the obligations of CEDAW and CERD, which are to be incorporated at the same time, are seen to be immediately realisable. Where these rights intersect there is no real debate, resulting in an urgent requirement to positively discriminate in favour of marginalised groups.

As mentioned in Chapter 2, CESCR intended states to recognise where they were in the context of each right and to mark-up continuous improvement towards full realisation of the rights. Their General Comment 3 reinforces this with an understanding that this realisation would take time but that it was urgent that steps were taken towards the goal and that states achieved a minimum level of realisation of all the rights.

To determine this minimum core, CESCR has looked at individual state methodologies for establishing what it means in their specific contexts. With regard to housing, General Comment 4 details such methods as a coordinated national housing strategy and effective monitoring to be obligations of immediate effect. General Comment 4 goes a step further in saying that many components of the right to adequate housing are realised by governments’ abstention from certain practices. This synchronises with state duties to not take regressive steps in respect of the rights.

The Optional Protocol to ICESCR (which will be incorporated if the maximalist mode preferred by the Taskforce is followed) introduces the concept of reasonableness in determining whether states are meeting their progressive realisation obligation.

We therefore take from this doctrine that the Right to Housing may be expressed quite differently depending upon the jurisdiction as the doctrines underlying it allow for this individualisation. The Bonaverio report compares Colombia, Finland and South Africa with recommendations for Scotland arising. What follows is a contextualising of that comparison with respect to the right to adequate housing.

Colombia

Colombia has a constitutional bill of rights including comprehensive chapters on classes of rights including economic, social and cultural rights. Courts must interpret these according to ratified human rights treaties and they frequently reference CESCR's commentary. Specific rights such as the fundamental right to health have been enacted through thorough context specific legislation.

The Right to Housing is enacted via Chapter 2, Title II Art. 51 of the Constitution.⁴⁹ The theme of dignity is repeated throughout the constitution and many rights are expressed in terms of the human dignity that they promote, uphold and protect.

The Colombian bill of rights uses a similar demarcation to the UN (i.e. civil and political rights – immediately enforceable vs ESC rights – progressively realised) but the courts developed this by using a 'connection principle'. That is by connecting ESC rights such as the right to housing to the fundamental value of dignity, the right to adequate housing has achieved a fundamental status making it immediately enforceable in some instances.

This again evolved in accordance with the idea that all rights had aspects that were civil and political as well as aspects that were economic, social and cultural. States were tasked with applying the rights to their national situations in a manner that was reasonable and proportionate to the urgency, available resources and nature of obligations. Where a statute specified a limit to the right, this was taken to be that clarification. Where no statute existed, the courts were to carry out that balancing act.

Allowing the judiciary space to interpret the treaties and engage law where parliament has done so inadequately allows the courts in Colombia to take into account the treaty, the CESCR's commentary and other jurisprudence in order to give effect to the right. The country has therefore taken a pluralistic approach to the exercise of rights, permitting a number of bodies to be influential here.

Colombia has no participation methods specific to ESC rights. However, it enshrines non-regression of social spending in its constitution.⁵⁰

Every four years the Colombian government issues a national development plan that includes goals and strategies to achieve social and economic development including a four-year investment plan that prioritises 'social public spending'. Although these do not necessarily align with specific ESC rights, there is some correlation.⁵¹

Some of the monitoring functions are ceded to independent organisations such as ombudsmen or National Human Rights institutions. There are a number of non-judicial oversight bodies that monitor the realisation of these rights in Colombia.

Case Study: Illustrating the limitations that reserved immigration legislation places upon the right to adequate housing

In February 2021, Gael applies to Moray Council for homelessness assistance. He is found to be present in the United Kingdom on a visa, the terms of which include 'No Recourse to Public Funds' and is therefore deemed ineligible. He challenges the decision of the local authority by Judicial Review on the basis that this is unreasonable as it denies him housing which is a human right.

Lord Tyre pronounces in his judgment that 'the state is at liberty to express the right to adequate housing in the terms of the treaty. It would be nihilistic to suggest that the state, being of limited resources, extend all rights equally to everyone without qualification or criteria without consideration as to how this were to be funded. The Housing (Scotland Act) 1987, by cross referencing the limitations in the Immigration Act 1999, gives a clear expression of the limits of the right and the Scottish ministers have at their disposal the means to amend this at a time of their choosing with the necessary knowledge in hand'.

The Colombian constitutional court's jurisprudence has substantially developed to allow it to differentiate between instances where the right is applied.



The Court has defined the content of the right to housing with reference to General Comment 4 of the Committee on ESCR, which refers to legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy. However, the Court has enforced this right mainly in situations of natural disasters, such as a risk of landslides that could affect housing, and forced eviction.⁵²

The court can grant remedies that compel the state to reconcile a policy with the right to housing such as adopting a participation framework or furnishing an ombudsman with information to enable the state to monitor and critique state behaviour.

The court can also grant remedies to enforce a minimum core obligation such as the right to homeless assistance, the absence of which would compromise the dignity of a rights holder.

Colombia does not implement a strict non-retrogression policy framework but may mitigate this by using a proportionality test to gauge whether a legitimate state interest can be met by taking measures that appear to be regressive.

In Colombia the remedies against public authority breach of duty can be levied by any court via a simple constitutional judicial procedure where individual remedy is sought. Structural remedies are the province of the constitutional court where orders can be made to engage the state to address a structural failure. These are particularly required where individual remedies are continuously sought in relation to the same unresolved issue.



BY CONNECTING ESC RIGHTS SUCH AS THE RIGHT TO HOUSING TO THE FUNDAMENTAL VALUE OF DIGNITY, THE RIGHT TO ADEQUATE HOUSING HAS ACHIEVED A FUNDAMENTAL STATUS MAKING IT IMMEDIATELY ENFORCEABLE IN SOME INSTANCES.

Finland

Finland also retains constitutional protection for ESC rights including housing. Their constitution is akin to Colombia's in stipulating the importance of dignity in consideration of these rights.⁵³

It includes broad and general guarantees of rights which take in the concept of progressive realisation.⁵⁴ There is no specific provision of progressive realisation in the constitution but, as significant weight is placed upon preparatory constitutional documents where the doctrine abundantly features, it can be said to be upheld. Further, general provisions in the constitution allow it to be implemented by those interpreting.⁵⁵

The Finnish constitution intentionally applies particular wording in respect of ESC rights so that it may create a 'subjective' (justiciable) right directly as a constitutional right where ordinary laws fail⁵⁶, or establish clear substantive requirements for laws to be enacted (Section 19.4)⁵⁷, or it may provide for a more general obligation to legislate to implement the constitutional right.

This is a relatively low maintenance way of implementing ESC rights in accordance with international law. Because the constitution itself is interpreted according to international law the burden of the party interpreting a new provision is lessened. By way of example, with such constitutional provisions in place, if a new regulation was enacted requiring housing associations to take necessary steps to secure tenants participation in

decision-making, that housing association could be certain that those necessary steps would follow guidance issued by CESCR and would be designed to promote the right of everyone to housing that is adequate in terms of General Comment 4. This does not require a legal challenge or interpretation via a court judgement. The local authority would be under a duty to issue such guidance.

Finland takes the pluralistic model seriously in incorporating it to grant more state institutions the power to review and critique legislation on human rights grounds. This includes a standing Parliamentary committee that has the power to prevent unconstitutional proposal becoming law, but it more frequently uses its powers to advise on how to remedy defects in law. This committee is also able to scrutinise the periodic national action plans required to be published by the government.

