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Austerity as Retrogression: The Rights to Adequate Housing and Social Security in the United Kingdom and Ireland

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Declaration of Originality

I, Poonam Shokar, do hereby declare that the work submitted for examination is my own and that due credit has been given to all sources of information contained herein. With this declaration, I certify that I have not obtained a degree at the University of Galway, or elsewhere, based on this work. I acknowledge that I have read and understood the Code of Practice for dealing with Plagiarism and the University Code of Conduct of the National University of Galway and that I am bound by them.

Poonam Shokar

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Summary of Contents

Austerity measures adopted by State Parties since 2008 had a detrimental impact on social housing and welfare, deteriorating the enjoyment of the rights to housing and social security under the International Covenant on Economic, Social and Cultural Rights. The doctrine of non-retrogression – the obligation prohibiting State Parties from taking backwards steps in the enjoyment of Covenant rights – holds immense potential in holding State Parties accountable for adopting austerity measures which deteriorate the enjoyment of Covenants rights.

The thesis attempts to categorise the use of austerity measures by the United Kingdom and Ireland as contrary to the doctrine of non-retrogression under the Covenant in relation to the enjoyment of the rights to adequate housing and social security. To achieve this, a two-pronged assessment of deliberately retrogressive measures is carried out: first, the State Party intention in adopting austerity measures is examined; second, a normative and empirical assessment of the doctrine of non-retrogression is conducted in relation to social housing and welfare legislation and policies adopted by the United Kingdom and Ireland from 2008 to 2021.

The thesis is interdisciplinary in its approach. First, both the doctrine of non-retrogression and austerity are unpacked, relying upon the disciplines of law, political philosophy and political economy to establish an overall framework to analyse deliberately retrogressive measures. Second, a doctrinal analysis of the rights to adequate housing and social security is undertaken to tailor a criterion for determining retrogression specifically for these rights. Third, a qualitative socio-legal analysis of British and Irish parliamentary budget debates is conducted to gauge whether the measures adopted by the State Parties were intended to be deliberately retrogressive. Finally, British and Irish social housing and welfare policies and legislation adopted from 2008 to 2021 are assessed from a normative and empirical perspective to determine whether they are deliberately retrogressive.

1. Introduction

The doctrine of non-retrogression seeks to prevent deliberate backwards steps towards the enjoyment of protected rights being adopted by State Parties to the International Covenant on Economic, Social and Cultural Rights. Despite its significant role in the protection of Covenant rights, the doctrine has received insufficient attention from the Committee on Economic, Social and Cultural Rights.¹ Through its General Comments, the Committee ‘distils its considered views on an issue which arises out of the provisions ... and presents those views in context of a formal statement of its understanding to which it attaches major importance.’² In setting out State Party obligations under the Covenant in General Comment 3, the Committee makes one sole reference to the doctrine of non-retrogression with little elaboration: ‘deliberately retrogressive measures ... require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.’³ The lack of application of the doctrine is likely due to evidential and conceptual challenges regarding its boundaries and enforcement.⁴

As a result, the doctrine of non-retrogression has rarely been utilised by the Committee in its Concluding Observations on State Party reports, perhaps owing to its paralysing conceptual confusion and practical ambiguity.⁵ Without a functioning doctrine of non-retrogression, the Committee is left with fewer tools at its disposal to identify breaches of the Covenant, especially in relation to the adoption of austerity measures since the global financial crisis which have exacerbated inequality and poverty.⁶ Furthermore, the lack of application of the doctrine thwarts attempts by civil society-based organisations to hold State Parties accountable for the backwards sliding in the protection of Covenant rights. Nonetheless, the global financial crisis and the proliferation of

¹ Aoife Nolan, *Economic, Social and Cultural Rights after the Global Financial Crisis* (Cambridge University Press 2015) 121.

² Phillip Alston, ‘The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law’ in Georges Abi-Saab, *The International Legal System in the Quest of Equity and Universality* (Brill 2001) 764.

³ UNCESCR, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the Covenant)’ (14 December 1990) UN Doc E/1991/23, para 8.

⁴ Ben Warwick, ‘Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights’ (2019) 19 *Human Rights Law Review* 467, 467.

⁵ *Ibid.*, 467.

⁶ Aoife Nolan (n 1) 23.

austerity measures have brought the doctrine of non-retrogression to the fore of economic, social and cultural rights scholarship and by the Committee through General Comment 19.⁷

Consequently, an opportunity arises to examine the doctrine of non-retrogression and analyse whether the adoption of austerity measures by State Parties of the Covenant in relation to social housing and social security are inherently retrogressive. With this in mind, the thesis examines the measures adopted by the United Kingdom and Ireland from 2008 until 2020/21. Choosing the United Kingdom and Ireland permits an examination of retrogression in two different contexts. As shown through the thesis, the United Kingdom has successively adopted a pro-austerity agenda for decades, whereas Ireland, as a result of international public debt, has adopted a pro-austerity agenda. Therefore, it is of interest to examine whether both contexts where austerity measures have been adopted would be considered deliberately retrogressive by the Committee.

Furthermore, United Nations human rights experts have recognised the impacts of austerity on human rights in the United Kingdom and Ireland. For example, the previous Special Rapporteur on Extreme Poverty and Human Rights, Phillip Alston, noted from his visit to the United Kingdom in 2018 that policies such as Universal Credit were fashioned under a 'rubric of austerity.'⁸ As a result of austerity-based policies, more of the UK population have been pushed into a cycle of poverty, severely impacting marginalised groups such as ethnic minorities, the disabled and single parent families.⁹ Similarly, then Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona on her visit to Ireland in 2011, noted concern regarding adjustment and recovery policies with the National Recovery Programme 2011 - a pro-austerity agenda - from a human rights perspective. She emphasised the need for a review of budgetary policies to ensure they comply with fundamental human rights principles.¹⁰

⁷ Ibid, 121.

⁸ UNHRC Special Rapporteur Phillip Alston, 'Visit to the United Kingdom of Great Britain and Northern Ireland; Report of the Special Rapporteur on Extreme Poverty and Human Rights' (23 April 2018) UN Doc A/HRC/41/39/Add.1, 2.

⁹ Ibid.

¹⁰ UNHRC, 'Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Carmona; Addendum Mission to Ireland' (17 May 2011) UN Doc A/HRC/17/34/Add.2, 7.

More recently, the current Special Rapporteur for Extreme Poverty and Human Rights, Olivier De Schutter emphasised that due to austerity, many States were ill-equipped for the Covid-19 pandemic in a range of sectors such as health and social security.¹¹ From a rights-based perspective, the incapacity of the public sector to meet demand in a time of crisis – as a result of austerity measures – makes clear the need for adequate public funding to institutions and programmes which deliver socio-economic rights such as housing, social security, education etc.¹² With this in mind, there is scope to examine the long-term detrimental impact of austerity measures on social housing and social welfare in the United Kingdom and Ireland. Against this backdrop, this introductory chapter outlines the purpose, methodology and framework of the thesis. In addition, the concept of austerity and the doctrine of non-retrogression are defined to provide the framework of analysis for the chapters which follow.

1.1 Purpose and Contribution of the Thesis

The thesis engages in an assessment of whether the adoption of austerity measures by the United Kingdom and Ireland are inherently retrogressive considering their State Party obligations relating to the rights to adequate housing and social security under the International Covenant on Economic, Social and Cultural Rights.

The doctrine of non-retrogression has immense potential for the Committee to hold both of these State Parties accountable for their use of austerity measures which have impacted the enjoyment of the Covenant rights. However, the doctrine of non-retrogression is underutilised by the Committee in addressing the question of whether the adoption of austerity measures is inherently retrogressive. The thesis demonstrates how the doctrine of non-retrogression can be utilised in the context of the right to housing and social security to highlight the impact and link between the use of austerity measures and the retrogression of Covenant rights. The analysis also includes the British and Irish response to the COVID-19 pandemic to discern if there has been a shift from a pro-austerity agenda in social housing and welfare policy formulation.

¹¹ UNHRC Special Rapporteur Olivier De Schutter, 'Looking Back to Look Ahead: A Rights-Based Approach to Social Protection in the Post COVID-19 Economic Recovery' (11 September 2020) UN Doc A/HRC/RES 44/13, 5, para 8.

¹² Sandra Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression' (2021) 37(2) South African Journal on Human Rights 181, 182.

In addressing whether the adoption of austerity measures in relation to social housing and welfare in the United Kingdom and Ireland are inherently retrogressive, the thesis aims to overcome several barriers. First, the lack of expansion on the doctrine of non-retrogression by the Committee muddies the criteria of how States Parties may violate the doctrine of non-retrogression, including the consequences of violation. Second, the Committee has not expressly stated that there is an inherent link between the use of austerity measures and retrogressive practices.

The thesis overcomes these barriers through consolidating the works produced by academics and the Committee on the doctrine of non-retrogression to conceptualise how the doctrine could operate to provide a human rights-based analysis of the impact of austerity measures adopted by the State Party. Furthermore, the interdisciplinary approach of the thesis, as elaborated in the methodology section, utilises a combination of doctrinal and qualitative research methods, drawing from human rights law, political philosophy and political economy disciplines to provide depth to the assessment of the doctrine of non-retrogression in relation to austerity measures adopted concerning social housing and social housing welfare.

Both the rights to adequate housing and social security are essential.¹³ Access to housing and income are integral components in providing stability to the individual, upon which they can self-actualise and enjoy further rights.¹⁴ The scope of the thesis is narrowed to State provided housing and related welfare assistance, otherwise referred to as ‘social housing’ and ‘social housing welfare.’ In relation to recipients of social housing and welfare, it is important to examine whether policies adopted by the State Party such as austerity measures caused a deterioration in the living standards of already vulnerable recipients.

¹³ For literature surrounding the right to housing and social security, see: Chester Hartman, *The Case for a Right to Housing* (Taylor and Francis 1998); Rachael Bratt, Michael Stone and Chester Hartman, *A Right to Housing: Foundation for a New Social Agenda* (Temple University Press 2006); Kirsten Adams, ‘Do We Need a Right to Housing?’ (2008) 9 Nev. LJ 275; Eugene Steuerle and Jon Bakjia, *Retooling Social Security for the 21st Century: Right and Wrong Approaches to Reform* (The Urban Institute 1999); Paul Spicker, *How Social Security Works: An Introduction to Benefits in Britain* (Bristol University Press 2011); Frans Pennings, ‘Social Security’ in *Routledge Handbook of the Welfare State* (Routledge 2018) 355-376.

¹⁴ UNCESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)’ (04 February 2008) UN Doc E/C.12/GC/19, 3, para 6; UNCESCR, ‘General Comment No.4: The Right to Adequate Housing (Art.11(1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23, 2, para 7.

With this terminology in mind, the thesis does acknowledge the changes to provision of social housing to include a mixture of local authority and non-state actors as well as the growth in providing personal targeted welfare subsidies to welfare recipient, such as the housing benefit, Rent Supplement and Housing Assistance Payment, to meet the costs of housing in the United Kingdom and Ireland. As a result, in order to keep the scope of the thesis as narrow as possible, targeted welfare subsidies and non-state actor stocks are included within the assessment of the doctrine of non-retrogression to provide a holistic understanding of social housing legislation and policies.

However, there is a predominant focus on the housing provided by state actors such as the local authority and their related welfare subsidies. Though existing socio-economic rights scholarship by academics such as Aoife Nolan, Ben Warwick and Diane Desierto explore the doctrine of non-retrogression and how an assessment could be conceptualised, there is a lack of research which tailors the doctrine of non-retrogression to specific Covenant rights. Therefore, the thesis seeks to contribute to the conceptualisation of the doctrine of non-retrogression in relation to the rights to housing and social security. Utilising an interdisciplinary approach in the research strives to provide a means of applying a human rights-based approach to social policy decisions. As a result, the thesis should be informative to a variety of actors, governmental or civil society-based, on how social policy can be tailored to reflect a human rights-based approach.

1.2. Methodology

The thesis attempts to address the retrogressive nature of austerity measures through employing an interdisciplinary approach, relying on both doctrinal and qualitative research methods supported by human rights law, political philosophy and political economy disciplines.

First, through doctrinal analysis, the doctrine of non-retrogression is expanded upon with reference to General Comments of the Committee on Economic, Social and Cultural Rights and key scholarship. Supported by political economy studies, austerity is also deconstructed to highlight its economic and political dimensions in State policy decisions. Subsequently, a baseline understanding of the doctrine of non-retrogression and austerity are formulated which aids further explanation of the importance in integrating

a human rights-based approach in social housing and welfare policy.

Second, the thesis interprets Articles 9 and 11 of the Covenant utilising the *travaux préparatoires* of the Covenant, General Comments 3 and 19, Concluding Observations and Optional Protocol Communications to provide an in depth understanding of the meaning, purpose and scope of the rights to adequate housing and social security. From this analysis, an assessment of the doctrine of non-retrogression is tailored to the rights to adequate housing and social security to be applied to the United Kingdom and Ireland as case studies.

Third, the thesis undertakes a socio-legal approach, utilising a qualitative analysis via NVivo of parliamentary debates in the United Kingdom and Ireland. Debates relating to national budgets, social housing and welfare are accessed through the Hansard and Oireachtas archives from 2008 until 2020 to categorise themes relating to a pro-austerity agenda in social housing and welfare policy formation. Doing so permits an interpretation of the deliberateness of retrogressive measures through the perspective of the State justification for adopting austerity measures. As there is a lack of literature surrounding qualitative analysis of parliamentary debates, the qualitative methodology in part follows the model set out by Aude Biquelet-Locke regarding qualitative analysis on the use of referendums.¹⁵ The model envisages utilising an exploratory approach of the data, semi-inductive coding strategy using computer assisted software and a triangulation of the data obtained from the model.¹⁶

Taking this into account, the works of Mark Blyth and Michel Foucault's 'governmentality' supports the qualitative analysis by providing an insight into both austerity and the role of policy and legislation in population control. British and Irish debates are categorised for themes, or rather economic and political features synonymous with a pro-austerity agenda. The data obtained from parliamentary debates regarding national budgets, social housing and welfare is then triangulated with General Comment 4's adequacy requirements to determine the extent to which Covenant obligations are reflected through the Government narrative.

¹⁵ Aude Biquelet and Katja Mirwaldt, 'Improving Robustness in Qualitative Content Analysis: A Three Stage Model for the Analysis of Parliamentary Debates about the Use of the Referendum' (2012) Third Annual New Directions in Analysing Text as Data Conference Draft Paper. See Abstract.

¹⁶ Ibid.

As a result, a top- down analysis is provided on the United Kingdom's and Ireland's approach to austerity in light of their obligations under the Covenant to discern whether measures are intended to be retrogressive in nature.¹⁷ Finally, social housing and welfare legislation and policies are examined from 2008 until 2020/21. The slight difference in time frames in relation to the NVivo analysis and normative and empirical assessment is due to the NVivo analysis being completed in 2020, prior to the normative and empirical assessment being completed. Additionally, the lack of empirical data found during the global financial crisis compelled a slight expansion of the time frame to ensure an effective examination of empirical retrogression within the assessment.

The development of the social housing systems and Concluding Observations of the United Kingdom and Ireland are examined to understand the current enjoyment of the rights to housing and social security. As noted by Nolan, the doctrine on non-retrogression encompasses a normative and empirical dimension. The normative dimension focuses on backwards sliding in *de jure* guarantees while empirical retrogression focuses on *de facto* backwards sliding as evidenced by statistics.¹⁸ Therefore, a doctrinal assessment of various housing, welfare and pandemic legislation and policies in the United Kingdom and Ireland are examined. In relation to empirical retrogression, UN human rights indicators support the examination of social housing and welfare legislation and policies utilizing statistics provided by each State Parties' social housing department. In addition, further data is provided by the Office of National Statistics, Central Statistics Office and from organisations such as the Joseph Rowntree Foundation and the Economic and Social Research Institute.

¹⁷ Ben Warwick (n 4) 475-476.

As a result, a holistic assessment of the doctrine of non-retrogression is provided to determine whether the United Kingdom and Ireland have adopted deliberately retrogressive measures in response to the 2008 global financial crisis and COVID-19 pandemic. In particular, engaging in an assessment of normative and empirical retrogression permits the examination of the deterioration in the enjoyment of economic, social and cultural rights despite a *de jure* guarantee provided through legislation. The following sections are dedicated to expanding on the meaning of austerity and the doctrine of non-retrogression. From this, the importance of a human rights-based approach to social policy regarding austerity measures is discussed.

1.3. What is Austerity?

Austerity refers to a 'form of voluntary deflation in which the economy adjusts through the reduction of wages, prices and public spending to restore competitiveness.'¹⁹ The rationale behind an austerity response pushes for greater business confidence and productivity.²⁰ Austerity not only has an economic impact on living standards, but also far-reaching political consequences on the enjoyment of Covenant rights through expenditure cuts to public services provided for individuals unable to access private resources.²¹ Therefore, exploring the political and economic nature of austerity aids in establishing the retrogressive nature of austerity measures.

1.3.1 Economic Dimension

As an economic concept, austerity can be traced back to a variety of economic theories. However, the most prominent sources are the works of Adam Smith and the ordoliberal school of economic thought.²² Smith wrote the *Wealth of Nations* during the 18th Century, where the capitalist economy and the invisible hand had not yet come into existence. The model he creates operates as an alternative to the mercantile system in operation from his time.²³

¹⁸ Aoife Nolan (n 1) 471-2.

¹⁹ Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP 2013) 2.

²⁰ Robert Boyer, 'The Four Fallacies of Contemporary Austerity Policies: The Lost Keynesian Legacy' (2012) 36 *Cambridge Journal of Economics* 283, 283.

²¹ Paul O'Connell, 'Let Them Eat Cake': Socio-Economic Rights in an Age of Austerity' in Paul O'Connell *et al* (eds) *Human Rights and Public Finance* (Hart Publishing 2012) 63-64.

²² Mark Blyth (n 19) 110; Mark Blyth, 'The Austerity Delusion: Why a Bad Idea Won Over the West' (2013) 92 *Foreign Affairs* 41, 45; E Ray Canterbery, *The Rise and Fall of Global Austerity* (World Scientific Pub Co Pte Ltd 2015) 13-17.

²³ GR Bassiry and Marc Jones, 'Adam Smith and the Ethics of Contemporary Capitalism' (1993) 12 *Journal*

of Business Ethics 621, 622.

Through the *Wealth of Nations*, Smith references austerity through the concept of parsimony:

As the capital of an individual can be increased only by what he saves from his annual revenue or his annual gains, so the capital of a society, which is the same with that of all the individuals who compose it, can be increased only in the same manner. Parsimony and not industry, is the immediate cause of the increase of capital. Industry indeed provides the subject which parsimony accumulates. But whatever industry might acquire, if parsimony did not save and store up, the capital would never be the greater.²⁴

He notes how the requirement of saving resources – parsimony - and finance is key to the growth of industry and in turn the economy. Parsimony refers to the quality of being extremely unwilling to spend money or personal frugality.²⁵ Therefore, Smith's form of capitalism relies on the psychological disposition of the individual being to save rather than spend, as those who spend prodigiously are thought to have little virtue or productivity.²⁶ Smith's concept of parsimony is applied on both a microeconomic and a macroeconomic level.

On a microeconomic level, Smith's model attempts to conceptualise a system in which the consumer is both a political and economic citizen.²⁷ On the one hand, the individual, or in this case the merchant, should save their money. However, if a merchant were to never spend at all, the level of capital they would accumulate would remain the same. Therefore, parsimony also envisages a virtue of delayed gratification: to save wherever possible to invest in capital that allows for greater growth in the long-term. Growth, in this form, is linked to the savings and profits of the merchant being lent to other productive members of society to be reinvested into the economy.²⁸

²⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (Salvio Soares (ed), na 1776; Metalibri 2007) 338.