Finland's constitution also makes provision for a Parliamentary Ombudsman and an office of the Chancellor of Justice. Interestingly the Chancellor operates in a similar manner to the former Lord Chancellor of the United Kingdom being both a government officer and a constitutional safeguard. The Ombudsman is answerable only to the parliament. Both receive complaints directly from individuals upon which they can take legal action against government departments. The Ombudsman produces annual reports wherein they can raise human rights issues. There are other sector specific ombudsmen offices as well.

Finland's constitutional committee makes their deliberations transparent including publishing briefings from experts that they have consulted.

Online public consultation on bills is the norm alongside a process similar to the Holyrood call for evidence by committees. Finland also takes part in the UN treaty system of periodic reporting with civil society members taking part in producing shadow reports.

Finland, as a member of the council of Europe, participates in periodic review under the European Social Charter engaging a similar process to ICESCR.

Finland has no constitutional court, but constitutional law may be challenged in any of the courts. In their decisions the courts look carefully at the preparatory documents to legislation as well as the analysis by the Constitutional committee. These courts have been able to address constitutional inadequacies through judgements on individual challenges.

There is a general obligation by way of convention in the Finnish constitution to refrain from taking retrogressive measures. In essence this operates similarly to the Colombian legal framework with a proportionality test being exercised. In relation to housing the Constitutional Committee stated that Section 19 of the Constitution does not as such guarantee a specific current level of benefit or its advancement at the rate of inflation. It is in accordance with the legislator's positive obligations that social security is developed as the economic resources of society allow and that the state of the national and public economy may affect the levels of benefits directly paid from public funds. When cuts are deemed necessary in the state budget it will form a legitimate aim somewhat to adjust levels of benefits that are protected by the Constitution, provided that this will not endanger the realisation of the constitutional right in question. Any retrogressive measure must not render meaningless the essential core of a constitutional or human right.



THERE IS A GENERAL OBLIGATION BY WAY OF CONVENTION IN THE FINNISH CONSTITUTION TO REFRAIN FROM TAKING RETROGRESSIVE MEASURES.... ANY RETROGRESSIVE MEASURE MUST NOT RENDER MEANINGLESS THE ESSENTIAL CORE OF A CONSTITUTIONAL OR HUMAN RIGHT.

South Africa

By way of example, South Africa's constitution includes a very full and comprehensive set of rights including the right to adequate housing⁵⁸ which is based on ICESCR and UNCRC. Again, this is underpinned by explicit obligations to uphold human dignity (as well as equality and freedom) on a progressively realisable basis.

The minimum core of obligations by each state is the subject of much discussion and jurisprudence and as such the constitutional court in South Africa considered this to be the province of the government to determine. This created a legal precedent whereby the task of proving reasonableness of government action therefore depends upon litigation which is typically expensive and therefore severely limited in a state where more than 50% of the population live in poverty.⁵⁹ The concept of minimum core obligations is discussed further in the following chapter.

The South African Constitution invalidates legislation enacted without a reasonable participation process. This is a power held by the constitutional court and they can determine whether a proportionate amount of consultation has been carried out. The specific ban does not exist for secondary legislation however consultative practices are regularly carried out anyway. The court has directed, specifically in relation to housing, that meaningful engagement with affected rights holders is required.

South Africa has been found to systematically lack the mechanisms of monitoring such as consistent data provision by the government. This is compounded by an ineffective National Human Rights Institution. Without the government providing

data narrating their resource allocation and corresponding policy framework it has not been possible for either the UN Committee or civil society actors to assess their compliance with human rights.

It is the South African constitutional court that determines the enforcement of ESC rights. Their jurisprudence has strongly directed government policy in the field of ESC rights. Housing has benefitted from this particularly where the court has directed government to provide short-term relief for those in acute socio-economic need, for example in eviction cases.

The South African bill of rights is enforceable horizontally (allowing private landlords to be held to account for their interference with this right e.g. through unlawful eviction or inadequate security of tenure, by tenants) as well as vertically (by the individual against the state).

Enforcement is difficult in South Africa with litigants often having to return to court long after and edict to seek its enforcement. The legacy of apartheid and the immaturity of institutions has hampered progressive realisation. Often civil society campaigning is a necessary accompaniment to a decision to obtain a tangible and satisfactory outcome.

The South African courts use practices known as severance (where words in a provision are edited out to render the provision constitutional) and reading-in (where words are inserted into a provision to achieve a constitutionally compliant result). Courts may also make any other order that is just and equitable such as a mandatory order requiring action by the government to remedy a situation.

The Netherlands

The Netherlands has long-established housing laws and tribunals upholding a nationally recognized right to housing for all Dutch citizens. The Netherlands adopted its first housing legislation creating social housing at the turn of the 20th century with the Housing Act of 1901. Additionally, the Netherlands was one of the first European countries to include the right to housing in its Constitution.⁶⁰ It has been a leader in providing the right to housing, becoming the country with the largest publicly-funded housing for rent (36%).

Over 100 years ago the Housing Act of 1901 created housing associations and authorized the state to support them financially. These housing associations make the Dutch housing policy rather unique. Although largely independent, the associations are funded and regulated by the state to ensure that they meet national housing needs and increase the supply of affordable housing.

However, throughout the years, the associations have increasingly financed the buildings on their own; the Dutch government now subsidizes the rent to make housing affordable. Moreover, the 1997 Housing Allowance Act regulates housing allowances. Housing allowances have been evaluated several times, and as a result, the program has improved step by step. Every tenant whose rent is relatively high in relation to household income and who meets certain conditions is entitled to a housing allowance. Tenants additionally have standing to challenge unreasonable rents through the Rent Tribunal Act.⁶¹

All in all, the Netherlands serves as a role model for other countries seeking to make the right to housing justiciable. The Netherlands has taken steps within its economic resources to uphold the right to housing. First, the Housing Allowance Act provides that all those in need can get the financial assistance to find housing. Second, the Rent Tribunal Act empowers citizens to challenge unreasonable rents. These clearly articulated rights guarantee to citizens affordable housing and make it possible for Dutch courts to interpret the right to housing broadly.



THE NETHERLANDS SERVES AS A ROLE MODEL FOR OTHER COUNTRIES SEEKING TO MAKE THE RIGHT TO HOUSING JUSTICIABLE.

Portugal

The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, visited Portugal in December 2016. This provided an opportunity to examine their legal framework and in particular, the effect of economic difficulties on delivering against the right to adequate housing.

Portugal has ratified ICESCR (including optional protocol); CCPR; CEDAW; CERD; CRC and CRPD (including optional protocol).

Housing rights are guaranteed by Article 65 of the Portuguese Constitution ⁶²:

- (1) everyone shall have the right for himself and his family to a dwelling of adequate size satisfying standards of hygiene and comfort and preserving personal and family privacy
- (2) (a) draw up and put into effect a housing policy as part of general regional planning and based upon town plans which safeguard the existence of an adequate network of transport and social facilities
 - (b) promote, in conjunction with local authorities, the construction of economic and social housing; and
 - (c) promote private building subject to the public interest

Portugal lacks a comprehensive legal framework giving effect to the constitutional imperatives. There is broad consensus amongst academics, civil society and administrative officials that this diminishes the practical fulfilment of the right.

Portugal boasts exceptionally high home ownership rates (75% of population – by comparison Scotland was at 62% in 2019⁶³). Only 2% of all housing stock is social housing. The rental sector reduced from 46% in 1970 to 20% in 2011.

Portugal had quite stringent rental controls that ignored market forces and personal circumstances. As a consequence, landlords were reluctant to maintain and improve their properties resulting in a large number of buildings going derelict. A reduction in construction and in reconstruction further reduced supply. In terms of quality, in 2016 it was reported that a quarter of homes were inadequately heated. Approximately a third of poor households in 2015 lived in unaffordable situations.