²⁵ ER Canterbery (n 22) 19.

²⁶ Mark Blyth (n 19) 110-111.

²⁷ GR Bassiry and Marc Jones (n 23) 622.

²⁸ Mark Blyth (n 19) 111

At a macroeconomic level, if all individuals followed this virtue of parsimony, society's capital would increase. This focus on saving-led investment can be found in supply side policies which focus on increasing the productivity and efficiency of producers in the economy.²⁹ Smith also envisaged a minimalised role for the State. The State may only intervene in the market solely to provide loans or to subsidise the costs of production for these individuals, thereby accruing debt to ensure the productivity of the private sector.³⁰

Smith's work sets out the course for an austerity-based narrative which has been built upon by various economic theories, in particular by ordoliberal from the Austrian School of economic thought. Overall, ordoliberalism supports the use of 'real austerity,' consisting of cuts to government budgets and taxation, including the sale of government assets and repudiation of government debt.³¹ Differing from Anglo-American liberalism which wishes to limit the role of the State to protect individual freedom, ordoliberals 'see the role of the State as setting the framework conditions necessary for markets to operate effectively in the first instance.'³² Therefore, policies must be established to create order in which private firms are able to fairly compete with each other, leading to economic growth.³³

²⁹ Ibid.

³⁰ Ibid, 113.

³¹ Mark Thornton, 'Real Austerity' (2013) *Revista Procesos De Mercado* 269, 269.

³² Mark Blyth (n 19) 133.

³³ Thomas Biebricher and Frieder Vogelmann, *The Birth of Austerity: German Ordoliberalism and Contemporary Neoliberalism* (Rowman & Littlefield 2017) 189.

When discussing depressions, Friedrich von Hayek posited that the State must resist from utilising monetary policies - such as adjusting interest rates and quantitative easing - to combat the effects of deflation as this would be inflationary and prolong economic depression.³⁴ Additionally, Ludwig von Mises posits that in the event of depression, the economy must adapt itself to the losses incurred due to deflation and depression, therefore the necessary actions moving forward is to curtail consumption.³⁵ As shown, the ordoliberal school of thought notes that firms and consumers allocate resources in the economy whereas the State has a minimised role only to regulate the economic system through, for example, ensuring fair competition. Beyond this form of intervention there are fears of debt or inflationary consequences which impact the economy. Therefore, the State is not only a protector or regulator of the economy, but also can be inferred to be an enemy to the progress of the market economy.

1.3.2 Political Dimension

Politically, austerity measures are thought of as 'official actions taken by the government during a period of adverse economic conditions to reduce its budget deficit using a combination of spending cuts or tax rises.'³⁶ The imposition of these budget cuts or amendments in taxation take place in the decision-making process regarding the national budget. The consequences of these macro-budgeting decisions are two-fold: first, they provide visible overarching public policy measures that decide the size and role of Government in the economy.³⁷ Second, these decisions produce public actions that are intended to have an impact outside of the political system, for example on the public health sector or on education.³⁸

³⁴ Friedrich von Hayek, *Prices and Production and Other works* (George Routledge and Sons, Ltd 1932) 6-7.

³⁵ Ludwig Von Mises, *'The Austrian Theory of the Trade Cycle and Other Essays'* (Ludwig Von Mises Institute 1978) 51; Mark Blyth (n 19) 146-147.

³⁶ Diane Desierto, 'Austerity Measures and International Economic, Social, and Cultural Rights' in E. Criddle, *'Human Rights in Emergencies'* (1st Edition, Cambridge University Press 2016) 241-242.

³⁷ Katherine G Willoughby, *Public Budgeting in Context: Structure, Law, Reform and Results* (John Wiley & Sons 2014) 7.

³⁸ Peter John, *Analyzing Public Policy* (Routledge 2013) 134.

Economic measures such as raising tax and cutting public expenditure are debated through the parliamentary process. States may impose legal frameworks, dictating when a budget should be submitted, debated and implemented or impose fiscal rules to hold Governments to account on the quantitative spending of the budget.³⁹ However, where there is little political consensus or public support, the enforcement of these rules may be inefficient.⁴⁰ Moreover, during a recession, the justification of austerity as a macroeconomic necessity may allow for policy decisions and amendments to be passed with little parliamentary and public scrutiny, given the urgency required in an economic crisis.⁴¹ Therefore, a distinction between policy and legislation can be defined. Legislation sets out the parameters of illegal and legal conduct and faces parliamentary scrutiny while the realm of policy is more flexible, subject to differing parliamentary scrutiny than the law and may impose additional requirements to aid in the functioning of the economy and order in a society.⁴²

Austerity's political influence and appeal can also be attributed to ordoliberalism. Foucault observes that ordoliberalism provided the foundation in which neoliberalism could be realised. He notes how both neoliberalism and ordoliberalism have similar principles, being a repulsion to State-controlled planning and interventionism.⁴³ Additionally, Foucault analyses ordoliberalism as containing a political oncology that focuses on a specific technology of power: specific practices of governing.⁴⁴ For example, the State can pass legislation enforcing fair competition between firms and consumer protection as a means to govern its citizens in a minimal fashion. As a result, it can be inferred that policies such as a living wage or an increase in corporation taxes would cross the boundaries of State intervention. Therefore, the ordoliberal governmentality requires the State to regulate itself and intervene only to ensure the functioning of the economy.

³⁹ Ian Lienert, 'Role of the Legislature in Budget Processes,' *The International Handbook of Public Financial Management* (Springer 2013) 6.

⁴⁰ Ibid.

⁴¹ Mary P Murphy, 'Ireland: Celtic Tiger in Austerity-Explaining Irish Path Dependency' (2014) 22(2) *Journal of Contemporary European Studies* 132, 138.

⁴² Ibid, 352.

⁴³ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979.* (Michel Senellart (ed), Graham Burchell (tr), Palgrave MacMillan, 2008) 270-271.

⁴⁴ Ibid, 240.

Similarly, neoliberalism consists of 'an attempt to revive the spirit of classical liberalism and to strip the liberal tradition of reliance of State intervention in the economy',⁴⁵ for example, through self-regulating markets. There is a predominant focus on individual freedom in society, where social mobility can solely be obtained through the market and reduced role of the State.⁴⁶ Foucault further notes the transformation of the civilian into an active counterpart to governmentality: *homo oeconomicus*:

homo oeconomicus is someone who is eminently governable. From being the intangible partner of laissez-faire, *homo oeconomicus* now becomes the correlate of a Governmentality which will act on the environment and systematically modify its variables.⁴⁷

Foucault not only differentiates neoliberalism from classic liberalism where the civilian is a quasi-naturalistic and ungovernable economic subject, but also notes how, as an economic subject, the civilian may be prone to further manipulation and construction.⁴⁸ What can be drawn from *homo oeconomicus* is that in the neoliberal ideology, the market becomes an institutional tool of discrimination.⁴⁹ The State only intervenes to ensure that the economy functions, therefore in the name of the market, policies and legislation are passed to benefit actors in the market to spur the economy forward.

In tandem with Blyth's economic blueprint, austerity coincides well with neoliberal governmentality. As an economic tool, austerity forms part of the government tool kit, which is used to create certain economic responses, for example growth.⁵⁰ Through cutting public spending and increasing taxation, the Government balances its deficits and begins to mould the ideal citizenry, where individuals are more reliant on the private sector services, such as credit unions, health insurance companies etc.⁵¹ Thereby, a residual welfare state is created where ad-hoc services are provided to those

⁴⁵ Gary Taylor, *Ideology and Welfare* (Palgrave Macmillan 2007) 69.

⁴⁶ *Ibid*, 72.

⁴⁷ Michel Foucault (n 43) 147.

⁴⁸ Mitchell Dean, 'Foucault and the Neoliberalism Controversy' in *The Sage Handbook of Neoliberalism* (SAGE Publications 2018) 40-41.

⁴⁹ Michel Foucault (n 43) 241-249.

⁵⁰ Mark Blyth (n 19) 39.

⁵¹ Emma Dowling, 'In the Wake of Austerity: Social Impact Bonds and the Financialization of the Welfare State in Britain' (2017) 22(3) *New Political Economy* 294, 294.

who are structurally disadvantaged through the capitalist system and policies are formulated to ensure the functioning of firms and the economy.⁵²

1.4 What is the Doctrine of Non-Retrogression?

This section focuses on expanding on the meaning of the doctrine of non-retrogression. General Comments 3 and 19 by the Committee on Economic, Social and Cultural Rights as well as the existing work produced by academics in relation to the doctrine are examined and consolidated to provide a baseline understanding of what the doctrine entails. Through establishing a foundational understanding of the doctrine of non-retrogression, an assessment of retrogressive practices by the United Kingdom and Ireland can be conceptualised in relation to the rights to adequate housing and social security.

1.4.1 Interpretation by the Committee of Economic, Social and Cultural Rights

General Comment 3 of the Committee on Economic, Social and Cultural Rights makes one reference to the doctrine of non-retrogression:

Any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.⁵³

Deliberately retrogressive measures diminish the enjoyment of economic, social and cultural rights. One can infer that in determining whether a measure is deliberately retrogressive has high evidentiary thresholds, as the State Party's whole economic, social and cultural rights framework and resources are called into question. Where the State Party is not able to justify the adoption of a measure in relation to the totality of rights provided in the Covenant and to its maximum available resources, it can be thought to have discharged its obligations under the Covenant.

Though the Committee does not expand on the meaning of a deliberately retrogressive measure in General Comment 3, General Comment 19 provides further elaboration on

⁵² Ibid.

⁵³ UNCESCR General Comment 3 (n 3) para 9.

the meaning of retrogressive measures with regards to the right to social security. The Committee stresses that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant.⁵⁴ The State has the burden to justify the retrogressive measure in light of the totality of Covenant rights subject to maximum available resources.⁵⁵ Additionally, General Comment 19 provides examples of what the Committee assesses regarding retrogressive practices in relation to the right to social security:

The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.⁵⁶

Warwick notes that both General Comments 3 and 19 represent two separate poles of varying complexity in demonstrating the existence of an impermissible retrogressive measure.⁵⁷ He notes that General Comment 3 can be summarised into five criteria:

- 1) the backwardness or stagnation of the measure
- 2) are maximum available resources being used?
- 3) can the measure be proven to be deliberate?
- 4) was the measure taken in careful consideration?
- 5) can the measure be justified by reference of the totality of ICESCR rights?⁵⁸

⁵⁴ UNCESCR General Comment No. 19 (n 14) 13, para 42.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ben Warwick (n 4) 478.

⁵⁸ Ibid.

General Comment 19 provides a range of suggested factors that the Committee can consider in making a finding of retrogression.⁵⁹ While General Comment 19 provides an easier step by step approach in examining retrogressive measures, Warwick has noted that in reality a rigorous step by step approach to retrogression is rarely followed.⁶⁰ Furthermore, the extended criteria provided by the Committee in General Comment 19 can be considered as additional pre-requisites which may further complicate the analysis of retrogression making it difficult to prove.⁶¹

1.4.2 The Doctrine of Non-Retrogression and Other Obligations under the International Covenant on Economic, Social and Cultural Rights

As previously noted, Article 2.1 of the Covenant obliges State Parties to progressively realise all Covenant rights subject to maximum available resources.⁶² In comparison to its sister treaty, the International Covenant on Civil and Political Rights (ICCPR), the Covenant is thought solely to have positive dimensions given the dichotomy imposed by progressive realisation compared to the ICCPR's immediate negative State Party obligations.⁶³ On the contrary, economic, social and cultural rights impose both positive and negative obligations on the State Party.⁶⁴

Attempting to reduce civil and political rights and economic, social and cultural rights to 'negative rights' and 'positive rights' should be approached with caution as 'every right requires both abstention and positive action by the State, there is hardly any right that does not require resources to be implemented and protected.'⁶⁵ The most common examples of a negative obligation in relation to the right to housing would be for the State Party to refrain from forcibly evicting the tenant which is outrightly incompatible

⁵⁹ Ibid, 479.

⁶⁰ Ibid, 480.

⁶¹ Ibid.

⁶² International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1976) UNGA Resolution 2200A (XXI) Art. 2.1 (ICESCR).

⁶³ Magdalena Carmona Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 3.

⁶⁴ Ibid, 4.

⁶⁵ Christian Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration' (2009) 4 *Erasmus Law Review* 379, 381.

with the Covenant,⁶⁶ and preventing the underdevelopment of housing that meets cultural needs.⁶⁷

Desierto posits that at its core, the doctrine of non-retrogression serves the important purpose of evaluating whether or not States are fulfilling their obligations to progressively realise the rights protected by the Covenant.⁶⁸ Additionally, she suggests that in combination with the principle of non-retrogression, the principle of non-discrimination and the minimum core content form a 'normative lattice' upon which the Committee is able to interpret and analyse alleged violations by State Parties of the Covenant.⁶⁹ In addition, Nolan and Courtis define retrogression through the dimensions of the obligation of progressive realisation as envisaged through Article 2.1 of the Covenant. They define progressive realisation as comprising of two elements: being a necessary contextualisation device in reflecting real world resource constraints of the State in fulfilling economic, social and cultural rights and having a meaning of improvement and advancement.⁷⁰ It is in this latter meaning that the doctrine of non-retrogression can be found as a means of protecting advancement through prohibiting deterioration or backwards sliding.

Taking these analyses a step further, progressive realisation, the minimum core content and non-discrimination impose clear positive and negative obligations to State Parties in advancing economic, social and cultural rights to all persons regardless of race, gender, sex etc.⁷¹ Meanwhile, the doctrine of non-retrogression imposes a negative obligation, being the prohibition of the State Party adopting measures which reduce the entitlements of right holders since ratification of the Covenant.⁷² As a result, the doctrine of non-retrogression implicitly counterbalances the obligation of progressive

⁶⁶ UNCESCR, 'The Right to Adequate Housing (Art.11) Forced Evictions: General Comment 7' (20 May 1997) UN Doc E/1988/22, para 1.

⁶⁷ UNCESCR General Comment 4 (n 14) 6.

⁶⁸ Diane A Desierto and Colin E Gillespie, 'A Modern Integrated Paradigm for International Responsibility Arising from Violations of Economic, Social, and Cultural Rights' (2014) 3 Cambridge International Law Journal 556, 574.

⁶⁹ *Ibid*, 569-570.

⁷⁰ Aoife Nolan (n 1) 122-123; UNCESCR General Comment 3 (n 3) para 9.

⁷¹ ICESCR (n 62) Arts 2.1, 2.2.

⁷² Aoife Nolan (n 1) 123.

realisation through reinforcing the *raison d'être* of the Covenant that rights must be advanced and improved upon and not encroached.⁷³

1.4.3 Austerity Measures as Deliberately Retrogressive Measures

General Comment 3 highlights that any deliberately retrogressive measure carried out by the State Party requires 'the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of maximum available resources.'⁷⁴ As austerity measures are designed with an intention to cut back public services such as health, social security and housing – which have negatively impacted the enjoyment of Covenant rights and exacerbated poverty and inequality⁷⁵ – there are grounds to categorise austerity measures as deliberately retrogressive.

In examining the deliberateness of retrogressive measures, Warwick provides two meanings of deliberate retrogression. The first is that the measure is in itself deliberate but the retrogression was not deliberate necessarily; the second is that the nature of the measure was deliberately constructed to be retrogressive.⁷⁶ The latter meaning has also been affirmed by both Sepúlveda and Nolan, with both implying that retrogression taken intentionally by the State fits the meaning of deliberately retrogressive measures.⁷⁷ With this latter meaning in mind - though there are further criteria which determine whether measures are deliberately retrogressive - the thesis seeks to categorise the use of austerity measures as having the deliberate intent to be retrogressive in nature when taking into account Covenant rights.

Linking the adoption of austerity measures and deliberately retrogressive measures together is not straightforward. General Comment 3 emphasises the significance of the minimum core content of Covenant rights being protected by State Parties. Even in light of economic constraints 'whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must

⁷³ Sandra Liebenberg (n 12) 188.

⁷⁴ UNCESCR General Comment 3 (n 3) para 9.

⁷⁵ Viljam Engström, 'The Political Economy of Austerity and Human Rights Law' (2016) Institute for Human Rights Working Paper No.1/2016, 1.

⁷⁶ Ben Warwick (n 4) 475.

⁷⁷ *Ibid*, 476.

be protected by the adoption of low-cost targeted programmes.’⁷⁸ Therefore, satisfying the minimum essential level of each right falls on every State Party, however, ‘where there is significant deprivation in the provision of goods such as housing and clothing at a basic level, will be considered a failure to discharge Covenant obligations.’⁷⁹

The significance of the minimum core content is further emphasised in the letter addressed to State Parties in 2012 by the Committee in the context of adopting austerity measures to respond to the global financial crisis. The Chairperson of the Committee emphasised the need to ensure the basic protection and fulfilment of Covenant rights during this period of austerity to prevent further risk to individuals and marginalised groups.⁸⁰ The emphasis of the minimum core content in this manner ‘should not be taken as arbitrarily predetermined static quantities, it undergoes dynamic reassessment through the reporting procedure.’⁸¹ In the letter, the Committee emphasised that policies formulated by States Parties to combat the financial crisis must be: temporary in nature; necessary and proportional; and non-discriminatory in nature.⁸²

Though the minimum core content does not adequately justify nor licence a State Parties’ failure to comply with the minimum core content of Covenant rights or neglect their duties relevant to the protection of rights,⁸³ the introduction of the 2012 letter has further complicated the assessment of Covenant obligations. The 2012 letter caused a shift from the ‘business as usual model’ to an ‘accommodation model.’⁸⁴ The ‘business as usual’ model provided daily State Party discretion in realising Covenant obligations through the combination of the doctrine of non-retrogression, Article 2.1 and Article 4.⁸⁵ The ‘accommodation model’ provides a level of flexibility to States to engage in an effective emergency response, which relaxes the rules and norms surrounding Covenant

⁷⁸ UNCESCR General Comment 3 (n 3) para 12.

⁷⁹ UNCESCR, ‘Letter Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights’ (16 May 2012) UN Doc CESCR/48th/SP/MAB/SW.

⁸⁰ Diane A Desierto, ‘Growth versus Austerity: Protecting, Respecting, and Fulfilling International Economic and Social Rights during Economic Crises’ (2012) 57 *Ateneo LJ* 373, 394.

⁸¹ *Ibid*, 379.

⁸² UNCESCR 2012 Letter (n 79).

⁸³ *Ibid*, 378.

⁸⁴ Ben Warwick, ‘Socio-Economic Rights during Economic Crises : A Changed Approach to Non-Retrogression’ (2016) 65 *The International and Comparative Law Quarterly* 249, 249-250.

⁸⁵ *Ibid*, 251.

obligations.⁸⁶ Since the 2012 letter, further critiques of Covenant obligations have been posited by authors such as Johnstone and Ámundadóttir. They have suggested a complete suspension of Article 2.1 in favour of a reinterpretation of the Covenant to create obligations of conduct and results to clarify State conduct.⁸⁷ Meanwhile, Sepúlveda has advocated for a basic social protection floor to ensure that the most vulnerable are protected during economic crises such as that in 2008.⁸⁸

With these critiques in mind, the thesis posits an additional solution to the complexity caused by the Committee 2012 letter. The thesis takes the approach that the doctrine of non-retrogression has immense potential to provide the Committee with an analysis on the adoption of measures – in particular austerity measures – which contribute to a deterioration in the enjoyment of economic, social and cultural rights. Through expanding on the meaning of the doctrine of non-retrogression and applying a framework tailored to various Covenant rights, a more effective assessment of the State Parties compliance to their Covenant obligations is determined. In fleshing out an intentional element in the ‘deliberately’ aspect and engaging in an assessment of both normative and empirical retrogression of the right to housing and social security, a holistic understanding of deliberately retrogressive measures from a social policy and human rights-based lens is obtained.