Being cognisant of these problems, the state launched a 15-year housing strategy in 2015. The special rapporteur viewed the strategy with some scepticism as it did not clearly link to other housing policies or frameworks. There are programmes such as the Housing Access Financing Programme which was severely underfunded and a resettlement programme which had stalled and resulted in ghettos on the outskirts of the city.

In 2012 the legal framework was liberalised including, concerning, a fast track eviction procedure that could be carried out extra-judicially by default. This lacked the necessary procedural safeguards to test the necessity of action that may breach fundamental rights. While there were accommodations made for some vulnerable groups, these lacked legal certainty.

The Special Rapporteur was concerned about the material effects of policies on vulnerable groups such as the Roma or those of African descent who were marginalised through the economic realities of the country. She noted with disapproval that unacceptable informal settlements featured significantly, far below the standard of developed countries with a stated commitment to economic, social and cultural rights. Evidence was gathered regarding unlawful home demolitions and evictions and apprehension by residents over likely municipal eviction. Concerningly, this breaches the most basic duty of the state in respecting human rights by refraining to take action that interferes with the right to adequate housing, in this case, threatening potentially unjust eviction.

Estimates of homelessness varied so much as to be meaningless, reflecting a failure by the state to take account to deliver the minimum core obligation of the right to adequate housing. This includes any demographic analysis of homelessness to identify vulnerable groups and apply resources to them.

The state was applauded for the design of their previous strategy which was based on the right to housing without the backdrop of a developed welfare system such as what would be found in Scotland. The strategy was comprehensive and inclusive, comprising as it did the views of a wide range of stakeholders who participated in its design. Its implementation however was limited by resources and a lack of policy integration. For example, rehabilitating old housing was put forward as a useful way to increase housing stock. However, the rehabilitated settlements were far from services and other factors linked to an adequate standard of living, such as work and health. Consequently, the initiative had the unintended consequence of marginalising vulnerable and unempowered groups.

An overall deficit of information key to budgeting, planning and maintenance of the national housing strategy indicated that the state was failing in terms of accountability. This inhibited the state's ability to determine what resources were required in order to address the problems that it faced, extending as far as the degree to which short-term lets featured in the city. Piecemeal regulations in this area were unlikely to engage the size nor scope of the problem constructively.



AN OVERALL DEFICIT OF INFORMATION KEY TO BUDGETING, PLANNING AND MAINTENANCE OF THE NATIONAL HOUSING STRATEGY INDICATED THAT THE STATE WAS FAILING IN TERMS OF ACCOUNTABILITY.

The interaction between ICESCR and CERD was acutely recognised in relation to the situation of Roma and those of African descent in Portugal. Their housing was noted to be particularly inadequate and the strategies to address their integration and empowerment suffered from the same lack of data and resources. This is further compounded by discrimination against people with disabilities prohibited by CRPD.

The ombudsperson and the court system were found to be underutilised. While they were instrumental in bringing international attention to the issue, their decisions are limited by a lack of pragmatic remedies. On account of treaty accession, Portugal is subject to a number of external scrutiny bodies such as the European Committee of Social Rights which has found violations in their conduct.

While useful in a foundational sense these are no substitute for a comprehensive legal framework linked to resources and coherent information upon which to base a strategy. The severe impact of the 2008 recession on Portugal amplified existing inadequacies within their system. Some of the Special Rapporteur's recommendations are so fundamental in nature that they expose the fragility of economic, social and cultural rights.



WHILE USEFUL IN A FOUNDATIONAL SENSE THESE ARE NO SUBSTITUTE FOR A COMPREHENSIVE LEGAL FRAMEWORK LINKED TO RESOURCES AND COHERENT INFORMATION UPON WHICH TO BASE A STRATEGY.

Conclusion

Of the contexts described by the Bonavero Institute, we might be tempted to prefer the Finnish Model, simply for geographic and socio-economic comparability. The historical and contemporary contexts of Colombia and South Africa may seem somewhat remote for our purposes. Finland as a strong parliamentary democracy with long-established rule of law safeguards and a mature welfare state clearly bears more in common with Scotland in the moment.

However, the task of creating a new human rights framework in a relatively new governmental system shares some similarity with the South African situation, and the construction of the Colombian system seems to hold some impressive examples of good practice.

What is clear from all these examples is that constitutional frameworks do not guarantee practical realisation of rights. A comprehensive legal framework coupled with strong primary reference points is evidently the most effective way to fulfil this right. Furthermore, while a fair and independent justice system is to be valued, the right balance between courts and political actors must be found. The courts themselves should not be seen as a political actor.

While the right to adequate housing ought to be viewed in its local context, the interplay with other rights and other treaties highlights the importance of a holistic approach to the right to an adequate standard of living.

A constitutional committee is a novel authoritative interpreter of the Finnish constitution. Such a bulwark is necessary to maintain perspective as laws change along with social and economic circumstances. This is a living example of why the Taskforce recommendation of a 'structure, process, outcome' methodology is essential. A stagnant legal framework is unsuitable for rights that have progression within their definition and are placed in direct proportion to the availability of resources. A continuous examination of outcomes leads to re-examinations of structures and ideally improved processes. What is important is that the institutional framework for this method is robust.



WHAT IS CLEAR FROM ALL THESE EXAMPLES IS THAT CONSTITUTIONAL FRAMEWORKS DO NOT GUARANTEE PRACTICAL REALISATION OF RIGHTS. A COMPREHENSIVE LEGAL FRAMEWORK COUPLED WITH STRONG PRIMARY REFERENCE POINTS IS EVIDENTLY THE MOST EFFECTIVE WAY TO FULFIL THIS RIGHT.

5.

INCORPORATION AND BUDGETING

This section is concerned with the necessary administrative changes for the incorporation and implementation of the right to adequate housing including Human Rights budgeting and scrutiny, and the importance of a human rights-based approach.

Minimum core obligations

The right to adequate housing is subject to the standard of progressive realisation. Despite its inherent optimism, it lacks specificity and is based on wants (those of the state) rather than needs (of the individuals). To strengthen the rights, the doctrine includes that of a minimum core obligation to begin to establish the level of provision from which a state cannot regress without corrective action being warranted.

International covenants such as ICESCR are built on the respect, protect, fulfil platform. Fulfilment of human rights is a positive obligation on states to actively promote human rights, facilitate access to resources and, where necessary, provide resources.

To test the proposition that Scotland is inclined towards progressive realisation of this right, among others, we require a framework that can track the differences made by government policy actions. There is currently no systematic mechanism to compare and to gauge whether rights are being progressively realised.

In contrast, civil and political rights are conclusively determined to have been realised by their outcomes. e.g. whether there are laws to enact universal suffrage; safeguards against arbitrary detention; laws prohibiting torture, inhuman and degrading treatment. This is not to say that the framework for civil and political rights is ideal – simply that it is not appropriate to rights that are defined as

progressively realisable and dependent upon states maximum available resources. When we consider the need for such a framework it is important to remember the principle of indivisibility that is underpinning human rights. The right to an effective remedy is enshrined in ICCPR at Articles 2 and 14. Closer to home, it is part of UK law by virtue of the European Convention (Articles 6 and 13). It is so fundamental as to be a component of the rule of law predating all these human rights instruments. This goes beyond the mere existence of a court or tribunal but engages the universal accessibility of such a forum and how adjudications can be sought and obtained. In pursuance of this, state parties have a duty to make it possible for their own actions to be analysed and held to account.

This is particularly the case in terms of ESC rights which are directly linked to the states' maximum available resources. ICESCR provides for the state to contextualise how they meet their obligations.⁶⁴ This is strictly limited and should not be interpreted as a license to excuse limitations without a valid rationale. Presently Scotland follows no practice in meeting their obligation to make it possible or easy to gauge their progress towards realising ESC rights. This invokes the principle of human rights budgeting. At its most basic, this involves the state taking a human rights-based approach to budgeting. The budget is the clearest statement of how the state prioritises its obligations to the public. It directs the state wealth towards the state expenditure with clear accounting for how money has been spent in the past.

Budgets are currently presented according to management accounting principles and tools. Funds are allocated to specific projects or departments for the purpose of running those entities. This is of little use to anyone who is monitoring what governments are allocating to their human rights obligations. What the department of Health and Social Care spends may affect several human rights to a lesser or greater extent. A fund dedicated to the supply of 5,000 new homes over three years may not seem as impressive when there is a crisis requiring 10,000 new homes to be built or if the homes themselves are of poor quality.

The point of human rights budgeting is for the state, at the outset, to take human rights standards into account when allocating resources and to support transparent monitoring and accountability. Both budget design and scrutiny are crucial to enabling us to determine how human rights have been addressed in relation to resources. Beginning the process with human rights principles is necessary to achieve any outcome that makes human rights effective.

Taking a human rights-based approach to budgeting can be described using the PANEL tool as follows:

Participation: the public being meaningfully consulted on how the government's financial priorities should be organised. This brings forward the views of participants in public life who are often excluded from consideration such as parents in caring roles.

Accountability: constructing and displaying budgets in a transparent and accessible manner so that the public are able to interpret how the government has met its human rights obligations.

Non-discrimination: conducting assessments on the impact of policies on vulnerable groups (i.e. those identified as requiring particular legal protection such as children and bearers of protected characteristics) which should make reference to additional resources required to neutralise any negative impact on the groups.

Empowerment: clear information, proactively given to rights-holders which enables them to monitor, challenge and affirm the impact of government policies and the level to which the state is meeting its obligations to the maximum extent that its resources allow. Consistent data sharing allows stakeholders to track the progress being made to realise human rights goals. Monitoring at local, state and international level is made effective through the production of this data at a reasonable cost.

Legality: in order that the effects of rights are tangible and not illusory, human rights obligations must be complied with in a context where states are required by law to demonstrate this. Financial information is already required of government departments, local governments and contracted third parties. A human rights-based standard for producing financial information should be codified and enshrined in law.



BEGINNING THE PROCESS WITH HUMAN RIGHTS PRINCIPLES IS NECESSARY TO ACHIEVE ANY OUTCOME THAT MAKES HUMAN RIGHTS EFFECTIVE.

In 2017 the Budget Process Review Group was established by the Scottish Parliament's Finance and Constitution Committee and the Scottish Government. It made recommendations including that:



Committees take a broader approach to budget scrutiny. This would mean shifting the focus from annual changes to inputs, to the difference spending makes. Scrutiny of the selected areas should consider what is being spent overall, what this is achieving in terms of specific output and outcome measures, and if it is offering value for money.⁶⁵

A series of initiatives from the Scottish Parliament and Scottish Government are moving toward a budgetary process that is more consistent with human rights principles. The National Performance Framework has been recommended as a tool against which to track budget spending against progress per the national outcomes. One of these outcomes is specifically to respect, protect and fulfil human rights. There is a consensus that human rights budgeting provides an improved framework for both the publication and assessment of information on financial decisions.

Dr Alison Hosie has produced a series of papers on human rights budgeting in which she details the progress towards implementation of human rights budgeting in Scotland.⁶⁶ It is clear that the Scottish Parliament and governments have been making positive steps to incorporate human rights standards within their budgeting and budget scrutiny. With the planned incorporation of ICESCR, it is useful to consider how human rights budgeting would aid in fulfilling the right to adequate housing.

What should first be considered is the policy framework wherein the right to adequate housing sits. Per Dr Hosie this entails:

- examining the country's human rights and international human rights obligations and commitments (referring to UN committees for guidance on what particular rights entail e.g. through General Comment 7; consider ECHR jurisprudence, advice from the Special Rapporteur on adequate housing)
- analysing the human rights concerns facing different groups within and across the housing sector (consult stakeholders such as housing associations; civil society partners; advocacy initiatives; equality and human rights organisations)
- designing policies that respond to those concerns (housebuilding; minimum standards, housing tribunal to consider evictions; linkage with other rights such as health and education)
- allocating adequate budget to implement those policies (clear amounts and a schedule as to when spending will occur and by whom)
- monitoring of whether the money was spent as planned, what was delivered and to whom (frequent reviews, ombudsman, civil society forums, parliamentary scrutiny)
- evaluating whether the policy was implemented and what impact it had (parliamentary scrutiny, Audit Scotland, index against National Performance Framework and previous budgets)

With regard to fulfilling human rights obligations to the extent prescribed by the maximum available resources, budget design requires implementation of human rights principles when considering the sources of government spending. While the government may anticipate a reduction in income from taxes, it may be that there is an alternative source of funding. If the state maintains a taxation system that privileges the wealthy at the expense of the less wealthy, then this may be considered a breach of human rights obligations.

States often operate independent planning systems as guarantor of objectivity and community interest. However, there are examples where political influence has been applied to circumvent such measures of community empowerment. Examples of this nature rely on opacity of process and a lack of scrutiny and independence of decision makers. Where a government had made a commitment to fulfilling the right to adequate housing, this would be held up as an instance where the government failed to utilise the maximum available resources by permitting funds to be diverted away from the local authority. Consequently, despite the fact that additional housing is being built, there is a reduction in proportion of affordable housing and the supply fails to increase with demand. There is therefore no progressive realisation of the right. The state funding has been diverted to facilitate greater inequality. An effective participatory decision-making system is a useful way of bringing a diverse analysis of a policy before it is implemented. Stakeholders may have been able to predict the circumvention of the rules in this manner and implement sufficient safeguards.

The human rights budgeting approach can therefore be held in stark contrast to the current approach to budgeting by government. Present budgets make no reference to meeting international treaty obligations. Accounting methods used by the government change frequently rendering the tracking of progress beyond the reach of the vast majority of stakeholders. By remaining confusing and inconsistent, the government disempowers individuals and monitoring bodies, facilitating the political manipulation of contributions to these issues. A human rights-based framework allows not only for the objective and outcome to be compared but for this to be done against specific legal commitments. There is little value in scrutiny without a framework against which objectives are set and thereafter accounted for.

In a paper produced for the Association of Local Authority Chief Housing Officers, Gillian Young of Newhaven Research suggests a set of criteria that could be used to quantitatively measure impact against the seven principles of adequate housing.⁶⁷ As a starting point this framework could be used to stratify available data and identify gaps in the information.

This reinforces the extent to which adequate housing is interdependent upon other rights being adequately expressed. Education, work, social security, freedom from discrimination and access to justice are all fundamentally linked to the right to adequate housing.



SUSTAINABLE DEVELOPMENT GOALS AND POST-COVID RECONSTRUCTION

Centrality of housing to sustainable development goals, Building Back Better principles (lessons from Covid-19), environmental targets and considerations.

Covid-19 has undoubtedly been the most significant event of the century so far. The comparisons to world wars, although often unwelcome, are appropriate inasmuch as there is a comparison to be made with the aftermaths of these significant events. The Great War precipitated the League of Nations; the United Nations and the modern human rights system emerged from the ruins of the second world war. The common thread is the commonality of experience; that these events affected everyone on a fundamental level and revealed deficiencies in state behaviours which prompted innovation and new remedies.