⁸⁶ Ibid.

⁸⁷ Rachael Johnstone and Aðalheiður Ámundadóttir, ‘Human Rights in Crisis: Securing the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Economic Downturns’ (2013) 1 *Int. J. of Human Rights and Constitutional Studies* 6, 7.

⁸⁸ Aoife Nolan (n 1) 33.

1.4.4 Normative and Empirical Retrogression

Nolan and Courtis build upon the meaning of retrogression through conceptualising two dimensions: normative and empirical. Normative retrogression entails the State taking backwards steps in relation to existing legal protections or guarantees enjoyed by citizens, while empirical retrogression involves the backwards steps in the enjoyment of rights in practice as evidenced through national statistics such as the unemployment rate or claimant count.⁸⁹ Warwick critiques that Nolan and Courtis' definition of retrogression being 'backwards steps' divorces it from hard legal doctrine, as it amounts to largely a tangential reference to retrogression which does not serve to provide greater meaning of retrogression itself.⁹⁰ Furthermore, Warwick notes that the term retrogression has been used infrequently and is often interchanged with the term regressive.⁹¹ Warwick builds upon Nolan and Courtis' work by dividing retrogression into retrogressive measures (normative) and retrogressive effects (empirical).⁹²

Warwick emphasises the overarching preference and straightforwardness of examining retrogression from a normative standpoint, as retrogressive effects can be examined in isolation from each other.⁹³ Furthermore, a paper-based analysis allows for *ex ante* assessment of alleged Covenant violations and identification of expressive harms of retrogression.⁹⁴ However, Warwick highlights the drawbacks of solely utilising a normative analysis being that there is the danger that 'retrogression becomes predominantly an exercise in legal argumentation, and the experiences of individuals become isolated because the effects upon them have been insufficiently long-term, severe or widespread to constitute 'proof'.⁹⁵

⁸⁹ Ibid, 123.

⁹⁰ Ibid, 470-71.

⁹¹ Ben Warwick (n 4) 469.

⁹² Ibid, 471-2.

⁹³ Ibid, 472.

⁹⁴ Ibid.

⁹⁵ Ibid, 473.

Nolan and Curtis posit that an assessment of empirical retrogression requires a comprehensive evaluation of State action and omissions as well as generation and use of available resources.⁹⁶ This evaluation is observed through qualitative indicators and objective socio-economic outcomes relative to the right concerned e.g., employment statistics in relation to the right to work.⁹⁷ Here, State conduct and its maximum available resources are examined *ex post* utilising indicators relevant to the Covenant right engaged. The statistics used can be domestic, as produced by the Office of National Statistics and Central Statistics Office, or internationally as set out by the Office of the High Commissioner of Human Rights in 2012.⁹⁸

Though empirical retrogression implies the use of metrics or statistics to provide a *de facto* assessment of a measure, there is also a possibility of qualitative assessment, through accepting forecasts and testimonial evidence from affected groups.⁹⁹ However, Warwick has warned about the merging of normative and empirical analysis, highlighting that both the retrogressive measures and effects may coincide with each other, which may be problematic as:

A new legislative measure might be retrogressive on paper but not be identified as such because of a lack of interest in the change at the time of its passage. When later retrogressive effects are seen and evidenced, then a claim of double retrogression may occur.¹⁰⁰

⁹⁶ Aoife Nolan (n 1) 124.

⁹⁷ *Ibid.* See Footnote 10 for reference on UN human rights indicators.

⁹⁸ *Ibid.*

⁹⁹ Ben Warwick (n 4) 474.

¹⁰⁰ *Ibid.*

As a result, such overlaps will have to be clearly managed to avoid confusion in this regard.¹⁰¹ Nolan and Curtis note several methodological challenges when the Committee seeks to determine whether empirical retrogression has occurred. Firstly, monitoring State compliance from an empirical standpoint requires a careful monitoring of the degree of empirical retrogression over time, as it is challenging to attribute retrogression from a particular State policy.¹⁰² Doing so involves a sophisticated and complex analysis of official statistics both domestically and internationally to gauge State policy interventions having an adverse outcome on the right holder, which may not be available until an economic crisis or emergency subsides.¹⁰³

Second, assessing empirical retrogression will 'involve a comprehensive assessment of the allocation and generation of financial resources, and thus the role of the Government to the economy.'¹⁰⁴ Both Nolan and Curtis emphasise that this assessment engages different schools of economic thought.¹⁰⁵ While it is possible to attribute the retrogressive impact of State policy decision to a particular economic and political ideology such as neoliberalism, there is reluctance by the Committee to fully comment on the impact on the nature of the role of the State in the economy. In General Comment 3, the Committee comments that:

The undertaking to take steps ... by all appropriate means including particularly the adoption of legislative measures neither requires nor precludes any particular form of Government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. ¹⁰⁶

¹⁰¹ Ibid, 473.

¹⁰² Aoife Nolan (n 1) 128.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ UNCESCR General Comment 3 (n 3) para 8.

In terms of political and economic systems the Covenant remains neutral, and its principles cannot accurately be described as favouring a socialist, capitalist, mixed, centrally planned, or laissez-faire economy.¹⁰⁷ Hence, a flexible approach is taken by the Committee in expressing general concern over the potential negative effects of measures adopted by the State, rather than noting that such measures are impermissible under the Covenant.¹⁰⁸ As long as measures are democratic and the protection and fulfilment of both civil and political rights and economic, social and cultural rights are reflected in the State system in question, the Committee will not conclude a State has empirically retrogressed in their Covenant obligations.¹⁰⁹ Where the State Party begins to prioritise the rights of private entities or adopt policies which negatively impact the enjoyment of Covenant rights, the obligation to respect is violated.¹¹⁰ Therefore, the Committee while remaining flexible in approach does push back on the use of market-based policies where incompatible with the Covenant.

1.5 Criteria for Examining the Doctrine of Non-Retrogression in relation to the Adoption of Austerity Measures

In applying the doctrine of non-retrogression to the adoption of austerity measures both as a response to the global financial crisis and beyond, an impasse is reached given the variety of the criteria which can be applied. The 2012 letter addressed to State Parties by the Committee highlights that austerity measures, if resorted to, should be temporary, non-discriminatory and necessary and proportionate.¹¹¹

Additionally, General Comment 19 in relation to the right to social security provides comprehensive criteria in regards to what the Committee will examine in relation to alleged deliberately retrogressive practices.¹¹²

¹⁰⁷ Ibid.

¹⁰⁸ Aoife Nolan (n 1) 127.

¹⁰⁹ UNCESCR General Comment 3 (n 3) para 8.

¹¹⁰ UNCESCR, 'General Comment No.24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E.C.12/GC/24, 4, para 12.

¹¹¹ UNCESCR Letter (n 79).

¹¹² UNCESCR General Comment 19 (n 14) 12, para 42.

Though, whether all the criteria can be expanded upon to cover all Covenant rights is unclear and perhaps unfeasible. As a result, there are a mixture of rules which can be applied to examine deliberately retrogressive measures, which only serve to muddy the waters on whether a mixed approach of both the 2012 letter and General Comment 19 should be applied or strictly one or the other.

Nolan considers this dilemma and puts forward criteria concerning retrogression for the purposes of Article 2.1 of the Covenant. From her work, retrogression is only permissible when it meets the criteria that it:

- i) Should be temporary in nature and in effect limited to the duration of the crisis.
- ii) Should be necessary and proportionate (and alternative measures comprehensively examined).
- iii) Should be reasonable.
- iv) Should not be directly or indirectly discriminatory.
- v) Should accord particular attention to the rights of disadvantaged and marginalised individuals and groups and ensure that they are not disproportionately affected.
- vi) Should identify the minimum core content of the right(s) in question and ensure the protection of this core content at all times.
- vii) Should have involved genuine participation of affected groups in examining the proposed measures and alternatives.
- viii) Should be subject to meaningful review procedures at national level.¹¹³

Nolan's criteria provide a comprehensive mixed approach of both the 2012 letter, General Comment 19 and the Committee's statement evaluating the obligation on maximum available resources under the Optional Protocol.¹¹⁴ This criterion also coincides with Desierto's commentary of the 'normative lattice' as both the minimum

¹¹³ Aoife Nolan (n 1) 140.

¹¹⁴ UNCESCR, 'An Evaluation of the Obligation to take steps to the "maximum of available resources" under and Optional Protocol to the Covenant: Statement' (10 March 2007) UN Doc E/C.12/2007/1, 2.

core content and principle of non-discrimination are encompassed in the assessment of the doctrine of non-retrogression. However, as the criteria focus on the Committee's work, it excludes Nolan's own work focusing on normative and empirical retrogression. Given the normative preference of Covenant obligations, normative retrogression can be assumed to be the focal point of the assessment. Furthermore, the criteria ignore the interpretation of the doctrine of non-retrogression in General Comment 3, preferring the use of General Comment 19 and the Committee 2012 letter.

While immensely comprehensive and providing a platform to consider the impact of austerity measures on the most vulnerable, it can be thought that the criteria posited by Nolan is overly complex combining a range of Committee materials which envisage a range of different tests. Though that is not to say that examining retrogressive practices is a simple process, as it engages both legal obligations and resources of the State, however, for the purposes of examining the right to housing and social security a specific approach is required.

From my point of view Nolan's work on normative and empirical retrogression provides a useful approach to examining retrogressive practices as both legislative protections and policy outcomes can be observed in relation to the enjoyment of Covenant rights. In terms of examining social housing and related social welfare provisions, solely a normative analysis has little effectiveness in examining backwards sliding in relation to the enjoyment of the right to housing and social security.

For this reason, the thesis opts to posit criteria which combines Warwick's interpretation of General Comment 3's criteria and Nolan and Curtis' work of normative and empirical retrogression, and the Committee 2012 letter, which will be tailored to the right to adequate housing and social security in the following chapters. The criteria are presented with the structure utilised by Warwick with amendments from Nolan and Curtis's work as follows:

Stage of Assessment	Sub-Criteria to Consider
The backwardness or stagnation of the measure.	<ul style="list-style-type: none"> ● Is the measure normatively retrogressive? Have existing legal guarantees/protections deteriorated? ¹¹⁵ ● Is the measure empirically retrogressive? Can it be shown through <i>de facto</i> statistics that the enjoyment of the right has deteriorated? ¹¹⁶
Are maximum available resources being used?	<ul style="list-style-type: none"> ● Has the minimum core content been protected at all times?¹¹⁷
Can the measure be proven to be deliberate?	<ul style="list-style-type: none"> ● Does the measure show an intent of being deliberately retrogressive and is retrogressive? ¹¹⁸
Was the measure taken in careful consideration?	<ul style="list-style-type: none"> ● Is the measure directly or indirectly discriminatory? ● Have alternatives been considered? ● Has there been genuine participation of affected groups? ● Is the measure necessary and proportional? ● Is the measure temporary?
Can the measure be justified by reference of the totality of Covenant rights?¹¹⁹	<ul style="list-style-type: none"> ● The extent to which other economic, social and cultural rights are enjoyed within the jurisdiction.

¹¹⁵Aoife Nolan (n 1) 123.

¹¹⁶ Ibid.

¹¹⁷ Ibid, 140.

¹¹⁸ Ben Warwick (n 4) 475.

¹¹⁹ Ibid, 487.

Positing these criteria provides a simplified version of examining whether a policy measure is deliberately retrogressive. The criteria incorporate the 2012 letter in examining whether the measure was taken in careful consideration as the criteria of temporariness, non-discrimination and necessary and proportional bring in elements the State Party must consider or meet in relation to a proposed policy change.¹²⁰

The thesis focuses on the backwardness or stagnation of the measures and whether the adoption of austerity measures is deliberately retrogressive. To attempt further criteria may move beyond the scope of the thesis. For example, in examining if austerity measures adopted by the United Kingdom and Ireland are deliberately retrogressive, examining whether the measures can be justified in relation to the totality of Covenant rights would significantly widen the scope of the thesis. Furthermore, in examining the minimum core content of rights, the Committee has the knowledge of benchmarks provided by the State through the reporting procedure.¹²¹ As a result, the thesis primarily addresses normative and empirical retrogression and the element of deliberateness to highlight the impact of austerity and its link with deliberately retrogressive measures.

1.6 Chapter Overview

Following the above, unpacking of the doctrine of non-retrogression and austerity, Chapter 2 will provide a doctrinal analysis of the right to adequate housing - Article 11 - and the right to social security - Article 9 - the Covenant. Respectively, the relevant *travaux préparatoires*, General Comments, Concluding Observations and Optional Protocol communications are explored to provide insights into the obligations entailed in the right to adequate housing and social security. As a result, the criteria posited for the doctrine of non-retrogression can be further tailored to the rights to adequate housing and social security and then analysed in relation to the United Kingdom and Ireland in later chapters.

Widely interpreting both rights to tailor an assessment of the doctrine of non-retrogression conforms with evolutive interpretation of the Covenant with regards to the Optional Protocol of the Covenant. As noted by Desierto and Gilepsie, in relation to

¹²⁰ UNCESCR Letter (n 79).

¹²¹ Diane Desierto and Colin Gilepsie (n 68) 567.

treaty interpretation of retrogression, the Committee first places the doctrine of non-retrogression in the background so the Committee can take up other matters in its comments. Second, the Committee widens the scope of application of the doctrine to include the steps or decisions taken by various actors such as domestic courts.¹²² Therefore, a vertical interpretation of the doctrine of non-retrogression is demonstrated through United Nations institutions as well as a horizontal interpretation through regional instruments and caselaw, providing a holistic interpretation of the non-retrogression to be applied for assessment.

Once a criteria for assessment of the doctrine of non-retrogression in relation to social housing and welfare is established, Chapter 3 will focus on the deliberateness element in regard to the British and Irish Government justifications for adopting austerity measures. Debates regarding national budgets and social housing and welfare in the House of Commons and Oireachtas are categorised for key themes which are synonymous with a pro-austerity agenda regarding Government justifications for austerity measures. The examination of debates from 2008 until 2020 allows for an organic examination of whether a pro-austerity agenda remains in Government narratives and policies. Here, Blyth and Foucault's works becomes essential in supporting the qualitative analysis, as they shed light on the intention of States in passing austerity measures. Following Warwick's work, this stage of analysis provides insight into whether measures passed in the United Kingdom and Ireland since 2008 in relation to social housing and social security have the intention of being deliberately retrogressive.

Chapters 4 and 5 will focus on providing an assessment of the extent of deliberately retrogressive measures in relation to social housing and social welfare in the United Kingdom and Ireland respectively. The United Kingdom's and Ireland's Concluding Observations and State Party reports will be utilised here to gain insight into each State Parties' position on Covenant obligations prior to assessment. Aside from this, a brief historical rendition of the development of the social housing system is given to inform the analysis in understanding how the United Kingdom and Irish social housing systems have transformed through policy and legislation. The chapters then engage in an application of the assessment of both legislation and policy supported by social housing

¹²² Ibid, 550.

statistics from a normative and empirical dimension. The analysis is further supported by statistics provided by the Office of National Statistics, Central Statistics Office and charities such as Focus and the Joseph Rowntree Foundation.

The conclusion provides a summary of the assessment carried out in the thesis. Primarily, the assessments of the doctrine of non-retrogression in relation to social housing and social housing welfare of the United Kingdom and Ireland are compared to each other. This comparison helps to answer some further questions which are garnered from the assessment, namely, do deliberately retrogressive measures look the same regardless of domestic context? Furthermore, the conclusion questions whether the thesis has helped to clear some of the methodological obstacles facing the Committee in assessing the doctrine of non-retrogression, in particular, whether fleshing out an empirical retrogression criterion has improved or hampered the assessment to be carried out by the Committee on the State Party obligations. This question centres around the capacity of the Committee to accommodate a fleshed out assessment on the doctrine of non-retrogression and the ability of the State Party to provide such information in State Party reports. Finally, the conclusion considers whether the assessment of the doctrine of non-retrogression would be successful given the existing neoliberal influence surrounding the enjoyment of economic, social and cultural rights.

2. The Rights to Adequate Housing and Social Security under the International Covenant on Economic, Social and Cultural Rights

To gauge whether the doctrine of non-retrogression – the requirement that States do not reduce existing rights protections – has been contravened in relation to the rights to adequate housing and social security in the United Kingdom and Ireland, it is important to understand what is entailed in both rights. In interpreting the rights to adequate housing and social security, the general rules to interpretation as encapsulated in the Vienna Convention on the Law of Treaties (VCLT) are applied.

Article 31 of the VCLT states that a 'treaty be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose.'¹ The context and purpose of a treaty shall comprise of *inter alia* its text, preamble and annexes, in addition to subsequent agreements and practices regarding the application and interpretation of the treaty.² Therefore, the rights to housing and social security can be interpreted textually through the International Covenant on Economic, Social and Cultural Rights alongside its subsequent practices, such as Concluding Observations, General Comments and Optional Protocol Communications responses by the Committee on Economic, Social and Cultural Rights.³

Additionally, supplementary interpretation through Article 32 of the VCLT is applied to provide confirmation of the interpretations of the rights to housing and social security where, as a result of the interpretation following Article 31, ambiguities and manifest absurdities arise.⁴ Therefore, the preparatory works of the Covenant, the *travaux préparatoires*, are examined to flesh out the object and purpose of Articles 9 and 11.1 of the Covenant.⁵

¹ Vienna Convention on the Law of Treaties, Adopted 23 May 1969, in force 27 January 1980, 1155 UNTS 331 (VCLT) Article 31(1).

² Ibid, Article 31 sub-ss (2), (3).

³ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (Adopted 05 March 2009) UNGA Res A/RES/63/117.

⁴ VCLT (n 1) Article 32.

⁵ Ibid, Article 32, sub-ss (a), (b).

The chapter first examines the text of the right to housing in Article 11.1 of the Covenant, in addition to the *travaux préparatoires*, General Comment 4, Concluding Observations and Optional Protocol Communications responses relating to the right. Second, the right to social security is considered, following suit in interpreting Article 9 of the Covenant by using Articles 31 and 32 VCLT. An assessment of the doctrine of non- retrogression tailored to the rights to housing and social security is formulated after applying Articles 31 and 32 VCLT, presented as tables.

These tables form part of the assessment criteria as established from the introductory chapter, utilising the structure provided by Warwick's interpretation of General Comment 3 of deliberately retrogressive measures.⁶ From this chapter, the criteria formulated are applied to social housing and welfare policies and legislation in the United Kingdom and Ireland.

2.1 The Right to Adequate Housing

The right to adequate housing is found in Article 11 of the Covenant, forming a component of the right to an adequate living standard.⁷ Article 11.1 states that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co- operation based on free consent.⁸

As seen, the right to housing does not stand alone and must be adequate in nature. Furthermore, a continuous obligation of improvement is imposed on State Parties to recognise and take steps to realise an adequate living condition for the individual and their families.⁹ While Article 2.1 obliges the progressive realisation of all Covenant rights, Article 11.1 makes unclear whether the additional obligation of a continuous

⁶ Ben Warwick, 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) 19 Human Rights Law Review 467, 478.