What is also beyond doubt is that the Covid-19 pandemic has highlighted the place of the home in an unprecedented way. The utility of homes has been challenged as they became schools, offices and leisure spaces to a large proportion of the population. Tragically they also became increasingly places of detention; disfunction and even death. This pandemic has been focussed on the home in a way that uniquely highlights the fundamental nature of a right to adequate housing.

In 2014 the UNHCR published their Global Strategy for Settlement and Shelter⁶⁸ outlining key principles reflecting the holistic complement of principles that underpin the right to adequate housing in conjunction with other ESC rights.

These include:

- Protection
- Age, gender and diversity
- Equity
- Accessibility
- Access
- Sustainability
- Community empowerment
- Appropriateness and reliability

This is apt given that this rubric was designed with crisis in mind. Applying these principles to housing in general in the context of disaster recovery is distinctly useful. For example, if we consider that Scotland would wish not to see the same disparities in terms of the effects of the pandemic on ethnic minority people they could look at what systemic factors existed to predict that outcome and how these can be altered. The lower average incomes of black people for example, tended to find them in areas of higher density housing with less leisure space than those in wealthier areas. The negative effects on both physical and mental health of this sort of systemic deprivation require a response from the state that is directly linked to the right to adequate housing linked to services and resources. This could not possibly be attended to in a time of national crisis. However, with the benefit of reflection, this can be addressed in terms of planning policy requiring social or low-cost housing to include access to a better standard of leisure space. The Scottish Government's policy therefore should be to raise the standard for this group that they know to be systemically disadvantaged.

OECD countries have devoted considerable resources to ensuring that industries and people could adapt to the directive to 'stay at home' and drastically reduce human contact. Efforts have been neither universal nor fool proof. The rental sector has been impacted significantly with landlords being prohibited to evict people on account of the public health imperative. Simultaneously, local authorities utilised hotels, hostels and other venues as premises to shelter the street homeless. Other countries have followed the same model of placing people in hotels over the period as an interim measure that is universally seen as unsustainable.

The Scottish and UK Government, like others, offered funding and guidance to local authorities on various aspects of housing during the pandemic. This assisted in procuring temporary emergency accommodation for people.

As a unique event, the pandemic has precipitated a range of new measures that should be carefully monitored and reviewed. The outcomes of these should be analysed and discussed in the context of the rights involved. The Scottish Government is, for example, now exploring retaining some of the additional protections put in place during the pandemic to protect renters from eviction.

Sustainable Development and Build Back Better

The Sustainable Development Goals (SDGs) are the closest the world has come to a strategy to eradicate poverty, address climate change, and build peaceful, inclusive societies by 2030.

This is an almighty challenge but driving implementation of the SDGs can help us become the society we want to be. In Scotland, the National Performance Framework (NPF)⁶⁹, launched in 2018 is the Scottish Government's main local mechanism through which it will implement the SDGs. One of the performance indicators in the framework is to respect, protect and fulfil human rights.

Since the Vienna Declaration and Programme of Action 1993 there has been a growing momentum towards tying rights to goals in order to drive actions, as opposed to rights being little more than declaratory. At this stage, the international human rights framework had experienced the continued challenges presented by the end of colonialism, the demise of the Soviet Union and the emergence of newly independent states. It may have seemed that there was an ideological vacuum wherein human rights standards could expand and fill, regaining prominence by consensus. The 1993 Conference reaffirmed the standards established in the Charter and treaties, with a view to redistributing the established tension between ESC rights and Civil and Political rights. By reframing both sets of rights through the lens of universality, inalienability, indivisibility and interdependence, the declaration sought to establish a level playing field upon which the modern human rights consensus could be built. There was included in the declaration a solemn affirmation of the link between poverty and human rights abuses including the duties of states in alleviating poverty in order that rights could be realised.⁷⁰

Although it was propelled by concerns for the environment, the 1992 Earth summit was the fertile ground upon which the Sustainable Development Goals were conceived, focussing on a global partnership for sustainable development to improve human lives and protect the environment. The discussion mirrors the Vienna Declaration Programme of Action's reaffirmation of the right to development, making it incumbent upon the international community to foster and support the developing world to achieve economic and social development.⁷¹ Out of these initiatives were born the Millennium Development Goals which subsequently grew into the Sustainable Development Goals. With the first of these goals being 'No Poverty', the goals are inextricably linked to ESC rights and became part of the narrative surrounding these rights. The Committee on Economic, Social and Cultural rights endorses a multi-dimensional concept of poverty to define it as 'a complex state of material and non-material deprivations that leads the individual to exclusion.'⁷²

All the goals can be directly or indirectly linked to the right to an adequate standard of living. Although they broaden to include issues related to the environment and sustainable resource use, there are parts of the world, and even parts of Scotland where those issues directly impact the right to adequate housing.

The effect of the Covid-19 pandemic upon the realisation of these goals is starkly characterised in the most recent United Nations Sustainable Development Goals report, where it is described as 'the worst human and economic crisis of our lifetime'⁷³. The report notes that the pandemic has 'exposed and exacerbated existing inequalities and injustices'⁷⁴. This is the case globally and per individual state. The inevitability of this is, in some ways, the reason for the existence of the doctrines underlying the need for ESC rights to be practically regarded as equal to civil and political rights.

At the Vienna conference, the issue was live with the proposition of an individual complaints mechanism to the International Convention on Economic, Social and Cultural Rights. Parties who rejected it saw it as an impractical step which infringed upon states decision-making powers regarding their resources.⁷⁵ By contrast, its proponents sought a judicial mechanism to provide interpretation and clarity for its provisions and thereby assist state compliance.⁷⁶ There has been no shortage of commentators to state that the UN needed to increase its commitment to economic, social and cultural rights; not only for their own sake but reasoned around the impact that poverty had on human rights abuses.⁷⁷ Civil society actors such as Amnesty have provided evidence of this reality,⁷⁸ marking in particular the economic, social and cultural rights that mirrored the Millennium Development Goals such as education, clean water and healthcare, and lamenting the lack of legal enforcement of these rights.⁷⁹

The progress from this discussion to unanimous ratification of the optional protocol including the complaints mechanism was by no means automatic, and it paralleled the development of the sustainable development agenda. 1992-2012 marked a significant gap in time to address the issue with the United Nations Conference on Sustainable Development, and the Sustainable Development Goals were not on the agenda until a preparation event one year prior. The Millennium Development Goals were established in 2000 with similarities in relation to targets but the human rights policy suggestions were general and there was less involvement by human rights advocates in their articulation and founding philosophy. The general aims were reaffirmed at the Johannesburg Summit in 2002. Views as to their effectiveness are mixed. However, both the Millennium Goals and Sustainable Development Goals are unequivocal about poverty and its consequences.⁸⁰

It is clear that pragmatism is behind the Sustainable Development Goals. They emerge from a decades long consensus, explored and advanced via a number of global conferences, best described by the Brundtland conference as 'development which meets the needs of current generations without compromising the ability of future generations to meet their own needs'⁸¹. Much stock is placed in the breadth of support and engagement of states to the goals and to the fact that they now have the force of a UN General Assembly resolution.