⁷ Daniel Moeckli *et al*, *'International Human Rights Law'* (OUP 2018) 186.

⁸ International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1976) UNGA Resolution 2200A, Article 11.1.

⁹ Ben Saul, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 862.

improvement of living conditions is applicable to the rights to housing, food and clothing or whether these rights must meet a sole requirement of being adequate. On the other hand, the mentioning of the rights to housing, clothing and food together serve as examples of rights falling under the banner of 'living conditions' to be continuously improved upon.

Besides this, there is ambiguity surrounding the meaning of adequacy in relation to housing. The vagueness of adequacy permits the State Party to tailor the right to housing to their own context. However, the protection of an adequate level of housing focuses on a range of areas – as will be seen in General Comment 4 - such as structure, location, protection from damp etc. Therefore, adequacy provides a basis to engage in wider interpretation of Article 11.1 of the Covenant. Primarily, the *travaux préparatoires* of the Covenant are explored to provide a background understanding of the object and purpose of Article 11.1.

2.1.1 Travaux Préparatoires of the International Covenant on Economic, Social and Cultural Rights: Article 11

The ambiguities surrounding the meaning of adequacy allows the thesis to apply supplementary interpretation as found in Article 32 of the VCLT. Studying the *travaux préparatoires* provides a background to confirm the meaning of what an adequate right to housing may entail and aids in clarifying ambiguities from the text of Article 11.¹⁰ Furthermore, examining the preparatory materials of the Covenant provides a greater understanding of the right to housing itself under Article 11 of the Covenant. Understanding this purpose aids in ensuring that tailoring the doctrine of non-retrogression to social housing policies does not exceed both the textual meaning and purpose of the Article.

In 1952, what ultimately became Article 11 of the International Covenant on Economic, Social and Cultural Rights was found in two draft Articles of a proposed instrument: Article 11, the right to adequate housing, food and clothing; and Article 12 on the right to an adequate living standard. State Parties formed delegations which submitted proposals on potential Articles of the Draft Covenant to be debated upon and finalised. The 222nd meeting of the Commission on Human Rights in 1951 discussed special

¹⁰ VCLT (n 1) Article 32(a).

provisions regarding the right to an adequate standard of living and the right to living accommodation. Of the several proposals discussed, the United States delegation put forward a text stating that 'the State Parties to this Covenant recognise the right to everyone to improved standards of living including adequate housing.'¹¹

This formulation of the United States proposal equates the right to housing to the right to an adequate living standard. The United States proposal was supported by the French delegation as both were 'so closely linked in the public mind that it would be difficult to deal with them separately.'¹² While the French delegation noted how closely linked the enjoyment of housing is to living standards, this stance was not adopted by other delegations. For example, the Uruguayan representatives highlighted that the United States proposal reflected existing living standards in the country,¹³ thereby requiring an Article to be drafted which would transcend time and be enforceable for future generations. Alternatively, the Uruguayan delegation preferred the Australian proposal which read 'each State Party to the Covenant recognises that everyone has the right to an adequate standard of living.'¹⁴

The Australian proposal represents a general and comprehensive interpretation of the right to an adequate living standard, as opposed to having separate provisions referring to the right to adequate housing. The proposal was supported by the United Kingdom delegation as 'there was a general understanding of all that was implied by an adequate standard of living.'¹⁵ Similarly, the United Kingdom delegation saw no need for a separate provision for housing, as the urgency imposed by housing shortages in delegations such as the United States would be a temporary phase.¹⁶

¹¹ UNCHR, 'Commission on Human Rights Seventh Session: Summary Record of the Two Hundred and Twenty-Second Meeting' (08 June 1951) UN Doc E/CN.4/SR.222, 16; Reprinted in Ben Saul, *The International Covenant on Economic, Social and Cultural Rights - Travaux Préparatoires, Volume I* (OUP 2016) 409.

¹² Ibid.

¹³ Ibid, 17.

¹⁴ UNCHR, 'Working Group on Economic, Social and Cultural Rights: Compilation of Proposals relating to Economic, Social and Cultural Rights' (27 April 1951) UN Doc E/CN.4/AC.14/2/Add.3, Section VII, 5.

¹⁵ UNCHR 222nd Meeting (n 11) 18; reprinted in Ben Saul Vol I (n 11) 410.

¹⁶ Ibid; reprinted in Ben Saul Vol I (n 11) 410.

From these two proposals, there is a debate between a reflective and a general understanding of the right to an adequate living standard. The reflective stance taken by the United States delegation is derived from housing shortages experienced from the conclusion of the Second World War, emphasising the importance and necessity of housing. In contrast, the Australian and British delegations favoured a general drafting of Article 11 applicable to a range of different jurisdictions, enabling the State to tailor the Covenant to their existing resources and housing needs over time.¹⁷

Compared to the United States and Australia, the Soviet Union delegation proposal provided a separate provision regarding living accommodation where 'governments must take measures to improve housing. That could be done by new building, restoration, capital repairs etc.'¹⁸ The Soviet Union proposal represents a comprehensive approach to a right to housing in comparison to the United States and Australian proposals, as there are clear cut obligations in reference to the measures the State can take to improve housing. Secondly, the use of the words 'living accommodation' to describe housing highlights an organic conception where the individual lives, rather than solely being bricks and mortar.

The Soviet Union proposal was rejected by six votes to five with seven abstentions.¹⁹ If adopted and included in the Covenant, the obligation would set out legislative and policy measures which the State Party could adopt to ensure that living conditions are improved upon. While on the one hand desirable, the significant burden placed on States to ensure, especially newly independent States, to meet these measures while lacking resources would be immense. The French delegation utilised similar reasoning in their rejection of the Soviet Union proposal, highlighting the proposals categorical and exclusive terms, which rules out individual initiative and leaves the State to take all the necessary steps, creating an impossible situation in many countries.²⁰

¹⁷ Ibid, reprinted in Ben Saul Vol I (n 11) 409.

¹⁸ Ibid.

¹⁹ Ibid, 22; reprinted in Ben Saul Vol I (n 11) 412.

²⁰ Ibid, 21; reprinted in Ben Saul Vol I (n 11) 411.

The stance taken by the French delegation was supported by the Yugoslav and Egyptian delegations. The Yugoslav delegation preferred a compromise between both the United States and Australian proposals to highlight both 'the recognition of the right to a standard of living worthy of man, and the need for continuous improvement in that respect.'²¹ The wording 'worthy of man' replicates the language found in the Universal Declaration of Human Rights by emphasising how housing should provide a dignified life to the human being.²² Such wording promotes a universality of housing, and also helps the State to contextualise in what ways housing can be deemed worthy in its own context. Furthermore, when paired with the 'need for continuous improvement' emphasises progressive realisation and the understanding that housing needs and demand are not static and may be subject to change in future. For example, existing housing stock may need to be rehabilitated or refurbished to meet current standards.

The favouring of a more general provision by the Commission highlights the prioritisation of State individualism in being able to tailor Covenant obligations according to their own context. The Chilean delegation best describes this position. While supporting the Soviet Union's proposal in placing the obligation upon the State for the role of housing, the Chilean delegation feared that:

It would not be an easy matter to draw up a satisfactory text concerning the standard of living, which was a very vague concept defying all attempts at definition. It would be possible, by taking a particular standard of living as a basis, to devise a clear and definite provision, but there were so many widely differing standards in the world that it was difficult to say which of them everyone should have the right to enjoy. He thought that the aim should be to improve living conditions in accordance with the economic capabilities of each State. The Commission should recommend a more equitable distribution of national incomes, with a view to ensuring that working people enjoyed a larger share in them and were thereby able to raise their own standard of living.²³

²¹ Ibid, 19-20; reprinted in Ben Saul Vol I (n 11) 410.

²² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Preamble.

²³ UNCHR 222nd Meeting (n 11) 18-19; reprinted in Ben Saul Vol I (n 11) 40

The Chilean delegation highlights the subjectivity in determining what constitutes an adequate living standard and the steps to take even in a general provision. The emphasis on the maximum available resources of the State and a suggestion of progressive taxation on one hand advocates for the individualisation of State practice and self-actualisation for citizens similar to the French delegation's proposal. On the other hand, emphasising the improvement of living conditions in accordance with the economic capabilities of the State favours the minimum core content of obligation, as not all States will be able to progressively realise the right to an adequate living standard to the same degree as other States and may settle for a basic protection of the right to housing.

The 223rd meeting of the Third Committee of the Commission of Human Rights considered the Australian and United States proposals and subsequent amendments provided by Yugoslav and Chinese delegation regarding continuous improvement of living standards and to include rights to housing, food, clothing and the means of transportation.²⁴ The Australian delegation believed the Chinese amendment to be unnecessary given the conciseness and inclusivity of the provision which would allow the Article to form a 'kernel of concepts to be developed in detail either through subsequent international agreements or by the activities of specialised agencies.'²⁵ However, the Australian delegation was willing to accept the amendment without the reference to means of transportation, given it was unnecessary to the conception of an adequate living standard. The removal of transportation was accepted by the Chinese delegation, however the amendment to the Australian text was rejected by seven votes to three with five abstentions.²⁶ The Australian delegation outrightly voted against the attempt of the Yugoslavian to bring a dynamic element to the text through the amendment of 'a continuous improvement living conditions,' stating it would be more suitable in a general clause.²⁷ Despite this, the overall Yugoslav amendment to the Australian text was accepted fourteen votes to none with four abstentions.²⁸

²⁴ Ibid, 21; reprinted in Ben Saul Vol I (n 11) 413.

²⁵ UNCHR, 'Commission on Human Rights Seventh Session: Summary Record of the Two Hundred and Twenty-Third Meeting' (13 June 1951) UN Doc E/CN.4/SR.223, 4.; reprinted in Ben Saul Vol I (n 11) 413.

²⁶ Ibid, 8; reprinted in Ben Saul Vol I (n 11) 415.

²⁷ Ibid, 6; reprinted in Ben Sau Vol I (n 11) 414.

²⁸ Ibid, 8; reprinted in Ben Saul Vol I (n 11) 415.

From these two meetings, both the American and Australian texts formed two separate draft Articles, later becoming Articles 23 and 24. In the 295th meeting the United Kingdom delegation motioned to delete Article 23 given its overlap with Article 24, but this was rejected.²⁹ Alongside the Chinese delegation put forward again the amendment to include the right to food and clothing in Article 23 which was adopted fourteen votes to none with four abstentions. Article 24 was similarly put to a vote and unanimously accepted.³⁰

At this time, the decision by the General Assembly had turned from its original decision to draft one Covenant to forming two separate Covenants through resolution 384 (XIII) on 29 August 1951.³¹ Articles 23 and 24 became Articles 11 and 12, respectively.³² The memorandum submitted by the Secretary General on 23 January 1953 recommended that Articles 11 and 12 be combined to read as the following:

The States Parties to the Covenant recognize the right of everyone to an adequate standard of living and the continuous improvement of living conditions, including the right of everyone to adequate food, clothing and housing.³³

Though a combined provision was proposed by the Secretary General, the Commission's 739th-743rd meetings discussed whether the Articles should be merged and in what manner. Once it had been agreed that Articles 11 and 12 were to be merged, several proposals were submitted. However, a conclusion as to the formation of Article 11 could not be reached, therefore a motion to form a working group to harmonise proposed amendments was adopted.³⁴

²⁹ UNCHR, 'Draft International Covenants on Human Rights and Measures of Implementation: Draft Amendment to Article 23 United Kingdom' (no date provided) UN Doc E/CN.4/L.83, 1; reprinted in Ben Saul, *The International Covenant on Economic, Social and Cultural Rights - Travaux Préparatoires, Volume II* (OUP 2016) 1164.

³⁰ UNCHR 222nd Meeting (n 11) 8.

³¹ UNGA, 'Resolution 384 (XXIII)' (29 August 1951) See UN Office of Legal Affairs, 'International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights' available at : < https://legal.un.org/avl/pdf/ha/iccpr/iccpr_ph_e.pdf> 1-2.

³² Ibid, Ben Saul Vol II (n 29) 1328.

³³ UNCHR, 'Commission on Human Rights Ninth Session Draft International Covenants on Human Rights and Measures of Implementation: Memorandum by the Secretary-General (23 January 1953) UN Doc E/CN.4/673,1; reprinted in Ben Saul Vol II (n 29) 1345.

³⁴ UNCHR, 'Commission on Human Rights: Report of the Tenth Session Supplement No.7' (23 February-16 April 1954) UN Doc E/2573 annex IA; reprinted in Ben Saul Vol II (n 29) 1916.

The working group text was largely accepted by the Commission, though there were suggestions to implement wording such as 'to take appropriate steps' to greater reflect progressive obligations framed in Article 2, alongside wording relating to international co-operation.³⁵ The fully amended text, as seen in the Covenant, was adopted forty-eight votes to none with sixteen abstentions.³⁶ The Covenant as a whole was adopted through a resolution the United Nations General Assembly resolution 2200 (XXI) on the 16 December 1996.

Overall, from examining the *travaux préparatoires*, what can be drawn is the dilution of the revolutionary impact of Article 25 of the Universal Declaration. The general and vague wording of Article 11 permits the State to tailor Covenant obligations to their own resources and circumstances. However, the drafting process demonstrates the displacement of the right to housing as a standalone right. Though the rights to food and clothing hold equal importance, grouping housing with these rights actively prevented a wider textual interpretation of the right to housing to be conceptualised. The fear of an over comprehensive Article in relation to State obligations, while to a degree valid, removes the human element of housing and envisages housing to be solely comprised of bricks and mortar subject to vague adequacy requirements.

When considering the wording of 'adequate' in comparison to proposed amendments such as the Yugoslav delegation's 'worthy of man', the rejection of this proposal represents more than favouring a vaguely written Article. As previously mentioned, the wording 'adequate' emphasises a bare minimum to be met by State Parties which in comparison to the words 'worthy of man' represents a far more diluted version of the conceptualisations of universality and human dignity as shown in Yugoslavian amendment.

Additionally, the separation of the requirement of 'continuous improvement' to living standards can be thought to promote two separate levels of implementation in the right to an adequate living standard. On the one hand, housing, clothing and food must be ensured at an adequate level while on the other hand, living standards should be continuously improved. Though it can be thought that living standards encapsulates the rights to housing, food and clothing, their separation promotes two streams of reasoning.

³⁵ Ibid; reprinted in Ben Saul Vol II (n 29) 1925.

³⁶ Ibid; reprinted in Ben Saul Vol II (n 29) 1916.

First, the separation of the right to housing, clothing and food aims to provide key focus areas for the State Party when trying to improve living standards. Second, while living standards can be continuously improved, the rights to food, clothing and housing remain at a particular 'adequate' level in relation to the maximum available resources of the State. The latter while conforming to Covenant obligations emphasise a minimalist approach that can be taken by the State to implement the right to housing which does not address the dynamic nature of housing needs.

As a result, there is a dissonance in the extent of recognition of housing as an economic and social right in comparison to rights to property found in a variety of jurisdictions such as India, France, Germany etc. The vagueness of the right to adequate housing while enabling State individualism, further facilitates ignorance in relation to how the right should be realised in the context of progressive realisation and the adoption of legislative measures as found in Article 2.1 of the Covenant. As a result, the interpretation of the Committee of the right to adequate housing will also prove useful.

2.1.2 General Comment 4: The Right to Adequate Housing

In further interpreting the ordinary meaning of the right to adequate housing - in accordance with Article 31 VCLT - General Comments provided by the Committee on Economic, Social and Cultural Rights are examined. Though non-binding in nature, the Committee's General Comments hold an authoritative influence internationally over how the right to housing should be conceptualised and implemented.³⁷ Despite having soft law status, General Comments perform an important role in normative development through providing progressive interpretations of international human rights law in response to shifting challenges in human rights protection.³⁸

³⁷ Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart Publishing 2013) 20; Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42(3) *Vanderbilt Journal of Transnational Law* 905, 905; Max Lesch and Nina Reiners, 'Informal Human Rights Law-Making: How Treaty Bodies Use 'General Comments' to Develop International Law' (2023) 12(2) *Global Constitutionalism* 378, 378.

³⁸ Stéphanie Lagoutte, *Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights* (OUP 2016) 71.

The Committee has two General Comments focusing on the right to adequate housing: General Comments 4 and 7. General Comment 4 focuses on the implementation of the right to adequate housing, while General Comment 7 focuses on forced evictions. In relation to the right to adequate housing, this section will focus on General Comment 4 in order to tailor an assessment of the doctrine of non-retrogression in relation to the right to housing, which will later be applied to social housing policies in both the United Kingdom and Ireland.

General Comment 4 emphasises that ‘the human right to adequate housing... is of central importance for the enjoyment of all economic, social and cultural rights.’³⁹ Noting the central importance of the right to housing, the Committee further highlights its integral importance in providing stability to the individual to self-actualise and enjoy further Covenant rights. In interpreting the right to housing, the Committee emphasises that:

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 views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.⁴⁰

Viewing housing not as a commodity affirms the fundamental principle of the Covenant and moral aspirations of the Universal Declaration, being human dignity and universality, ensuring that the right to housing regardless of their economic resources or personal circumstances.⁴¹ Moreover, such an interpretation attempts to shift away from the idea that housing is solely its physical structure, rather it has emotional, psychological and relational ties for the individual.

The Committee further stresses the adequacy component of the right to housing. As noted, the ambiguity of adequacy in Article 11.1 on the one hand permits the State Party to tailor the right to its own context and resources. On the other hand, the Committee has noted that ‘there remains a disturbingly large gap between the standards set in Article 11.1 of the Covenant and the situation prevailing in many parts of the world.’⁴²

³⁹ UNCESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23, para 1.

⁴⁰ Ibid, para 7.

⁴¹ Ibid, 7. ⁴² Ibid, para 4.

As a result, the ambiguity surrounding the meaning of adequacy in relation to the right to adequate housing has undermined the right's implementation. Though there is recognition and respect for the right to housing by State Parties, without a fleshed out meaning of adequacy, implementation State Parties may take the meaning of adequacy to be synonymous with the minimum core content of the right or become complacent and accept their current housing circumstances to be suitable. Therefore, it is not surprising that the Committee have found a large gap in housing standards as encapsulated by Article 11.1 given its textual vagueness.

To address the gap in housing standards, the meaning of adequacy is expanded on in General Comment 4. Several factors are introduced for housing to be considered adequate: Legal security of tenure; Availability of services, materials, facilities and infrastructure; Affordability; Habitability; Accessibility; Location; and Cultural adequacy.⁴³ All of these factors hold an integral importance in defining adequacy of housing. Each element consists of sub-elements which sets out procedures and policies which States should implement to respect the right to housing.⁴⁴ Furthermore, the adequacy components provide a more concise guidance to interpretation of the right to housing by judiciaries domestically.⁴⁵

The Committee sets out a wide net in relation to legal security of tenure, including both public and private provision of housing such as co-operative, homeownership, leaseholds and emergency housing and informal settlements.⁴⁶ Having an inclusive scope of this kind ensures security of tenure is not only guaranteed through legislation covering private landlord-tenant obligations, but also of social housing landlords. The Committee further emphasises that all persons should possess 'a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.'⁴⁷

⁴³ Ibid, para 8.

⁴⁴ Jessie Hohmann (n 37) 21.

⁴⁵ Bret Thiele, 'The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health' (2002) *American Journal of Public Health*, 712, 713.

⁴⁶ UNCESCR General Comment 4 (n 39) para 8(a).

⁴⁷ Ibid.