Human rights actors had significant involvement in negotiating the goals and the concerns. Although there has been considerable critique of the goals and their composition, they represent an unprecedented agreement among state actors and NGOs of the urgency of addressing development and engaging human rights in the process. Winkler and Williams proffer that:



The 2030 Agenda is built on the dimensions of people, planet, prosperity, peace and partnerships. Making the connections and finding comprehensive solutions is complex – but that is the strength of having the 2030 Agenda grounded in human rights. International human rights law provides a scaffolding, and accountability mechanisms, that allow a systems-based and consistent response to sustainable development that can bring about transformative, structural change to reduce inequalities and challenge power imbalances. Because the world adopted the SDGs, they offer one of our best, contemporary global opportunities to oppose social injustices that human rights advocates can use as a tool.⁸²

There is naturally discussion and commentary about the shortcomings of the Sustainable Development Goals. Some commentators bemoan the imprecise language and the lack of precise unequivocal links to ESC rights.⁸³



BECAUSE THE WORLD ADOPTED THE SDGS, THEY OFFER ONE OF OUR BEST, CONTEMPORARY GLOBAL OPPORTUNITIES TO OPPOSE SOCIAL INJUSTICES THAT HUMAN RIGHTS ADVOCATES CAN USE AS A TOOL.

That ‘Build Back Better’ has gained traction as a maxim in relation to recovery from the pandemic is notable. The phrase has a specific legacy in disaster recovery, used internationally since 2006 in relation to the 2004 Indian Ocean Tsunami response and to subsequent catastrophes since then. It encompasses 10 key principles, the last of which is ‘good recovery must leave communities safer by reducing risks and building resilience’.⁸⁴

Resilience is a central theme to the approach, and this is framed in terms of sustainable development by Stephane Hallegatte, Jun Rentschler and Brian Walsh, authors of a 2018 report into the concept:



As the Unbreakable report has shown, poor people are not only more vulnerable to natural hazards, they also tend to have access to fewer post-disaster support mechanisms, such as insurance, borrowing, or remittances, and have fewer savings to draw on. As a consequence, they tend to experience higher losses relative to income, and often have to resort to “negative coping mechanisms” such as reducing food intake, cutting down on health care, or reducing education spending.⁸⁵

The report examines, food security, health provision, education, household incomes and childhood development, all of which are disproportionately negatively affected relative to poverty. The lack of available resilient welfare disaster prevention or mitigation measures can be seen to directly inhibit both economic, social and cultural rights and civil and political rights.⁸⁶

UN Secretary-General Antonio Guterres places human rights at the centre of the global COVID-19 response,⁸⁷ emphasizing the following six interconnected human rights messages:

1. Protecting people’s lives is the priority, protecting livelihoods helps us do it: dealing with the economic and social impact alongside the public health response
2. The virus does not discriminate, but its impacts do: inclusive responses to a global threat to ensure no one is left behind
3. Involve everyone in your response: participation in open, transparent and accountable response
4. The threat is the virus, not the people: emergency and security measures, if needed, must be temporary, proportional and aimed at protecting people
5. No country can beat this alone: global threats require global response
6. When we recover, we must be better than we were before: The crisis has revealed weaknesses that human rights can help to fix

It has been argued that human rights are too often an afterthought in recovery operations and that they should inform and curate the perspective through which resilient disaster recovery is carried out. While all states can be implored, as above, to respect and promote economic, social and cultural rights, as some states have, the treaty is reliable to the extent that states need only comply with it to the maximum of their available resources. In the circumstances, the role of the Committee on Economic, Social and Cultural Rights and other UN bodies goes no further than it did previously:



The United Nations’ seeming de-emphasis of human rights accountability, reparations, and enforcement, in my view, suggests that the United Nations implicitly yields to the more nationalist rhetoric of more authoritarian (or authoritarianism-inclined) States zealous of asserting exclusive authority and jurisdiction over human rights violations against populations during the Covid-19 pandemic.⁸⁸

The conjunction of the Covid-19 disaster relief effort and the forum of the Sustainable Development Goals presents an opportunity to marshal a response to the pandemic in a manner that prioritises economic, social and cultural rights.

The universal nature of the pandemic has highlighted the pre-existing structural equalities (as have other contemporary political events) in an unprecedented manner. The 2020 SDG report makes frank determinations about the prospects of the 2030 agenda. The cost to economies of medical treatment, prevention of deaths and loss of life continues to rise immeasurably. One could make the case that the importance of measures to promote those rights that preserve life and livelihoods has never been more acute and that economic, social and cultural rights are the natural focus of a recovery effort focused on resilience following a disaster of this nature given the nature of the damage. Tragically, the pandemic has underlined the purpose and need for this societal development and the rights which underpin it, as well as laying bare the relationship between sustainable lives and livelihoods.



Vulnerable populations are not ‘fragile’ populations, but rather, disempowered populations whose full political, civil, economic, social, cultural, and developmental rights have not been the central focus of any grand ambitious global strategy such as the SDGs under Agenda 2030.⁸⁹



THE UNIVERSAL NATURE OF THE PANDEMIC HAS HIGHLIGHTED THE PRE-EXISTING STRUCTURAL EQUALITIES IN AN UNPRECEDENTED MANNER.

Sustainable Development Goals are not legal instruments and their lack of precision in that regard is a hinderance where legality is concerned. However, there is unprecedented participation of parties and accountability measures are still being developed, with the input of human rights advocates. As Winkler points out: 'They require all countries to reduce inequalities, even where absolute deprivation is low and/or small pockets of people experience persistent marginalisation.' With 17 articulated goals and 169 targets, there is considerable detailed material for advocates and rights-bearers to interrogate the policies of governments and corporations: an empowering format for development of rights. 'Human rights advocates do not have to sacrifice their priorities in order to engage with SDG implementation and monitoring; quite the contrary, the imperative is to inject precisely those priorities into these efforts.'⁹⁰

The global recovery from Covid-19 has yet to present its forecasted challenges. What is clear from the UN reporting is that indicators relating to economic, social and cultural rights were already depressed. A return to prioritising civil and political rights at their expense will have a further negative impact but it need not be a foregone conclusion. The abundance of supportive data strengthens the argument for advancing the cause of economic, social and cultural rights especially at the time when states are to become ever more reliant on their citizens for their political recovery in the wake of Covid-19.

Consistent with the sustainable development agenda is the need for community empowerment. 2007 saw the world economy hobbled because of lax regulation that allowed the trading of insecure financial instruments based on the housing market. One of the consequences of the 2007 crash was a wider understanding of financial instruments, and governments being held to account for jeopardising such a fundamental facet of life through lax regulation. It is regrettable therefore that states are still being rebuked, for example by the Special Rapporteur for adequate housing, where the investment in the housing market emanates from an opaque private sector. Both the investment and activity of private housing providers merits caution as states have proven unwilling or unable to impose a level of monitoring and regulation that guarantees the sustainability of housing according per Article 11. On the contrary, the Special Rapporteur considers insecure speculative investment in housing to be a cause of poverty and inequality in housing.

A number of countries, including Scotland, placed a moratorium on evictions during the Covid-19 pandemic on the grounds that they created movement of people which was contrary to public health policy in the crisis. This reflected a hierarchy of need; in this instance the necessity of the preservation of life superseded the liberty of property owners to treat their property as they saw fit. This is a particular dichotomy in Scotland where 80% of rented housing is in the private sector. Such an intervention reminds us of a potential strain between the right to housing and the right to property enshrined in Article 17 of the UDHR.⁹¹

States are entitled to utilise mechanisms such as rent controls to ensure affordability and minimum building standards to ensure the quality of private sector housing. Default forms of tenancy have emerged from common law in Scotland and developed into statute to protect tenants from the arbitrary exercise of power by landlords. The extent to which these interfere with a landlord's disposal of their property can be answered judicially. In June 2021 the United States Supreme Court, while allowing the Center for Disease Control to maintain their moratorium on evictions signalled that it had to be finite and proportionate to the purpose, being to avoid movement in areas where infections continued to increase. This was on the basis of potential unlawful interference with the landlord's property right under their constitution.

Financial hardship leading to rental arrears caused by the pandemic has been a cause for concern. The Scottish Government launched a grant fund for tenants to alleviate this, expanding the financial relief offered to those in difficulty⁹²; though as a finite fund some have expressed concerns this will not go far enough.

In parallel the United States Congress approved \$46 billion in rental assistance earlier in the pandemic but only a small proportion of this (\$3 billion) had been distributed by the end of June. The United States Attorney General recently urged lawyers to volunteer their time to represent tenants in an anticipated avalanche of eviction actions.⁹³ This is an example of a nation failing to budget along the lines of a comprehensive right to adequate housing. Housing provision varies significantly between different states with little federal supervision.

Negotiating the relationship between these two sets of rights presents a challenge in a state that is dependent on private sector housing and it is a human rights obligation that the state must address with clarity. A well-resourced justice system should afford redress to all parties and there should be no avenues through which landlords can disguise evictions without accountability. Similarly, where the landlord's interest is upheld there should be immediately viable avenues for tenants to obtain adequate housing. The practical reality is that the state is reliant upon the private sector to meet its obligations and has a duty to facilitate that partnership.

Scotland and the United Kingdom currently face similar challenges to other OECD countries in terms of housing. For instance, the lockdowns caused the suspension of the Affordable Housing Supply programme. This delay will now be compounded by economic factors. Inflated costs of construction have slowed down the delivery of new housing in the UK. Shortages in labour and materials such as timber and cement have already slowed down building. The shortage in labour dates back to the 2007 financial crisis and is currently at its highest level in two decades. This coincides with a massive global housing demand increase over the past year with the UK facing the fastest housing price rise in 17 years.⁹⁴

The reasons for the decline are fairly clear. Britain lost about 40% of its EU workers since voting to leave the European Union and now has migrant labour restrictions in place. The United Kingdom requires 200,000 additional workers by 2025 in order to meet government housing targets. Twenty-nine million homes will need to be retrofitted to meet 2050 net zero carbon targets. Britain is not alone in a lot of these problems and will be competing with other nations for the same resources.

It is important to recognise that the supply of housing affects living standards and inequality. It affects the way that we shape and create urban environments and healthy societies. It will impact climate targets and overall economic growth.

Whatever the solutions are, they must be organised, delivered and monitored for impact assessment and basic accountability, as should the measures taken throughout the pandemic. Commentators have expressed optimism that an unintended consequence of pandemic has been attention paid to the systemic problems of homelessness. The policy innovations should generate useful data for review and analysis.

The existing guiding principles on business and human rights, although not binding, are a comprehensive framework for commercial activity in areas where human rights are engaged. The Scottish Government could consider incorporating these principles to guide procurement, planning and housing development, possibly going as far as applying them to standard terms of contracts, thereby ensuring that commercial organisations were bound in some way to human rights standards.

The case of *Ali v Serco* 2019 promoted such a view whereby the Inner House bench considered that human rights and equality obligations did not pass as a matter of law from the state to parties whom they contracted for services, even where those services were strictly identified as duties of the state. Rather this would have to be on the basis of negotiated contractual terms. Although this decision disappointed many commentators it placed the duty to either follow the court's logic or supersede it with a statutory provision restoring the public function rationale.⁹⁵

The UNCRC Incorporation (Scotland) Bill specifically addressed this mandating that any body providing a service under the act was fulfilling a public function and therefore liable under its provisions.



IT IS IMPORTANT TO RECOGNISE THAT THE SUPPLY OF HOUSING AFFECTS LIVING STANDARDS AND INEQUALITY. IT AFFECTS THE WAY THAT WE SHAPE AND CREATE URBAN ENVIRONMENTS AND HEALTHY SOCIETIES. IT WILL IMPACT CLIMATE TARGETS AND OVERALL ECONOMIC GROWTH.

CONCLUDING REMARKS

Housing is as ideal a paradigm to conceive the incorporation of fundamental human rights as we are likely to find. The social, cultural, economical and environmental factors of housing are as prominent as the legal, and the interplay between these is universally experienced.

It cannot be ignored that since March 2020, the provision and adequacy of housing has been far more decisive to the survival of our communities than ever, with perspectives on housing being challenged by the extreme circumstances. One only needs to consider how the density of housing and provision of local green space has impacted on survival and quality of life for most of the world's populations. In Scotland, there has been a resource expansion in order to maintain people both in their own homes and in emergency accommodation for those who were homeless in a variety of circumstances. The suspension of evictions during the various national and local lockdowns recognises that there are times when eviction is a disproportionate measure and that the right to a home outweighs the property rights of landlords. It is implausible that the state and civil society would discard the wisdom of this experience. Rather, it should be an opportunity to reframe how we conceive our society operating.

It would also be prudent to acknowledge the arguments made before the Supreme Court in respect of the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill. The process of legal challenge underlines the fact that regardless of the issue or rights at stake, Scotland is still in a complicated constitutional situation. It would obviously be far easier if both jurisdictions were synchronised with regard to incorporation of human rights but, in the alternative, the constitutional position places the burden upon Scotland to incorporate treaties in such a manner that is compliant with the Scotland Act and legislatively competent. Without pre-judging the outcome of the case, it highlights issues that will be faced by any attempt at incorporation of human rights, including the right to adequate housing. Again, this is a facet of the multiple dimensions of housing that necessarily will impact upon areas that are reserved to Westminster.

A decision that incorporation needs to be reconsidered should be seen as an opportunity to re-examine the methodology of incorporation so that it does not breach the constitutional boundaries yet retains its maximalist characteristics as far as possible. Elements such as Human Rights Budgeting and the institutionalisation of a human rights-based approach need not be delayed. In fact, they may assist in conceiving of the legal framework in a more accommodated way. Civil society stakeholders too can engage in the programme promoted by the Taskforce and overwhelmingly supported by the parliament.

Lastly, the conjunction between the right to adequate housing and climate justice is becoming increasingly apparent both in terms of the impact of our construction, energy generation and transportation on the environment. There is a need to ensure that current and future housing is delivered in a manner that is progressive in terms of the wider human rights framework, including the engagement of housing related businesses in their human rights obligations. The incorporation of ICESCR in conjunction with a right to a healthy environment presents a pioneering opportunity to demonstrate that adequate housing can be delivered progressively and sustainably.



ELEMENTS SUCH AS HUMAN RIGHTS BUDGETING AND THE INSTITUTIONALISATION OF A HUMAN RIGHTS-BASED APPROACH NEED NOT BE DELAYED. IN FACT, THEY MAY ASSIST IN CONCEIVING OF THE LEGAL FRAMEWORK IN A MORE ACCOMMODATED WAY.

APPENDIX 1: ACRONYMS

CAT – Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1985

CEDAW – Convention on the Elimination of Discrimination Against Women 1979

CERD – Convention on the Elimination of Racial Discrimination 1965

CESCR – United Nations Committee on Economic, Social and Cultural Rights

CRC/UNCRC – The United Nations Convention on the Rights of the Child 1989

CRPD – Convention on the Rights of Persons with Disabilities 2006

ECHR – European Convention on Human Rights 1953 (Incorporated under Human Rights Act 1998)

EHRC – Equality and Human Rights Commission

ESC – Economic, Social and Cultural rights

FMAG – First Minister’s Advisory Group

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICCPR – International Covenant on Civil and Political Rights

NPF – National Performance Framework

NRPF – No Recourse to Public Funds

PSED – Public Sector Equality Duty (Section 149 of the Equality Act 2010)

SHRC – Scottish Human Rights Commission

SST – Scottish Secured Tenancy

SSST – Short Scottish Secured Tenancy

UDHR – Universal Declaration of Human Rights

UNCESCR – United Nations Committee on Economic, Social and Cultural Rights

APPENDIX 2: RELATED DOCUMENTS

Selected international instruments and other documents related to the right to adequate housing.