A preference is highlighted towards the legal adoption of measures to ensure the security to tenure of all persons and households lacking such protection, including with consultation of affected groups.⁴⁸

Availability of services and materials, facilities and infrastructure states that adequate housing must contain facilities essential for health, security, comfort and nutrition as well as having access to natural and common resources such as safe drinking water, energy for cooking, heating and lighting, sanitation, food storage, refuse disposal etc.⁴⁹ This criteria listing can also be found in factors relating to habitability, location and accessibility.

Habitability requires housing to have adequate space and protection from cold, damp, heat, rain, wind or threats to health and structural hazards etc.⁵⁰ Additionally, housing must be situated where individuals can access employment, health care services, schools childcare services and other social facilities.⁵¹ Furthermore, housing must not be situated in locations far away from resources which impose financial burdens on poor households, nor be built upon polluted sites.⁵² It can be argued that these factors focus on the social functions of the home, providing an extension into the work and familial contextualities of the person to ensure that the individual can self-actualise and live in dignity.

Accessibility, on the other hand could be argued to operate differently, as adequate housing must be accessible to disadvantaged groups who must be accorded full and sustainable access. This listing includes groups such as the elderly, children, the physically disabled, mentally ill, victims of natural disasters etc.⁵³ While the meaning of full and sustainable access in this regard is unclear, it may imply that access such as ramps or space for medical equipment or storage should be available and be of a quality that does not rapidly deteriorate. In this regard, a dual positive obligation imposed on the State to prioritise disadvantaged groups in policy and legislation, in addition to providing housing that ensures the security and dignity of the person.

⁴⁸ Jessie Hohmann (n 37) 21.

⁴⁹ UNCESCR General Comment 4 (n 39) para 8(b).

⁵⁰ Ibid, para 8(d)

⁵¹ Ibid.

⁵² Ibid, para 8(f).

⁵³ Jessie Hohmann (n 37) 27.

Therefore, continuous research and refurbishment of housing to meet the housing needs of disadvantaged groups is required. As noted by the Committee on the Rights of Persons with Disabilities in relation to social housing programmes, housing should be offered which is accessible for persons with disabilities,⁵⁴ which is safe, adequate and affordable.⁵⁵

Affordability encapsulates that household costs associated with housing should be at a level where attainment and satisfaction of other basic needs are not compromised or threatened.⁵⁶ Therefore, the State not only has a responsibility to ensure that housing remains affordable, but can also extend to a range of budgetary and monetary policies to ensure that housing costs do not contribute to a cost of living crisis, as has occurred from the financialisation of housing since the global financial crisis. A further positive obligation is imposed on States to ensure that subsidies or related schemes are accessible to finance housing as well as allocating resources for the provision of housing in accordance with housing needs.⁵⁷ Furthermore, affordability states that tenants should be protected by appropriate means against unreasonable rent increases.⁵⁸ This implies that the State could impose minimum and maximum rental prices to ensure that housing costs do not reach an unaffordable level.

Cultural adequacy refers to the way in which housing is constructed, focusing in particular on the materials used and construction policies which should facilitate an expression of cultural identity and diversity of housing.⁵⁹

⁵⁴ UNCRPD Committee of the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility' (22 May 2014) UN Doc CRPD/C/GC/2, para 42.

⁵⁵ UNCRPD Committee on the Rights of Persons with Disabilities, 'General Comment No. 5 (2017) on Living independently and being included in the community' (21 October 2017) UN Doc CRPD/C/GC/5, para 14.

⁵⁶ UNCESCR General Comment 4 (n 39) para 8(c).

⁵⁷ *Ibid*, para 8(b).

⁵⁸ *Ibid*.

⁵⁹ *Ibid*, para 8(g).

Though it can be thought that the notion of cultural adequacy aligns with cultural relativism in that all housing should not be the same, it has been argued that the universality principle in relation to the right housing does not have such a requirement.⁶⁰ Rather, the right to privacy in the home will be met differently in different cultural contexts such as climate, religious requirements and other cultural variables.⁶¹

Additionally, the Committee highlight that accommodating for cultural housing needs should not sacrifice technological facilities.⁶² This approach emphasises a non-discriminatory approach to housing, whereby the individuals or households ability to realise further economic rights should not be comprised in having their particular housing needs met.

Aside from the factors provided by the Committee, several further points can be noted from General Comment 4. First, General Comment 4 does not attempt to define adequacy. As noted by Hohmann the concept of adequacy holds neither positive nor negative connotations.⁶³ Additionally, the concept of adequacy may equal satisfactoriness, though this does little to clarify the standard adequacy possesses.⁶⁴ It can be inferred that the Committee attempts to keep the concept of adequacy as broad as possible, so as not to omit any features that may deem what is considered adequate housing over time. As furthered by Kenna, 'the adequacy level of housing may act as a floor or as a ceiling in the realisation of States obligations.'⁶⁵ Therefore, while the vagueness of the adequacy may not illicit a true understanding of the minimum core content of the right to adequate housing,⁶⁶ it can be argued that doing so permits a tailoring of adequacy for each State in the Committees reporting procedure.

⁶⁰ Jessie Hohmann (n 37) 28.

⁶¹ Ibid.

⁶² UNCESCR General Comment 4 (n 39) para 8(f).

⁶³ Jessie Hohmann (n 37) 21.

⁶⁴ Ibid.

⁶⁵ Padraic Kenna, 'International Instruments on Housing Rights' (2010) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction (ASCE)* 11, 5.

⁶⁶ Jessie Hohmann (n 37) 21.

Secondly, the Committee recognise that policy plays a key role in the resource allocation of the State such as through adopting a national housing strategy.⁶⁷ However, the role of formative legislative and administrative measures such as constitutional and legislative provision of remedies such as appeals and compensation should not be underestimated.⁶⁸ These points made by the Committee are in accordance with Article 2.1 of the Covenant and also point out the need of an integrated approach through legislation and policy to ensure respect for the right to adequate housing.

Thirdly, the Committee noted that ‘despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction.’⁶⁹ The recognition by the Committee of the integral need of housing, especially in times of economic hardship has a resounding significance given the 2008 recession, where economic hardship placed many in the United Kingdom and Ireland at risk of losing their homes as a result of mortgage arrears or through loss of employment.

Finally, a key point noted by the Committee is that the State alone is unable to satisfy housing needs, and therefore can rely on enabling strategies which include the involvement of the private sector.⁷⁰ While this point accommodates States which utilise a mixed approach in the supply of housing, it can be argued that this particular point made by the Committee is outdated or requires amendment. In hindsight, the financialisation of housing on a global scale was a key contributor to the global financial crisis which has normalised the private sector as the predominant supplier of housing.⁷¹

As a result, affordability of housing becomes dependent on the limited supply and heightened demand in housing markets displacing households unable to access resources to afford the rising costs of housing.⁷²

⁶⁷ UNCESCR General Comment 4 (n 39) paras 15–17.

⁶⁸ Ibid.

⁶⁹ Ibid, paras 11, 15-17.

⁷⁰ Ibid, para 14.

⁷¹ Padraic Kenna, *Contemporary Housing Issues in a Globalized World* (Routledge 2014) 8.

⁷² Ibid; UNHRC Special Rapporteur Raquel Rolnik, ‘Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (10 August 2012) UN Doc A/67/286, para 12.

As General Comment 4 was produced in 1991 by the Committee, it may be considered outdated given the events of the global financial crisis and increased commodification of housing globally.⁷³ However, General Comment 4 provides a wider interpretation of the right to housing which to an extent compensates for the textual limitations of Article 11.1 of the Covenant. Furthermore, General Comment 4 provides a foundation upon which a wider interpretation of the right to housing is promoted on an international scale. Having this foundation, allows further General Comments by Committee to address practical implications associated with the implementation of the right to housing. For example, General Comment 24 expands on the State Party obligation to protect the right to housing in relation to business activities by adopting intervention measures such as ‘exercising rent control in the private housing market as required for the protection of everyone’s right to adequate housing.’⁷⁴ Therefore, while not the sole General Comment relating to the right to housing, the wider interpretation of General Comment 4 has paved the way for future General Comments to provide guidance as to how the right to housing should be implemented and ensured by State Parties given the growing privatisation of housing.

2.1.3 Concluding Observations, Optional Protocol Communications and the Reports of the Special Rapporteur on the Right to Adequate Housing and Non-Discrimination.

Examining the Concluding Observations of the Committee in relation to the right to adequate housing as well as Optional Protocol communications provides an up-to-date analysis of how the right to adequate housing is interpreted by the Committee. The United Kingdom is not a State Party to the Optional Protocol, Ireland has signed but not yet ratified the Optional Protocol.⁷⁵

⁷³ Ingrid Leijten and Kaisa de Bel, 'Facing Financialization in the Housing Sector: A Human Right to Adequate Housing for All' (2020) 38(2) Netherlands Quarterly of Human Rights 94, 94.

⁷⁴ UNCESCR, 'General Comment No.24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E.C.12/GC/24, para 19.

⁷⁵ UN Treaty Body Base, 'Ratification Status for CESCR-OP', available at <
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/treaty.aspx?treaty=cescr&lang=en>

Though individual complaints from the United Kingdom and Ireland cannot be brought before the Committee, the merits from Committee decisions can still be utilised to interpret Covenant rights which are applicable to all State Parties to the Covenant. Concluding Observations from the United Kingdom and Ireland are examined in the third and fourth chapters, therefore Concluding Observations from other Member States will be relied upon to supplement the interpretation of the right to adequate housing under the Covenant.

2.1.3.1 Concluding Observations in Relation to the Right to Adequate Housing

The right to adequate housing received greater attention after the 1990s in the Concluding Observations of the Committee on Economic, Social and Cultural Rights. The introduction of General Comment 4 in 1991 and General Comment 7 in 1997 aided the fleshing out the right adequate to housing. Placing the matter of forced evictions to one side, the Committee has noted concern in relation to rising homelessness, housing shortages and poverty in relation to Article 11 in general.⁷⁶ As a result, recommendations regarding the right to housing urge the State Party to take all appropriate measures such as setting rental rates which take into account vulnerable groups, and adopting measures where necessary which assist households at risk of homelessness from dramatic rent increases due to the elimination of rental subsidies.⁷⁷

The Committee has expanded its recommendations to cover the role of social housing, noting concern of the privatisation of municipal social housing and rising housing prices, especially on marginalised and disadvantaged groups.⁷⁸ Regarding the adequacy of housing supply, the Committee has called for the provision of housing units in sufficient numbers to cater for low-income families and disadvantaged and marginalised groups in line with General Comment 4.⁷⁹ Though on one hand the lack of social housing provision can be considered inadequate, the use of inadequacy in this

⁷⁶ UNCESCR, 'Consideration of the Reports Submitted by State Parties under Article 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Poland (16 June 1998) UN Doc E/C.12/1/Add.26, 2, para 5.

⁷⁷ Ibid, para 25.

⁷⁸ UNCESCR, 'Consideration of Reports Submitted by State Parties under Article 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Norway (23 June 2005) UN Doc E/C.12/1/Add.109, 3, para 18. ⁷⁹ Ibid, para 37.

regard is inconsistent. The Committee has noted concern in relation to continuing shortages of social housing stock and has recommended General Comment 4 and has concluded that appropriate steps must be taken in relation to allocating resources to increasing social housing stock and financial support without referring to adequacy.⁸⁰ In relation to the privatisation of social housing stock, adequacy is engaged where low-income and disadvantaged, and marginalised groups are unable to access social housing.⁸¹

The importance of the enjoyment of the right to housing by marginalised and disadvantaged groups is made clear through Concluding Observations. The Committee notes that shortages in both private and social housing ‘undermines the ability of the State Party to provide accommodation especially to disadvantaged and marginalised individuals and groups.’⁸² What becomes clear about the right to adequate housing is that at its core there is an obligation on the State Party to provide for low-income, disadvantaged and marginalised groups. The Committee has noted concern where disadvantaged and marginalised groups such as migrants and the Roma people have faced obstacles in accessing adequate housing units, emphasising that the State Party should allocate resources to provide financial support in the form of rental subsidies⁸³ and improve conditions for access of housing by the Roma and other disadvantaged and marginalised groups.⁸⁴

⁸⁰ UNCESCR, ‘Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium’ (04 January 2008) UN doc E/C.12/BEL/CO/3, paras 20, 37.

⁸¹ UNCESCR, ‘Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Norway’ (23 June 2005) UN Doc E/C.12/1/Add.109, paras 18, 20; UNCESCR, ‘Consideration of Reports Submitted by State Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: France’ (09 June 2008) UN Doc E/C.12/FRA/CO/3, para 44.

⁸² UNCESCR, ‘Consideration of Reports Submitted by State Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Estonia’ (16 December 2011) UN Doc E/C.12/EST/CO/2, para 22.

⁸³ UNCESCR, ‘Concluding Observations on the Fifth Periodic Report of Denmark, Adopted by the Committee at its Fiftieth Session (29 April-17 May 2013)’ (06 June 2013) UN Doc E/C.12/DNK/CO/5, para 17; UNCESCR, ‘Concluding Observations on the Sixth Periodic Report of the Russian Federation’ (16 October 2017) UN Doc E/C.12/RUS/CO/6, para 47.

⁸⁴ UNCESCR, ‘Concluding Observations on the Sixth Periodic Report of Bulgaria’ (29 March 2019) UN Doc E/C.12/BGR/CO/6 paras 35-36; UNCESCR, ‘Concluding Observations on the Fourth Periodic Report of Portugal’ (08 December 2014) UN Doc E/C.12/PRT/CO/4, para 14.

The obligation is further reflected through the adequacy requirement of accessibility in General Comment 4,⁸⁵ it is also reaffirmed through the Committee's statement on poverty. Article 11 amongst the rights to social security, work, food, education and health play a core role in the eradication of poverty.⁸⁶ As a result, ensuring access to adequate housing for low-income and disadvantaged groups meets the minimum core content of the right to adequate housing under the Covenant and serves as a core human rights-based approach in anti-poverty strategies.⁸⁷ Despite this link, the poverty statement is not recommended to State Parties in relation to right to adequate housing.

Though a baseline of the enjoyment of the right to adequate housing, the Committee has made clear the right to adequate housing applies to everyone, even in relation to social housing waiting lists and eligibility criteria which ensure access of social housing to those 'in the greatest need.'⁸⁸ Therefore, what can be inferred is that while social housing is provided for individuals unable to access private sector housing, the incorporation of eligibility criteria which restricts access to social housing does not meet the minimum core content of the right to housing, as it denies many people the enjoyment of their right to adequate housing where they are 'too well off' to access social housing yet cannot afford private sector housing.

In relation to the adoption of austerity measures, the Committee has noted concern of the negative impact of austerity measures on the right to adequate housing, in particular on disadvantaged and marginalised groups given rising homelessness, lack of access to adequate housing units, shortages of social housing stock and affordable housing in the private sector.⁸⁹ In response the Committee has recommended measures to address social housing deficits, especially for disadvantaged and marginalised groups which regulate the private housing sector to improve accessibility, availability and

⁸⁵ UNCESCR General Comment 4 (n 39) para 8(e).

⁸⁶ UNCESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, Statement Adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001' (10 May 2001) UN Doc E/C.12/2001/10, para 1.

⁸⁷ *Ibid*, para 17.

⁸⁸ UNCESCR, 'Considerations of Reports Submitted by the State Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: New Zealand' (31 May 2012) UN Doc E/C.12/NZL/CO/3, para 22.

⁸⁹ UNCESCR, 'Concluding Observations on the Sixth Periodic Report of Spain' (25 April 2018) UN Doc E/C.12/ESP/CO/6, para 35.

affordability of housing for persons with low incomes.⁹⁰ The Committee has also recommended comprehensive national housing strategies,⁹¹ increases in social housing funding and social reimbursements to finance the cost of housing in severe circumstances where households are at risk of homelessness or lack adequate housing.⁹²

In such circumstances presented in various State Party reports, the minimum core content of the right to housing is emphasised in recommendations in relation to the right to housing. However, the lack of reference to the Committee 2012 letter in Concluding Observations makes questionable what circumstances call for a warning as to deliberately retrogressive measures in relation to the right to housing. Where the Committee have noted insufficient and inadequate housing and rising homelessness in both private and public sector housing, the consideration of retrogressive practices should be considered in Concluding Observations given the central importance of the right to housing in enabling the individual to realise further economic, social and cultural rights.⁹³

Examining Concluding Observations demonstrates the Committee's grave concerns regarding enjoyment of the right to adequate housing given rising housing costs, homelessness and social housing shortages impacting the availability, accessibility, security and affordability of the right to housing. What can be noted is a global shift in the allocation of social housing to include non-state actors. The Committee has recommended a plethora of regulatory, financial, budgetary and legislative measures to State Parties with reference to General Comment 4. However, in relation to concerns as to the sufficiency and adequacy of housing in a State Party, the lack of reference to the Committee 2012 letter and poverty statement in Concluding Observations prevents an assessment of deliberately retrogressive measures and violations of the right to adequate housing to be considered.

⁹⁰ Ibid, para 36; UNCESCR, 'Concluding Observations on the Third Periodic Report of the Plurinational State of Bolivia' (05 June 2021) UN Doc E/C.12/BOL/CO/3, para 49.

⁹¹ UNCESCR, 'Concluding Observations of the Fifth Periodic Report of Italy' (28 October 2015) UN Doc E/C.12/ITA/CO/5, para 41.

⁹² UNCESCR, 'Concluding Observations on the Sixth Periodic Report of Germany' (27 June 2018) UN Doc E/C.12/DEU/CO/6, para 54.

⁹³ UNCESCR General Comment 4 (n 39) para 1.

2.1.3.2 Optional Protocol Communications concerning the Right to Adequate Housing

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights came into force on 5 May 2013.⁹⁴ Under the Optional Protocol of the Covenant, a ratifying State ‘recognises the competence of the Committee to receive and consider communications as provided for in the present provisions of the Protocol.’⁹⁵ Communications may be sent by individuals or on behalf of individuals with their consent, and if deemed admissible the Committee may suggest interim measures to the State Party concerned.⁹⁶ There are 27 State Parties to the Optional Protocol. Ireland has signed but not ratified the Optional Protocol and the United Kingdom is not a State Party.⁹⁷ However, the existing communications provide useful material to interpret the right to housing especially regarding the provision of social housing.

The Committee has considered 56 communications of alleged violations in relation to the right to an adequate living standard, of which 75 percent resulted in a discontinuance decision.⁹⁸ These decisions have largely centred around the complainant requesting an interim measure from the Committee to prevent potential violations of their rights through an eviction.⁹⁹ Despite these cases largely focusing on forced evictions in the private sector, there have been some cases which have involved social housing in combination with housing rights. *M.T. et al v Spain* involved the eviction for occupation without legal title of the family who had rented from the Badalona Municipality Housing Institute, who turned out not to be the legal owner. However, the authors decided to discontinue the consideration of the communication in accordance with Article 17 of the provisional rules of procedure under the Optional Protocol.¹⁰⁰

⁹⁴ OP-ICESCR (n 3) Article 18(3).

⁹⁵ Ibid Article 1.1.

⁹⁶ Ibid, Articles 2, 8.

⁹⁷ UN Treaty Database (n 75).

⁹⁸ ‘The Jurisprudence of The Committee on Economic, Social And Cultural Rights’ <<https://www.giescr.org/cescr-jurisprudence/#database>>.

⁹⁹ Ibid.

¹⁰⁰ *M. T. et al v Spain*, Discontinuance Decision (11 February 2019) CESCR 66 Comm. 110/2019.

Soraya Moreno Romero v Spain involves the eviction of the author and her children from a private property in which they were squatting.¹⁰¹ The case itself is complex, balancing forceful evictions and the role of the State in providing social housing accommodation as an alternative. The author had applied for social housing after illegally occupying a property, which was rejected on this basis.¹⁰² Though the Committee decided that the authors right under Article 11.1 was not violated, there is some jurisprudence in relation to social housing authorities to be considered.

Overall, the Committee notes that all evictions should not render human beings homeless or vulnerable to the violation of other human rights regardless of if the eviction is carried out by public or private entity.¹⁰³ Where an individual is unable to provide for themselves, the State must take all appropriate measures to the maximum of its available resources to ensure adequate alternative housing, resettling and productive land as needed.¹⁰⁴ Where the State does not guarantee alternative housing, it must be shown that despite having taken all the reasonable measures, subject to maximum available resources, it has been unable to uphold the right to housing of the person concerned.¹⁰⁵ Additionally, where the State has been unable to provide a permanent alternative accommodation, temporary accommodation that does not meet all the adequate requirements may be used in so far as it protects the human dignity of the person.¹⁰⁶ The adequacy requirements as provided in General Comment 4 are focused on in relation to determining the adequate housing alternatives provided.¹⁰⁷

¹⁰¹ *Soraya Moreno Romero v Spain*, Adoption of Views (22 February 2021) CESCR 69 Comm. 048/2018.

¹⁰² *Ibid*, para 6.6.

¹⁰³ *Ibid*, para 11.1.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*, para 11.4.

¹⁰⁷ *Ibid*, para 11.3.

Taking all of this into consideration, the Committee response to the communication reflects the tripartite obligations envisaged in the Covenant to respect, protect and fulfil the right to adequate housing. The State must respect the human dignity of the person through preventing homelessness and violation of human rights as a result of eviction. The obligation to protect is ensured through the State providing alternative accommodation which meets adequacy criteria where the dignity and rights of the person is ensured. Furthermore, the State must fulfil this by facilitating the acquisition of alternative accommodations which meets the needs of the person. Where this is not possible, there is a high evidential burden on the State to prove that every effort has been taken in reasonableness and maximum available resources has been taken.

While in the *Soraya* case, the author was unsuccessful in establishing a violation of her rights under Article 11.1, the Committee has held there to be a violation of Article 11.1 in relation to the *Djazia* decision. Similar to the facts of *Soraya* in terms of forced eviction, the *Ben Djazia and Naouel Bellili* decision involves the authors renting private accommodation of which the author was unable to make payments for as a result of the termination of his unemployment benefit.¹⁰⁸ The authors had additionally applied several times to various social housing bodies and for his unemployment benefit and was unsuccessful. In the face of eviction, the authors successfully obtained a court order to delay the eviction and a social housing request was sent to the housing bodies, which was unsuccessful. The authors and their children were ultimately evicted and have stayed in short term shelters, their car and their relatives' homes.¹⁰⁹ The authors exhausted all avenues in reapplying for the court order, as well as appealing to the Constitutional Court on grounds of a violation of *amparo*, seeking interim measures in the European Court of Human Rights, which were unsuccessful.¹¹⁰ There is a further claim that the relief measures for persons on with insufficient income are insufficient to protect the right to adequate housing, as experienced by the author who had several unsuccessful social housing claims.¹¹¹

¹⁰⁸ Mohamed Ben Djazia and Naouel Bellili v Spain, Adoption of Views (20 June 2017) CESCR 61 Comm. 005/2015.

¹⁰⁹ Ibid, part A.

¹¹⁰ Ibid.

¹¹¹ Ibid, para 3.3.

The Committee consideration of the merits focuses on a variety of points, of which the State duty to protect tenants, and the right to housing for evicted persons and access to public housing will be examined. First, while the State Party argued that the eviction was not directly initiated by public authorities, as a result of the expiration of a rental term in the contract, the Committee notes that in any event the State bears the ultimate responsibility to ensure that the rights under the Covenant are respected and protected from direct or indirect interference through adopting measures.¹¹²

Furthermore, while the Covenant 'primarily establishes rights and obligations between the State and individuals, the scope of the provisions of the Covenant extends to relations between individuals.'¹¹³ This stance taken by the Committee further emphasises the responsibility of State to provide assistance to individuals with insufficient income as a result of the obstacles they face in the private sector. There is an additional responsibility of the State to facilitate an environment in which the individual is able to enjoy their right to housing in light of privatisation of housing, through the adoption of measures.

The Committee notes that evictions of persons in relation to rental accommodation may be compatible with the Covenant if provided for by law, carried out as a last resort and the persons have had access to effective judicial remedy.¹¹⁴ Additionally, the Committee posited that there has to be a real opportunity for genuine prior consultation for the individual and State authority, with alternative means available preventing the individual from being exposed to further violation of the Covenant and other human rights.¹¹⁵

¹¹² Ibid, paras 14.1- 14.2.

¹¹³ Ibid.

¹¹⁴ Ibid, para 15.1.

¹¹⁵ Ibid.

The requirement of genuine participation highlights the positive obligations of States to ensure genuine participation of persons in all stages of housing decisions. Similar to *Soraya*, the Committee affirms the State has a duty to ensure that evictions should not render individuals homeless.¹¹⁶ In line with Article 2.1 of the Covenant, the State must take all necessary steps to provide alternative housing to evicted persons, irrespective of whether the eviction is initiated by authorities or individual such as the lessor.¹¹⁷ Should the State be unable to guarantee this, they must 'demonstrate that it has considered the specific circumstances of the case and that, despite having taken all measures, to the maximum of its available resources, it has been unable to uphold the right to housing to the person concerned.'¹¹⁸

Alongside examining progressive realisation, the Committee considers deliberately retrogressive measures. The Committee highlights that the State Party's argument was insufficient in progressively realising the right to housing, given that the Madrid Housing Institute sold part of its public housing stock to investment companies despite there being a demand for the stock.¹¹⁹ Furthermore, the Committee acknowledges that the State Party holds discretion in how tax revenue is utilised to realise in full Covenant rights, and therefore may adopt deliberately retrogressive measures.¹²⁰ However, these steps must be based on 'the most thorough consideration possible and was justified in respect of all the rights under the Covenant and that all available resources were used.'¹²¹ Furthermore, in times of 'severe economic and financial crisis, all budgetary changes of adjustments affecting policies must be temporary, necessary and proportional and non-discriminatory.'¹²²

¹¹⁶ Ibid, para 15.2.

¹¹⁷ Ibid, paras 15.2-15.3.

¹¹⁸ Ibid, para 15.5.

¹¹⁹ Ibid, para 17.5.

¹²⁰ Ibid, para 17.6.

¹²¹ Ibid.

¹²² Ibid.

What can be seen is that the Committee applies both General Comment 3's definition of deliberately retrogressive measures and the Committee 2012 letter when considering if the steps taken by a State Party are deliberately retrogressive. In this instance, the State Party has not convincingly explained why it was necessary to adopt retrogressive measures given demands were greater during the financial crisis.¹²³ The *Djazia* communication highlights how the doctrine of non-retrogression is applied effectively, taking into account both the normative requirements of retrogression as envisaged in General Comment 3 and the Committee 2012 letter, as well as empirical through the examination of the State Parties budgetary resources.

Overall, the State has a primary responsibility in ensuring individuals do not become homeless as a result of eviction and face a large evidential burden to prove that the steps they have taken are reasonable and to its maximum available resources. Furthermore, alternative housing arrangements provided cannot be hostels, shelters or short-stays and must meet standards of safety and dignity for the individual.¹²⁴ From this decision, the Committee held that State Party as a whole violated the authors' right to adequate housing, placing an obligation upon the State to provide the authors with an effective remedy in compensation, legal costs and through assessing the situation of the authors and offering them public housing or adequate housing.¹²⁵

¹²³ Ibid.

¹²⁴ Hakima El Goumari and Ahmed Tidli v Spain. Adoption of Views (18 February 2021) CESCR 69 Comm. 085/2018, paras 11.1-11.2.

¹²⁵ Mohamed Ben Djazia and Naouel Bellili v Spain (n 108) paras 18-20.

Both the *Djazia* and *Soraya* decision highlight the State role in ensuring access to alternative accommodation for tenants where they are evicted. The emphasis of the obligations of the State to respect, protect and fulfil the right to housing in reference to both the public and private sector. Therefore, the State is the predominant regulator and obligation holder, thereby removing claims that the private sector is out of the control of the State. As a result, the State must facilitate the right to housing through the adoption of various measures such as constructing or acquiring further social housing units or guaranteeing judicial protections for evicted lessees.

As the *Djazia* communication considers deliberately retrogressive measures, it can be inferred that when State Parties have ratified the Optional Protocol of the Covenant, the Committee is more forward in applying the doctrine. In relation to the right to housing, it is of interest to see that in addition to the Committee 2012 letter, General Comment 3 is relied upon rather than the pre-requisites of General Comment 19, perhaps as the right to social security is not touched upon in these communications. Given that the Optional Protocol of the Covenant is not applicable to the United Kingdom and Ireland, the focus on General Comment 3 provides a basis upon which the General Comment 4 adequacy requirements can be applied to flesh out the understanding of deliberately retrogressive measures in the context of the right to adequate housing.

2.1.3.3 The Special Rapporteur on the Right to Adequate Housing and Non-Discrimination.

In terms of interpretation, the travaux préparatoires of the Covenant and the Committee materials such as general comments, concluding observations and Optional Protocol communications fleshes out the right to adequate housing greatly. However, discussing the reports produced by the Special Rapporteur on the Right to Adequate Housing and Non-Discrimination provides a contemporary commentary on the challenges facing the realisation of the right to adequate housing. The mandate of the special rapporteur can *inter alia* report in accordance with relevant instruments on the development of laws, policies and good practices which are beneficial to the enjoyment of housing.¹²⁶ For

¹²⁶ UN Human Rights Council, 'Resolution Adopted by the Human Rights Council on 19 June 2020: Adequate Housing as a Component of the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-Discrimination in This Context.' UN Doc A/HRC/RES/43/14 paras 4-5.

example, the current special rapporteur on the right to adequate housing and non-discriminations, Balakrishnan Rajagopal has a mandate to continue to engage with states in the implementation of the right to adequate housing, especially on the new urban agenda and housing-related Sustainable Development Goals and targets, consulting civil society groups and stakeholders.¹²⁷ As a result, the special rapporteur can also provide recommendations to states as to how the right to adequate housing can be enjoyed. Previous special rapporteurs in relation to the right to adequate housing, Raquel Rolnik and Leilani Farha have largely focused on the growth in the privatisation and financialization of housing.

In 2012, Raquel Rolnik noted the growth of privatisation within the housing sector. In particular, she notes that in the late 1970s neoliberal economic doctrine caused a shift within housing policy transferring all “activities from state control to the private sector and for unrestricted free markets and trade.”¹²⁸ The growth of the private sector shifted the role of the state from provider to facilitator of the markets to the extent that the responsibility of supplying affordable housing.¹²⁹ As a result, conceptually adequate housing shifted from being viewed as shelter ensuring human dignity to one of commodification.¹³⁰

Many states favoured home ownership within social housing policy, implementing right to buy schemes for social housing tenants, thereby reducing the stock pile of social housing.¹³¹ In tandem to achieve greater homeownership, housing finance became influential in securing affordable housing through providing loans or grants for the purchase of rental, construction or improvement of housing.¹³² It is well known that the increased globalisation of market financed housing was a key contributor to the global financial crisis.¹³³ Rolnik highlights that the widespread housing bubble in real estate prices and decrease in the affordability of housing did little to promote access to further access to affordable housing for the poorest.¹³⁴ The subsequent crisis led to governments adjusting demand-side policies such as interest rates, financial regulation of the banking

¹²⁷Ibid.

¹²⁸ UN HRC Special Rapporteur Rolnik, ‘Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (10 August 2012) UN Doc A/67/286, para 2.

¹²⁹ Ibid, para 3.

¹³⁰ Ibid, para 11.

¹³¹ Ibid, para 5.

¹³² Ibid, para 8.

¹³³ Kenna (n 71) 8.

¹³⁴ Rolnik (n 128) para 12.

sector, rather than introducing supply side policies to increase the supply of housing, thereby increasing supply and housing affordability.¹³⁵ Furthermore, as a result of austerity measures and lack of supply side policies investing in social housing and programmes further reduced access to housing to the poorest populations.¹³⁶

Rolnik's 2012 report examines several housing finance policies to determine their human rights impact. The report affirms the integrity of housing and adequacy criteria and state obligations as envisaged in General Comment 4.¹³⁷ Furthermore, her work as special rapporteur draws attention to the role of economic doctrine within state policy in regard to housing provision. The minimised role of the state as envisaged through neoliberal doctrine while favouring private sector actors contributes to the displacement of housing as a social and economic right.

Her successor, Leilani Farha, further builds upon Rolnik's work through two reports of relevance: the first on the financialisation of the right to housing and second, guidelines for the implementation of the right to adequate housing. Leilani Farha's 2017 report clarifies the process of financialisation of housing, noting also, the expanding dominance of housing markets and corporations within the housing sector.¹³⁸ From creating hedge cities as safe havens for global capital investments to predatory lending practices to the most vulnerable,¹³⁹ housing has been at the centre of "an historic structural transformation in global investment and the economics of the industrialised world with profound consequences for those in need of adequate housing."¹⁴⁰ Therefore, through the facilitation of neoliberal ideology, deregulation and credit based schemes, the private sector has commodified the conceptualisation in housing, uprooting the social function of housing rooted in human dignity and security.¹⁴¹

Farha reaffirms the obligations to respect, protect and fulfil the right to adequate housing,¹⁴² though takes a further step in highlighting that:

¹³⁵ Ibid, para 32.

¹³⁶ Ibid.

¹³⁷ Ibid, para 17.

¹³⁸ UNHRC Special Rapporteur Leilani Farha, 'Report of 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' (18 January 2017) UN Doc A/HRC/34/51 paras 1,10.

¹³⁹ Ibid, paras 4–5.

¹⁴⁰ Ibid, para 3.

¹⁴¹ Ibid, paras 11,19.

¹⁴² Ibid, paras 13–18.

State compliance with the right to housing must be assessed in relation to the circumstances of rights-holders. A human rights framework for addressing the financialisation of housing must challenge the way in which accountability to the needs of communities and the human rights obligations of governments has been replaced with accountability to markets and investors.¹⁴³

Farha's comment here is significant. Neoliberal doctrine has played a significant role in transforming the state and housing to become accountable to financial institutions and global credit markets rather than meaningfully engage with right holders.¹⁴⁴ The extent of this can be further highlighted through the adoption of austerity measures as a result of entering into agreements with international organisations such as the International Monetary Fund, where states have agreed to "dramatically reduce or eliminate housing programmes, privatise social housing and sell off massive amounts of housing and real estate assets to private equity funds."¹⁴⁵ As a result, Farha equally calls for a paradigm shift within legislation and policies of states to take into account the needs and obligations towards right holders.

Moreover, Farha highlights the compacting effect of austerity measures on the financialisation of housing. Individuals and families were blamed for taking on too much debt and resultingly restricted from accessing mortgages through new rules and regulations, while austerity measures cut programmes which enabled accessing to housing options.¹⁴⁶ Accordingly, the instability created by the financialisation places individuals and families in a susceptible position where they are unable to access housing in the private sector if they lack income and resources, nor are they able to rely on state assistance given the residualisation of the welfare state. Being in such a position makes the individual vulnerable to predatory lending practices or homelessness should they be unable to make mortgage repayments, far removing housing from the conceptions of adequacy, human dignity and security envisaged in General Comment 4.

On the one hand, it could be thought that enabling the private sector to supply housing needs could be considered respecting existing housing structures. Farha debunks the role of the private sector in this regard. She emphasises that the bulk of real estate

¹⁴³ Ibid, para 16.

¹⁴⁴ Ibid, para 39.

¹⁴⁵ Ibid, para 41.

¹⁴⁶ Ibid, para 22.

transactions do not create nor meet housing needs and expresses concern at how the vast amounts of money poured into housing is rarely directed at relieving the insufferable housing conditions of many of the population.¹⁴⁷ The financialisation of housing has been a key driver of inequality given remote investors purchasing residential properties to sell at a later date creating richer urban areas while displacing lower income households who have to confront escalating living costs.¹⁴⁸

Additionally, as a result of housing becoming the stashed safe haven for remote investors and corporations, there is a prominence of ghost estates where properties are left empty while homeless communities burgeon.¹⁴⁹ For example, post the financial crisis within Ireland one in five properties were ghost estates while waiting lists for social housing grew exponentially to 75%.¹⁵⁰ The commodification of housing not only removes its social value as has been emphasised by Farha and Rolnik, but further highlights the lack of integration of human rights law or standards within housing regulations and policies.

The failure of investment treaties in recognising human rights standards has only reinforced systematic patterns of inequality through placing the interests of investors above right holders and denying access to justice or legal redress to those whose housing is at stake.¹⁵¹ Despite the establishment of the guiding principles on business and human rights implementing a protect, respect and remedy framework, very little attention has been paid by corporations within real estate on human rights standards or the right to adequate housing.¹⁵² While Farha elaborates on the process of financialization of housing within this report, her final report on providing guidelines on the implementation of the right to housing, offers an in-depth elaboration on how the right to housing should be implemented in light of financialization, homelessness and inequality.

She reaffirms her prior report that 1.8 billion people worldwide lack adequate housing, and 150 million people are homeless, as a result of private sector dominance within housing which has divorced the social function of housing through treating it as a

¹⁴⁷Ibid, paras 28-29.

¹⁴⁸ Ibid, para 34.

¹⁴⁹ Ibid, para 30.

¹⁵⁰ Center for Economic and Social Rights, 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (2012) 19.

¹⁵¹ Leilani Farha (n 138) paras 52, 56.

¹⁵² Ibid, paras 63-64.

commodity for speculation.¹⁵³ Furthermore, the global financial crisis is not like any previous crisis which has been caused by a decline in resources or economic downturn, rather the 2008 crisis was caused by economic growth, expansion and growing inequality.¹⁵⁴

Therefore, the financialization of housing represents an unprecedented phenomenon on a global scale, acting as an unregulated medium upon which greater socio-economic and wealth inequalities have become exacerbated. While, there has been an increased recognition of the housing crisis as a human rights crisis, there is a lack of clarity on what it means to implement the right to housing in a comprehensive and effective manner.¹⁵⁵³⁰ The report provides several guidelines, which elaborate on the normative elements for the effective implementation of the right to housing under international human rights law.¹⁵⁶³¹ These guidelines have been welcomed and reaffirmed by the UN General Assembly in resolution 43/14 calling upon states to *inter alia* take measures to address inadequate housing and curb factors which result in a lack of affordable housing.¹⁵⁷ While some guidelines focus on the accountability and regulation of the private sector, key guidance relevant to the thesis are examined below.

Primarily, Farha reaffirms that the state is the primary duty bearer under international human rights law.¹⁵⁸ In defining the state, she refers to “all public authorities and all level and branches of government, from the local to the national, including legislative, judicial and quasi-judicial bodies.”¹⁵⁹ Furthermore, state obligations are understood as encompassing all aspects of the relationships of states with businesses, financial institutions, investors and other private actors who play important roles in the realisation of the right to housing.¹⁶⁰ Therefore, the report builds upon General Comment 4 by further elaborating the dichotomy of the right to adequate housing, including all branches and agencies of government including the monitoring and regulation of private entities

¹⁵³ UNHRC Special Rapporteur Leilani Farha, ‘Guidelines for the Implementation of the Right to Adequate Housing’ (26 December 2019) UN Doc A/HRC/43/43 paras 2-3.

¹⁵⁴ Ibid, para 4.