International treaties

Charter of the United Nations (1945)
Convention Relating to the Status of Refugees (1951)

International Covenant on Economic, Social and Cultural Rights (1966) and its Optional Protocol (2008)

International Covenant on Civil and Political Rights (1966) and its two Optional Protocols (1966 and 1989)

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984) and its Optional Protocol (2002)

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)

Convention on the Rights of the Child (1989) and its two Optional Protocols (2000)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

Convention on the Elimination of All Forms of Discrimination against Women (1979) and its Optional Protocol (1999)
Convention on the Rights of Persons with Disabilities (2006) and its Optional Protocol (2006)

Regional treaties

African Charter on Human and Peoples' Rights (1981)

African Charter on the Rights and Welfare of the Child (1990)

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

European Social Charter (1961)

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- ¹⁶ States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others. (para 11, General Comment 4)
- ¹⁷ General Comment 4, Para 9
- ¹⁸ CESCR, General Comment No. 9: The domestic application of the Covenant, paras 3, 9.
- ¹⁹ The Bonavero Report prepared for the Human Rights Taskforce contextualises this: Manuel Jose Cepeda Espinosa, Kate O'Regan and Martin Scheinin, *The Development and Application of the Concept of the Progressive Realisation of Human Rights*. 28/01/21 p73
- ²⁰ For example, see Human Rights Based Approach | Scottish Human Rights Commission
- ²¹ Gillow v. United Kingdom, 24 November 1986, Series A No. A109.
- ²² Marzari v Italy ECHR 4 May 1999
- ²³ No one shall be subjected to torture or to inhuman or degrading treatment or punishment
- ²⁴ R (on the application of DA and DS and others)(appellants) v Secretary of State for Work and Pensions (Respondent)[2019] UKSC 21, para 35: 'It cannot seriously be disputed that the values underlying the right [to] family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and thus by financial resources adequate to meet basic needs, in particular for accommodation, warmth, food and clothing'

- ²⁵ Art 34(3) In order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.
- ²⁶ Scotland’s legal framework has consistently prioritised provision for the homeless. The Special Rapporteur on adequate housing has called homelessness ‘perhaps the most visible and most severe symptom of the lack of respect for the right to adequate housing.’
- ²⁷ Baroness Hale set out the inadequacy of a vulnerability test based on a comparison with other local homeless people *Hotak v Southwark LBC* [2015]UKSC 30 [2016] AC 811 SC at 93
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- ³⁰ Scottish Human Rights Commission (May 2020), *Housing Rights in Practice: Lessons learned in Leith*
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- ³⁸ Mental Health (Care and Treatment)(Scotland) Act 2003
- ³⁹ Local Government (Scotland) Act 2003, Section 20
- ⁴⁰ UNHCR Factsheet No.21. p31
- ⁴¹ CERD, ICESCR, CEDAW,CRPD
- ⁴² providing the widest protection possible within devolved competence
- ⁴³ Recommendation 1(b) Incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) For information purposes, this Covenant includes for everyone economic, social and cultural rights, including the following:
- right to an adequate standard of living, including the rights to adequate food, clothing and housing and the continuous improvement of living conditions
 - right to the enjoyment of the highest attainable standard of physical and mental health
 - right to education
 - right to social security
 - right to take part in cultural life
- ⁴⁴ <https://undocs.org/A/HRC/37/59>

- ⁴⁵ The medical model describes disability as a consequence of a health condition, disease or caused by a trauma that can disrupt the functioning of a person in a physiological or cognitive way. This model is a conceptualization of disability as a condition a person has and focuses on the prevention, treatment or curing of the disabling condition. The social model focuses on barriers facing people with disabilities instead of concentrating on impairments and deficits of the person with a disability. In this model a person's activities are limited not by the impairment or condition but by environment and barriers are consequences of a lack of social organization.
- ⁴⁶ <https://www.bath.ac.uk/publications/proving-the-value-of-advice-a-study-of-the-impact-of-citizens-advice-bureau-cab-services/attachments/citizens-advice-bureau.pdf>
- ⁴⁷ Availability of services, materials, facilities and infrastructure
- ⁴⁸ Manuel Jose Cepeda Espinosa, Kate O'Regan and Martin Scheinin, *The Development and Application of the Concept of the Progressive Realisation of Human Rights*
- ⁴⁹ All Colombian citizens are entitled to live in dignity. The State will determine the conditions necessary to give effect to this right and will promote plans for public housing, appropriate systems of long-term financing, and community plans for the execution of these housing programs.
- ⁵⁰ Social spending is defined by the law as "spending the objective of which is the solution of unsatisfied basic needs in health, education, environment, water, housing, and those tending to the general welfare and improvement of quality of life of the population..." (Decree 111 of 1996, Article 41)
- ⁵¹ The National Development Plan (NDP) 2018-22 ... aims to boost equality, entrepreneurship and legality. Cross-cutting areas include environmental sustainability; science, technology and innovation; transport and logistics; digital transformation; public services in water and energy; mining resources; identity and creativity; peace building; ethnic groups; people with disabilities; and equality for women. <https://www.oecd.org/dev/americas/Colombia-Country-Note-Leo-2019.pdf>
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- ⁵³ Constitution of Finland subsection 4 of Section 19
- ⁵⁴ "The Constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society" (1.2, second sentence). Section 22, in turn, provides for a general positive obligations clause addressed to all who exercise public authority to guarantee the enjoyment of constitutional rights and (international) human rights.
- ⁵⁵ Section 22 of the Constitution: Exercise of public authority shall ensure the enjoyment of constitutional rights and (international) human rights.⁸²
- ⁵⁶ Section 19.1 Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care
- ⁵⁷ The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing.
- ⁵⁸ See section 26(1) of the Constitution, and similarly sections 27(1)(a), (b) and (c).
- ⁵⁹ <https://theconversation.com/south-african-policies-go-some-way-to-tackling-poverty-and-inequality-but-more-is-needed-151696#:~:text=South%20Africa%20is%20one%20of,those%20living%20in%20rural%20areas.>
- ⁶⁰ Article 22(2) of the Constitution of the Kingdom of the Netherlands: «It shall be the concern of the authorities to provide sufficient living accommodation».
- ⁶¹ <https://www.government.nl/topics/housing/rented-housing/involving-the-rent-tribunal>

- ⁶² Article 65 Constitution of Portugal, Comparative Constitutions Project
- ⁶³ <https://www.gov.scot/publications/scottish-household-survey-2019-key-findings/pages/5/>
- ⁶⁴ Article 4: The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.
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- ⁶⁷ ALACHO (2021), The Right to Adequate Housing, p19
- ⁶⁸ UNHCR (2014) Global Strategy for Settlement and Shelter
- ⁶⁹ National Performance Framework, <https://nationalperformance.gov.scot/>
- ⁷⁰ Para 1 Part 25 VDP: “25. The World Conference on Human Rights affirms that extreme poverty and social exclusion constitute a violation of human dignity and that urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.”
- ⁷¹ Part I, para 10 states: “The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the Right to Development, the human person is the central subject of development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights. States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development. Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.”
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Scotiabank House, 6 South Charlotte Street | Edinburgh | EH2 4AW | shelterscotland.org