¹⁵⁵ Ibid, para 6–7.

¹⁵⁶ Ibid, para 9.

¹⁵⁷ UN General Assembly, ‘Resolution adopted by the Human Rights Council on 19 June 2020: Adequate Housing as a component of the right to an adequate living standard of living, and the right to non- discrimination in this context’, (06 July 2020) UN Doc A/HRC/RES/43/14, Para 1 (b)- (c).

¹⁵⁸ Ibid, para 10.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

within the housing market.

Guideline no.1 on the right to housing reaffirms the fundamental nature of housing as a human right given its “integral to core human rights values as dignity, equality, inclusion, well-being, security to the person and public participation.”¹⁶¹ Following General Comment 4, the right to housing should not be merely interpreted as a right to mere physical shelter or as a commodity, rather it must be “understood in relation to the inherent dignity of the human person.”¹⁶² Similarly the interdependence of the right to housing is recognised and affirmed, in particular to the right to life.¹⁶³ The measures states can implement include recognising the enforceability of housing as a human right domestically through applicable constitutional or legislative provisions, or through interpretation on interdependent right such as the right to life.¹⁶⁴³⁹In line with the right to life, the right to housing is defined as:

The right to live in a home in peace, security and dignity, and include security of tenure and dignity, and include security of tenure, availability of services, affordability, habitability, accessibility, appropriate location and cultural adequacy.¹⁶⁵

Affirming the adequacy requirements of General Comment 4, this interpretation should be integrated into policy and programme design and including in the training of lawyers and judges.¹⁶⁶⁴¹This interpretation of the right of housing should be incorporated by courts within domestic law as indivisible and interdependent with other rights to facilitate the full protection of the right to housing.¹⁶⁷

Furthermore, the State must prohibit all forms of discrimination in housing by public and private actor, guaranteeing formal and substantive equality.¹⁶⁸ The implementation proposes further positive obligations on the state to address housing disadvantages and ensures equal enjoyment of the right to housing.¹⁶⁹ Aside from the positive obligations

¹⁶¹Ibid, para 12.

¹⁶²Ibid, para 15.

¹⁶³ Ibid, para 13.

¹⁶⁴ Ibid, para 16 a).

¹⁶⁵ Ibid, b).

¹⁶⁶ Ibid, a).

¹⁶⁷ Ibid, d).

¹⁶⁸ Ibid, para 48 a).

¹⁶⁹ Ibid.

arising from the principles of equality and non-discrimination, interpreting the right to housing via the right to life imposes another immediate obligation to respect housing through integrating it with the lived in experience of the individual, in a manner that is equal to life and secures the concept of human dignity.

Guideline no.2 refers to taking of immediate steps to ensure the progressive realisation and reasonableness. Farha notes that the most egregious violations of the right to housing derives “from failures of states to take positive measures to address unacceptable housing conditions in which so many people are compelled to live.¹⁷⁰ The progressive realisation of the right to housing, preferably through the adoption of the legislative measures, subject to maximum available resources is further clarified through the Optional Protocol of the Covenant with a reasonableness test as to the steps taken by states.¹⁷¹ It could be argued that concepts of adequacy and reasonableness are interchangeable, however, the introduction of a reasonable test through the Optional Protocol introduces additionally jurisprudence which enables greater horizontal integration of domestic courts in line with Covenant materials.¹⁷²

In terms of measures, guideline no.4 introduces implementing comprehensive strategies for the realisation of the right to housing. Measures taken must be deliberate, concrete and targeted towards the fulfilment of housing for all as swiftly and efficiently as possible, with the prioritisation of disadvantaged and marginalised groups.¹⁷³ Farha notes that major structural issues giving rise to homelessness, informality and other violations, involving many different areas of policy and programmes, requiring comprehensive plans to effect meaningful change over time.¹⁷⁴ What is pertinent to note is the complex role both social policy and human rights plays within enacting policies and programmes in relation to eradicating inequality and homelessness. When encompassed with enacting meaningful change the requirement of creating clearly defined goals and identifying the resources to be allocated and clarify responsibilities and a time frame for responsibilities.¹⁷⁵ Having clearly defined goals includes developing strategies which

¹⁷⁰ Ibid, para 17.

¹⁷¹ Ibid, para 18.

¹⁷² Diane A Desierto and Colin E Gillespie, ‘Evolutive Interpretation and Subsequent Practice’ [2013] Interpretive Communities and Processes in the Optional Protocol to the ICESCR, ZaöRV 549, 573.

¹⁷³ Farha (n 138), paras 19 a)-b).

¹⁷⁴ Ibid, para 25.

¹⁷⁵ Ibid, para 22.

provide coherence and co-ordination in all relevant policy areas such as taxation and urban planning, as well as addressing key obstacles within housing, such as discrimination, predatory lending etc.¹⁷⁶

Additionally, further positive obligations of independent and regular monitoring of the progress of implemented strategies are envisaged.¹⁷⁷ Meaningful measures also include meaningful participation within the formulation of government strategies. Guideline no. 3 notes that meaningful and effective participation is a “core element of the right to housing and critical to dignity, the exercise of agency, autonomy and self-determination.”¹⁷⁸ The guidelines pushes for further rights dichotomy within social policy, considering social housing recipients as right holders for a dignified life and not recipients of charity.¹⁷⁹⁵⁴This enables a bottom up analysis in comparison to the top-down approach taken by states, which re-enforces social exclusion and ill equipped housing for people’s needs.¹⁸⁰ The guideline emphasises the need for meaningful participation guaranteed in law to include institutional supports to enable diversity of access to information on strategies and policies which concern their lives.¹⁸¹

Guideline no.5 focuses on the elimination of homelessness in the shortest possible time including preventing the criminalisation of homelessness. The guideline takes an expansive interpretation of homelessness to include living on the streets, makeshift encampments, in groups or individually, living in improvised shelters without access to water, sanitation or electricity.¹⁸² The wide interpretation of homelessness aids to include as many circumstances as possible in which an individual finds themselves without access to housing, enabling a wider conception of right holders. The guideline emphasises that homelessness is a profound assault on dignity of the individual, constituting as a *prima facie* violation of the right to housing and other human rights.¹⁸³ This stance highlights that homelessness is not only a structural issue within social policy, rather a core goal to eradicate to ensure the dignity and security of the individual.

⁵¹ *ibid*, paras 28 b)-c).

⁵² *ibid*, para d).

⁵³ *ibid*, para 20.

⁵⁴ *ibid*, para 21.

⁵⁵ *ibid*, para 22.

⁵⁶ *ibid*, paras 24 a)-c].

⁵⁷ *ibid*, para 29.

⁵⁸ *ibid*, para 30.

Furthermore, homelessness individuals to informal housing are frequent subject to criminalisation, harassment and discriminatory practices as a result of their housing status.¹⁸³ As a result, implementation guidelines emphasise that states should provide access to safe, secure and dignified emergency accommodation with necessary supports without discrimination on any grounds.¹⁸⁴ Additionally, there is an emphasis on providing individuals and families with access to adequate permanent housing so as not to rely on emergency accommodation for extended periods.¹⁸⁵ It can be thought that this guideline calls for further positive obligations on the state, whether publicly or privately to provide permanent housing that meets the needs of individuals and families to prevent overcrowding of emergency accommodation for more immediate short term housing needs.

Additionally, there are immediate obligations imposed on the state to prohibit and address discrimination on the ground of homelessness or other housing status, including repealing legislation which criminalise or penalise behaviours with being homeless, such as evicting homeless people from public places.¹⁸⁶ Immediate obligations such as these not only re-enforce the respect for human dignity but also recognise how the concept of home transcends fixtures, and forms a sense of security and stability for the homeless should they be unable to access accommodation. Additionally, the guideline calls for alternative procedures for dealing with minor offences to allow homeless individuals to break the cycle of criminalisation, incarceration and homelessness in a manner that respects and promotes their rights.¹⁸⁷

These reports reflect a progressive understanding of the right to housing as envisaged in General Comment 4, while reflecting the current obstacles faced in the enjoyment of the right to housing. The accountability held by the special rapporteurs not only hold states to account for the financialization of housing but provide a great number of normative elements to consider in regard to implementing the right to housing. Finally, what can be drawn from these reports are the pitfalls of the general wording of Article 11.1 of the Covenant. The impact of neoliberal economic doctrine and the use of austerity measures not only displaced the role of the state in social housing provision, but also passed the

¹⁸³ Ibid, para 31.

¹⁸⁴ Ibid, para 33 a).

¹⁸⁵ Ibid, b).

¹⁸⁶ Ibid, c).

¹⁸⁷ Ibid, d).

burden of accessing housing onto the individual regardless of economic status. Though General Comment 4 fleshes out the right to adequate housing, the non-binding nature of general comments to a does little to deter and hold states accountable for adopting policy measures which have contributed to deregulation and gradual financialisation of housing to the extent as described by the Special Rapporteurs.

2.1.4 Assessing the Doctrine of Non-Retrogression in relation to the Right to Adequate Housing

From engaging in a wider interpretation of Article 11.1 of the Covenant, the obligations concerning the enjoyment of the right to housing are further clarified. The importance of the individual enjoying their right to adequate housing extends to both private and social housing, of which the State Party has a responsibility to realise through a variety of legislative, financial, administrative, and budgetary measures.¹⁸⁸ The adequacy components from General Comment 4 hold a key role in determining whether housing itself is adequate. However, what further determines inadequacy of the enjoyment of the right to housing is whether disadvantaged and marginalised groups are able to access housing and are not subject to overcrowding or substandard accommodations.

Taking this into consideration, in engaging an assessment of the doctrine of non-retrogression in relation to the right to adequate housing, it is clear that the adequacy components and the matter of access to housing by marginalised and disadvantaged groups addressed in General Comment 4 play a key role in assessing the normative elements of the right to adequate housing. In assessing empirical retrogression both Nolan and Courtis note that:

A comprehensive evaluation of State conduct (actions and omissions), including the generation and use of available resources. It will often require the use of qualitative indicators as State conduct will manifest (or foreseeably will manifest) in objective socio-economic outcomes, such as employment (right to work) or the incidence of communicable disease (right to the highest attainable standards of physical and mental health)¹⁸⁹

¹⁸⁸ UNCESCR, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 7.

¹⁸⁹ Aoife Nolan, *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2015) 124.

Building upon Nolan and Curtis' analysis, State conduct and its maximum available resources can be examined *ex post* utilising indicators relevant to the Covenant right engaged. The statistics used can be domestic, as produced by the Office of National Statistics in the United Kingdom and the Central Statistics Office in Ireland, or international as set out by the Office of the High Commissioner of Human Rights.¹⁹⁰ Examining whether housing legislation and policies are deliberately retrogressive falls under the first part of assessment of the criteria formulated in the introductory chapter. Therefore, deliberately retrogressive measures in relation to the right to housing assessing normative and empirical retrogression will engage the following:

¹⁹⁰ UNOCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation' (2012) UN Doc HR/PUB/12/5, 94.

Assessment of the Doctrine of Non-Retrogression in relation to the Right to Housing: The Backwardness of the Measure

General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Security of Tenure	<ul style="list-style-type: none"> ● Is the legal security of tenure guaranteed for all forms of public and private accommodation? ● Do all persons have a guarantee against forced evictions? 	<ul style="list-style-type: none"> ● Average time taken to settle disputes related to housing and land rights in courts and tribunals. ● Number/proportion of legal procedures seeking compensation following evictions in the reporting period, by result after adjudication. ● Number and proportion of displaced or evicted persons rehabilitated or resettled in the reporting period. ● Reported cases of “forced evictions” (e.g., as reported to the special procedures), in the reporting period. ● Proportion of households with legally enforceable, contractual, statutory or other protection providing security of tenure or proportion of households with access to secure

		tenure.
Availability of Services	<ul style="list-style-type: none"> • Are an adequate level of services, materials and infrastructure provided for? 	<ul style="list-style-type: none"> • Number of and total public expenditures on housing reconstruction and rehabilitation by evicted/displaced persons during the reporting period. • Share of public expenditure on provision and maintenance of sanitation, water supply, electricity and other services of homes.
Accessibility	<ul style="list-style-type: none"> • Are the housing measures accessible to disadvantaged groups? • Are the special housing needs of disadvantaged groups taken into consideration? • Do the measures directly or indirectly discriminate against these groups in accessing housing? 	<ul style="list-style-type: none"> • Disaggregated homelessness statistics from CSO and ONS on barriers to accessing housing by race, gender, disability and household type. • Proportion of specialised social housing bodies for persons with disabilities. • Number of specialised housing units for persons with disabilities. • Percentage of minorities and marginalised groups living in shelters and

		emergency accommodation.
Habitability	<ul style="list-style-type: none"> • Are housing measures providing habitable accommodations with adequate space and protection from cold, damp, heat, rain etc? 	<ul style="list-style-type: none"> • Share of public expenditure on social or community housing. • Habitable area (sq. m. per capita) earmarked for social or community housing during the reporting period. • Proportion of population with sufficient living space (persons per room or rooms per household) or average number of persons per room among target households. • Proportion of households living in permanent structure in compliance with building codes and by-laws. • Proportion of households living in or near hazardous conditions.
Affordability	<ul style="list-style-type: none"> • Is housing affordable, in the sense that housing costs do not compromise other basic needs? 	<ul style="list-style-type: none"> • Proportion of households that receive public housing assistance, including those living in subsidised rental and subsidised owner-occupied housing. • Proportion of homeless population that used public or community-based

		<p>shelters in the reporting period.</p> <ul style="list-style-type: none"> ● Proportion of households spending more than “X” per cent of their monthly income or expenditure on housing or average rent of bottom three income deciles as a proportion of the top three (at risk of homelessness statistics by the ONS and CSO). ● Annual average of homeless persons per 100,000 population: Homelessness statistics by the ONS and CSO. ● Proportion of household budget of target population groups spent on water supply, sanitation, electricity and waste disposal.
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The above criteria exclude some of the adequacy components from General Comment 4 and focuses on security of tenure, availability of services, accessibility, habitability and affordability. The reasons for this are two-fold. First, the UN human rights indicators guide in relation to the right to housing, sets out process and outcome indicators with regards to habitability, accessibility, affordability and security of tenure.¹⁹¹ As a result, it is difficult to ascertain how in social housing components such as cultural adequacy can be measured empirically. For example, would cultural adequacy be measured via survey

¹⁹¹ Ibid, 94.

on the satisfaction of social housing tenants of a variety of faiths and ethnicities etc.? Or perhaps through the number of housing units produced taking into account cultural needs of a variety of groups? Second, the habitability, affordability and accessibility and security components fit well in an assessment of social housing in focusing on both the quality and security of social housing. As a result, these criteria are put forward as a means to examine deliberately retrogressive measures in relation to social housing.

2.2 The Right to Social Security

The Committee on Economic, Social and Cultural Rights has highlighted that in order to respect, protect and fulfil the right to adequate housing, the State Party can adopt a series of measures, one of which is providing subsidies or benefits to help marginalised and disadvantaged groups to access housing.¹⁹² The Concluding Observations of the Committee, in relation to the right to adequate housing do not explicitly recommend General Comment 19 on the right to social security when referring to housing welfare policies which aim to make accessing housing more affordable. Given the interdependence of human rights, the rights to housing and social security play a central role in facilitating the individual to realise further economic, social and cultural rights.¹⁹³

The removal or changes to social welfare policies which provide financial assistance to low-income, marginalised and disadvantaged groups significantly impact the enjoyment of the right to adequate housing. For example, Phillip Alston, the prior UN Special Rapporteur on Extreme Poverty and Human Rights, highlighted how Universal Credit – an umbrella means-tested benefit provided to welfare recipients in the United Kingdom¹⁹⁴ - which is fashioned under a ‘rubric of austerity’ and has contributed exacerbating poverty in the United Kingdom.¹⁹⁵ Therefore, the right to social security

¹⁹² UNCESCR General Comment 4 (n 39) para 8(c); UNCESCR Poland Concluding Observations 1998 (n 76) 2, para 5.

¹⁹³ UNCESCR General Comment 4 (n 39) para 1; UNCESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)’ (04 February 2008), UN Doc E/C.12/GC/19, para.1

¹⁹⁴ Jane Millar and Fran Bennett, ‘Universal Credit: Assumptions, Contradictions and Virtual Reality’ (2017) 16(2) *Social Policy & Society* 169, 169.

¹⁹⁵ UNHRC Special Rapporteur Phillip Alston, ‘Visit to the United Kingdom of Great Britain and Northern Ireland; Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (23 April 2018) UN Doc A/HRC/41/39/Add.1, 2.

should have a greater role in the examination of deliberately retrogressive measures in relation to the enjoyment of the right to adequate housing.

Against this backdrop, this chapter undertakes an examination of how the right to social security can be tailored in the affordability component of the assessment of deliberately retrogressive measures in relation to the right to adequate housing. Article 31 VCLT is applied to interpret the ordinary meaning of Article 9 in light of its context, object and purpose.¹⁹⁶ Therefore, the text of Article 9 and subsequent practices of treaty, being General Comment 19, Concluding Observations and Optional Protocol communications are examined.¹⁹⁷ Article 32 VCLT is also applied to interpret the meaning of social security utilising the *travaux préparatoires* given the ambiguity surrounding the meaning of social security.¹⁹⁸ After interpretation the affordability component of the assessment is fleshed out to incorporate criteria from the right to social security.

Article 9 of the International Covenant on Economic, Social and Cultural Rights states that ‘the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.’¹⁹⁹ Social security schemes gradually gained prominence through the twentieth century, primarily as social insurance where workers and employers paid a co-contribution to finance sickness and compensation for workers.²⁰⁰ Over the years, Social security has widened to include social assistance to groups such as the elderly and unemployed, financed through taxation.²⁰¹ The origins of Article 9 of the Covenant are in Article 22 of the Universal Declaration of Human Rights, which states:

¹⁹⁶ VCLT (n 1) Article 31.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid, Article 32.

¹⁹⁹ ICESCR (n 8) Article 9.

²⁰⁰ Ben Saul ICESCR Commentary (n 9) 609.

²⁰¹ Ibid

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.²⁰²

The Universal Declaration highlights the moral underpinnings of social security. Based on the dignity of the human being as an individual and member of society, the integral nature of social security in ensuring that the individual is able to enjoy further economic, social and cultural rights is made clear. The duty placed on the State Party is more defined manner in Article 22 of the Universal Declaration than Article 9 of the Covenant which omits steps the State can take to realise the right to social security. As can be seen, Article 9 of the Covenant is fairly limited in scope in comparison to the Universal Declaration which provides scope for the right to be widely interpreted by the thesis.

2.2.1 Travaux Préparatoires of the International Covenant on Economic, Social and Cultural Rights: Article 9

Expanding on the meaning of social security – as encapsulated in Article 9 of the Covenant – through the preparatory works of the Covenant clarifies the meaning of social security and allows for the affordability component of the assessment to contain the substance of both Articles 11 and 9 of the Covenant.

The drafting of Article 9 involved extensive debate on several issues as evident in the *travaux préparatoires*. Before engaging in the preparatory materials of Article 9, it is essential to note that the International Labour Organisation (ILO) provided significant input to the drafting process given their direct interest in economic, social and cultural rights, in particular Articles 22-25, of the Universal Declaration of Human Rights.²⁰³

²⁰² UDHR (n 22) Article 22.

²⁰³ Ben Saul ICESCR Commentary (n 9) 15

In the drafting process of the Draft International Covenant for Human Rights, States formed delegations which submitted proposals on potential Articles to the Commission on Human Rights. In relation to the right to social security, the Australian proposal stated that ‘everyone shall have the right to social security through medical care and to safeguards against absence of livelihood caused by unemployment, illness or disability, old age, or other reasons beyond his control.’²⁰⁴ Here, the right to social security is contextualised in the form of social welfare to aid the individual from becoming entrapped in poverty and provides an enumerated list with an open ending being ‘or other reasons beyond his control.’²⁰⁵ As a result, both a clear cut obligation on the State is imposed to provide specific mentioned services while allowing for a dynamic interpretation of the social security as social welfare needs change over time.

The Soviet Union text proposed that ‘social security and social insurance for workers and employees shall be effected at the expense of the State or at the expense of the employers in accordance with the laws of each country.’²⁰⁶ In comparison with the Australian text, the Soviet Union text distinguishes social insurance from social security, highlighting the requirement of employment-based compensation in the event of injury and illness for the global workforce. The text is clear on the obligation that the State shall take all the burden in ensuring that both social security and social insurance are accessible to citizens. On the one hand, the text attempts to individualise social security for each State through mentioning ‘in accordance with the laws of each country.’ On the other hand, it can be thought that the overall text attempts to impose a planned economic form of governance on states by making the State the sole contributor to social insurance which does not match the reality of other States which may rely on a tripartite system of social insurance.²⁰⁷

²⁰⁴ UNCHR, ‘Commission on Human Rights: Report of the Sixth Session Supplement No.5’ (27 March- 19 May 1950) UN Doc E/1681, 6; reprinted in Ben Saul Vol I (n 11) 16.

²⁰⁵ Ibid.

²⁰⁶ UNCHR, ‘Draft Report of the Seventh Session of the Commission on Human Rights’ (18 May 1951) UN Doc E/CN.4/527, 10; Reprinted in Ben Saul Vol I (n 11) 16.

²⁰⁷ UNCHR, ‘Commission on Human Rights Seventh Session: Summary Record of the Two Hundred and Twenty- First Meeting’ (07 June 1951) UN Doc E/CN.4/SR.221, 5-6; Reprinted in Ben Saul; Vol II (n 29) 1089-1090.

Through greater drafting of Covenant Articles, the Commission on Human Rights mainly debated over whether Article 9 should be written generally or in an enumerated fashion. A representative from the ILO participated in the drafting process. During the 220nd meeting the Australian delegation amended their proposal to fit the general formatting of other Covenant Articles, which read ‘the States Parties to this Covenant recognize that everyone has the right to social security.’²⁰⁸ The Australian proposal was further amended by the ILO representative to State that ‘the States Parties to this Covenant recognize the right of everyone to social security.’²⁰⁹ The amended proposal was generally favoured by members of the Commission, however, it was noted by the Soviet Union delegation that the proposal was ‘so simple as to be elementary.’²¹⁰ Furthermore, the Soviet Union delegation posited that a general drafting of the Article of social security would allow the principle of social security to be denied, therefore the Article required practical obligations.²¹¹

The ILO representative addressed the delegations in support of an enumerated provision by suggesting that if the ‘provision were amplified by reference to particular forms of social security... many countries would probably find it difficult to ratify the Covenant.’²¹² While drafting the ILO Convention No.102 in relation to social security, the ILO found it necessary to distinguish between eight sectors of social security, doing so in the provision would be impracticable as practice varied widely from State to State.²¹³ This exchange reflects the extensive debate in relation to the right to social security throughout the drafting process. While it may be desirable to replicate Article 22 of the Universal Declaration, the legal practicalities of ratification pushed towards a more general drafting of the right to social security.

²⁰⁸ UNCHR, ‘Commission on Human Rights Seventh Session: Summary Record of The Two Hundred and Twentieth Meeting’ (05 June 1951) UN Doc E/C.N4/SR.220, 12; Reprinted in Ben Saul Vol II (n 29) 338.

²⁰⁹ Ibid.

²¹⁰ Ibid, 13.

²¹¹ UNCHR Sixth Session Report (n 204) 9-10; reprinted in Ben Saul Vol I (n 11) 288-289.

²¹² Ibid.

²¹³ Ibid, 10.

As noted by the Greek delegation, the practical issues in drafting an over detailed provision may lead to the provision being referred back by the Economic and Social Council and General Assembly for being too detailed.²¹⁴ As a result, the Commission's aim should be 'to secure the widest ratification of the Covenant by Member States and hence to facilitate acceptance of the section of the Covenant relating to economic and social rights.'²¹⁵ The need to establish an international legal instruments which could bind State Parties towards implementing both civil, political and economic, social and cultural rights, placed a great deal of pressure on the Committee to reconcile not only State contributions in drafting but also in regards to building upon the Universal Declaration of Human Rights.

Another issue during the debate on the drafting of social security has been the elusiveness of the concept of social security. As posited by the Egyptian delegation 'the concept of social security was the outcome of an historical evolution: first social welfare, then social insurance, and, finally, the overall social security of the present day.'²¹⁶ Therefore, the Egyptian delegation found it difficult to accept the Australian proposal given its simplicity and the Uruguayan-Yugoslav proposal given its detailed enumeration which may lead to omissions and errors.²¹⁷ Similarly, the Danish delegation found the Australian proposal to be too short and lacking precision, and the Uruguayan-Yugoslav proposal to be too restrictive.²¹⁸

Following this reasoning, both the Danish and Egyptian delegations proposed amendments to the Australian proposal to read:

The States Parties to this Covenant recognize the right of everyone to social welfare, insurance and security (Egypt).²¹⁹

²¹⁴ Ibid, 14.

²¹⁵ Ibid

²¹⁶ Ibid, 18.

²¹⁷ Ibid.

²¹⁸ Ibid, 18-19.

²¹⁹ Ibid, 17.

The States Parties to this Convention recognize the right of everyone to social security, that is to say, the right to social provision for everyone who, for reasons beyond his control, is unable to provide a livelihood for himself and his family (Denmark).²²⁰

Both proposed amendments provided different levels of elaboration. The Egyptian delegation provides a general elaboration of categories of social security such as social welfare and social insurance. Though somewhat limited, the Egyptian proposal provides brief guidance as to what areas of social security should be entailed in the obligation. However, the meaning of 'security' and 'insurance' on its own may be considered too vague even when accompanied by 'social welfare.' The Danish proposal provides a general explanation of the right to social security, which provides open ended circumstances which may engage a right to social security for individuals and their families, permitting State adaptation of the right. Despite these proposals, the ILO representative noted that:

There is a tendency to use the term social security in an extremely comprehensive sense, covering both social assistance and social insurance. The phrase 'social assistance' had a special connotation in the English language; it related especially to all social welfare measures taken on the basis of the means test the use of the words 'social security' would be preferable, in view of their more general connotation.²²¹

²²⁰ Ibid, 19.

²²¹ Ibid, 19-20.

In favour of a more generalised text, the Australian proposal was adopted nine votes to three with five abstentions and additional amendments rejected.²²² The influence of the ILO representative's specialised knowledge convinced certain delegations to not attempt to change the wording of Article 22. However, during the 284th meeting, some delegations favoured the Soviet Union amendment to the Australian proposal to include social insurance.²²³ The Soviet Union amendment read 'the right of everyone to social, security, including social insurance', which was rejected by eight votes to five with five abstentions.²²⁴ Despite the rejection of the Soviet Union proposal, in the 729th meeting a Soviet Union amendment was introduced to add the word 'including social insurance' at the end of the provision which was accepted by twenty-six votes to thirteen with twenty-eight abstentions.²²⁵ Therefore, the fully amended proposal of Article 9 was adopted by fifty-one votes to one with forty-nine abstentions.²²⁶

What can be understood from the process of the drafting of Article 9 is the desire to have some form of elaboration of the Article to provide a baseline of services guaranteed by the State to the individual.²²⁷ It can be argued that similar to Article 11, through attempting to draft a general Article in relation to the right to social security,

²²² Ibid, 22.

²²³ UNCHR, 'Commission on Human Rights Seventh Session: Summary Record of the Two Hundred and Eighty- Fourth Meeting' (19 May 1952) UN Doc E/CN.4/SR.284; reprinted in Ben Saul Vol II (n 29) 1095.

²²⁴ Ibid, Ben Saul Vol II (n 29) 1095,1097.

²²⁵ UNCHR, 'Commission on Human Rights Tenth Session: Supplement No.7' (23 February -16 April 1954) UN Doc E/2573, Annex IA; UNGA, 'General Assembly Eleventh Session Third Committee: Summary Record of the Seven Hundred and Twenty-Ninth meeting' (11 January 1957) UN Doc A/C.3/SR.729; Reprinted in Ben Saul Vol II (n 29) 1846.

²²⁶ Ibid.

²²⁷ Ibid; reprinted in Ben Saul Vol II (n 29) 1839.

Article 9 may be viewed as insufficient in securing the implementation of the right to social security. However, as noted by the United Kingdom delegation, while not resembling Article 22 of the Universal Declaration, further amendment or elaboration on the Article would be inconsistent with the remaining Covenant rights and ILO Conventions.²²⁸ Additionally, with the current Article State Parties would be called upon to recognise the broadest possible conception of social security.²²⁹

Examining the drafting process of Article 9 confirms the intention of drafters to keep the wording of the Article vague to permit greater tailoring of the right by the State Parties to their own context. Similar to Article 11, the revolutionary nature of Article 9 is restrained textually to ensure greater levels of ratification by State Parties. Furthermore, what can be seen from the drafting process is that the various contingencies for recognising a right to social security mentioned by State delegations such as infirmity, disability, illness etc., do not mention housing needs or addressing living costs. As a result, the vagueness of Article 9 provides scope to consider housing welfare policies under social security. Therefore, further interpretation of the right to social security is required to further contextualise how the right to social security can serve in an assessment of retrogressive practices in the context of social housing policies.

2.2.2 General Comment 19: The Right to Social Security

General Comment 19 fleshes out the meaning and purpose of the right to social security by identifying the essential elements of the right and the obligations placed upon the State Party and non-State actors.²³⁰ Prior to the publication of General Comment 19, Article 9 of the Covenant received little attention from the Committee, remaining textually vague.²³¹ General Comment 19 provides an expansive elaboration of the right to social security in three parts which set out the meaning of social security, its normative elements and core obligations for the State at international and national level.

²²⁸ Ibid; reprinted in Ben Saul Vol II (n 29) 1843.

²²⁹ Ibid.

²³⁰ Lillian Chenwi, 'Delineating the Content of the Right to Social Security: CESCR General Comment (2008) 9(3) ESR Review: Economic and Social Rights in South Africa 23, 24.

²³¹ Eibe Reidel, *Social Security as a Human Rights: Drafting a General Comment on Article 9 ICESCR: Some Challenges* (Springer 2006) 18.

As mentioned in the introductory chapter, General Comment 19 provides expansion on deliberately retrogressive practices through providing pre-requisites to be examined by the Committee on Economic, Social and Cultural Rights.²³² While these pre-requisites are utilised in the assessment of deliberately retrogressive practices in relation to the right to adequate housing, having an understanding of General Comment 19 aids the general interpretation of the right to social security as a whole.²³³

The Committee first affirms the central importance of social security in ‘guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their Covenant rights.’²³⁴ Similar to the right to adequate housing, the right to social security also plays an integral role in ensuring that individuals or families have access to resources such as food, housing and health to be able to live in dignity and have an adequate living standard. In particular, social security plays an important role in realising Articles 6, 10, 11 and 12 of the Covenant, through implementing a variety of measures such as combatting poverty and social exclusion and providing supporting social services.²³⁵ Additionally, measures adopted in relation to each of these Articles cannot be taken as a substitute for social security schemes.²³⁶ Therefore, in relation to the assessment of social housing welfare schemes in the United Kingdom and Ireland, it is important to develop an assessment which includes the guidance set out by General Comment 19 rather than solely rely on the affordability component of General Comment 4.

²³² Ben Warwick (n 6) 478.

²³³ VCLT (n 1) Article 31 subs 3(b).

²³⁴ UNCESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)’ (04 February 2008) UN Doc E/C.12/GC/19, para 1.

²³⁵ *Ibid*, 5, para 28.

²³⁶ Lillian Chenwi (n 230) 25.

Aside from this, the Committee highlights the redistributive role of social security, especially in poverty reduction and alleviation and the promotion of social inclusion.²³⁷ Therefore, social security plays an important role in not only reducing inequality, but also in improving social mobility and preventing individuals from falling into poverty traps from which they are unable to escape. Furthermore, social security plays a role in responding to vulnerability, risk and deprivation deemed socially unacceptable in a society.²³⁸ For example, General Comment 19 notes that State Parties to the Covenant must take effective social security measures and periodically revise them, in accordance with progressive realisation and maximum available resources as encapsulated in Article 2.1 of the Covenant.²³⁹

The Committee also broadly interprets the right to social security, noting that ‘measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all peoples a minimum enjoyment of this human right.’²⁴⁰ This broad interpretation of the right to social security includes both contributory and insurance-based schemes - known as social insurance - and non-contributory schemes such as universal or targeted social assistance schemes - otherwise known as social welfare - and private, self-help or community-based social security schemes.²⁴¹ The Comment goes beyond solely guiding State Parties on a national level but recognises the need for local implementation of social security to ensure that local needs are frequently met and monitored through policy.

The Committee expresses their concern at the ‘denial of or lack of access to adequate social security, which has undermined the realisation of many other Covenant rights.’²⁴²

²³⁷ UNCESCR General Comment 19 (n 234) para 2.

²³⁸ Lillian Chenwi (n 230) 24; UNCESCR General Comment 19 (n 234) para 22.

²³⁹ UNCESCR General Comment 19 (n 234) para 4.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*, paras 4 sub-ss (a), (b).

²⁴² *Ibid.*, para 8.

As a result, General Comment 19 provides an expansive elaboration of the right to social security to further assist the State in implementing the right to social security, setting out the normative elements of social security such as availability, accessibility, adequacy and risks and contingencies and areas of application of the social security. The criteria for the elements of the right to social security reflects the wording of Article 22 of the Universal Declaration entitling everyone to the right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”²⁴³

It is pertinent to note the role of adequacy in the right to social security. Though not present in the text of Article 9, the Committee notes that benefits in cash or kind must be:

Adequate in amount and duration in order that everyone may realise his or her right to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in Articles 10, 11, 12 of the Covenant.²⁴⁴

Given the interdependence of Articles 9, 10, 11 and 12, the concept of adequacy has been introduced into Article 9 to ensure conformity of interpretation with these Articles given the integral nature of social security in ensuring realisation of these rights. The principles of human dignity and non-discrimination are emphasised in relation to adequacy to ensure that any adverse effect on the level of benefits and the form in which they are provided.²⁴⁵ Adequacy is also provided with a dynamic element, requiring the State to frequently monitor adequacy criteria regularly to ‘ensure that beneficiaries are able to afford the goods and services they require to realise their Covenant rights.’²⁴⁶ Such an interpretation places further emphasis on paragraph 3 of the General Comment where the adequacy of social security still requires to be redistributive, implying further monitoring and addressing obstacles relating to poverty, social exclusion and cost of living crises.

²⁴³ UDHR (n 22) Article 25.

²⁴⁴ UNCESCR General Comment 19 (n 234) para 22.

²⁴⁵ Ibid, para 23.

²⁴⁶ Ibid.

In addressing obstacles in relation to the enjoyment of the right to social security, the minimum core content and violations are important elements covered by General Comment 19. The minimum core content of the right to social security for the State is to ensure:

Access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, food stuffs and most basic forms of education.²⁴⁷

As a result, if a State is unable to ensure its social security schemes provide access to even the most basic of goods and services essential to human survival, this would be *prima facie* be categorised as a violation under the Covenant. If unable to meet the minimum core content for all risks and contingencies in its maximum available resources, through a wide process of consultation the State may select a group of social risks and contingencies and ensure that the obligations of respect, protect and fulfil and principle of non-discrimination are met for these groups.²⁴⁸

The obligation to respect 'requires State Parties refrain from interfering directly or indirectly with the enjoyment of the right to social security.'²⁴⁹ An immediate obligation is entailed on the State to disengage from practices which interfere with self-help or traditional arrangements for social security. Additionally, a positive obligation is also involved for the State by adjusting the State's legislative and policy agenda in accordance with international human rights law.²⁵⁰ Respectively, the obligation to protect requires that State Parties 'prevent third parties from interfering in any way with the enjoyment of social security' through adopting legislative measures prohibiting the denial of equal access to social security.²⁵¹

²⁴⁷ Ibid, para 59(a).

²⁴⁸ Ibid, sub-ss (b)-(f).

²⁴⁹ Ibid, para 44.

²⁵⁰ Ibid.

²⁵¹ Ibid, para 45.

The obligation to fulfil requires States to adopt necessary measures directed at the full realisation of the right to social security and is sub-divided into three further elements: to facilitate, promote and provide.²⁵² Facilitation involves States taking positive measures to assist individuals and communities to enjoy the right to social security, for example through adopting legislation and national strategy plans which recognise the right to social security for everyone and will cover social risks and contingencies.²⁵³ Promotion focuses on the State ensuring that there is appropriate education and public awareness concerning the access to social security.²⁵⁴

The obligation to provide involves the State providing social security through contributory and non-contributory schemes where individuals are unable to provide for themselves, through reasonable circumstances beyond their control.²⁵⁵ The obligation to provide creates a special priority to the most disadvantaged groups to have access to social security either through low-cost alternative schemes or schemes financed through taxation,²⁵⁶ further emphasising the principles of non-discrimination, the minimum core content and human dignity. Furthermore, the State must pay 'special attention ... to ensuring that the social security system can respond in times of emergency.'²⁵⁷ Therefore the State must consider the impact of social policies and legislation which impact the durability and sustainability of their social security system in meeting its minimum core content in times of emergency. It could be argued that the tripartite obligations must be balanced delicately by the State in both providing social security alongside localised social assistance schemes to ensure access to social security to everyone.

²⁵² Ibid, para 47.

²⁵³ Ibid, para 48.

²⁵⁴ Ibid, para 49.

²⁵⁵ Ibid, para 50.

²⁵⁷ Ibid.

Keeping these obligations in mind, the State must prove that every effort was made to use all resources at its disposal to satisfy as a priority, these minimum obligations, and where necessary seek international assistance to realise the right to social security.²⁵⁸ Given the integrity of social security in ensuring the individual and groups stability to further enjoy other Covenant rights, it is of concern that the consequences for not meeting the minimum core content have not been defined further than evidential criteria required of States.

In terms of violations of the right to social security, General Comment 19 notes a variety of violations of the right to social security, such as adopting deliberately retrogressive measures and the State Party formally repeal or suspending legislation necessary for the enjoyment of social security.²⁵⁹ Deliberately retrogressive measures envisaged in paragraph 42 of General Comment 19 are examined in the criteria for normative retrogression further in the chapter. Acts of Commission carried out by third party actors on behalf of the State Party are still the responsibility of the State Party as the State holds the primary authority in adopting legislative measures which ensure access to social security both privately and publicly.²⁶⁰ It is up to the State Party to ensure that their actions in relation to social security are compatible with Covenant obligations; provide an opportunity for genuine consultation; full disclosure on proposed measures; reasonable notice; legal recourse and remedies and legal assistance for these remedies.²⁶¹

²⁵⁸ Ibid.

²⁵⁹ Ibid, paras 60-61.

²⁶⁰ Ibid, para 64

²⁶¹ Ibid, para 46.

Furthermore, States have to highlight that the steps they have taken were necessary and taken in good faith towards the realisation of social security in their maximum available resources, without discrimination towards men and women.²⁶² In assessing compliance, the Committee examines whether: implementation is reasonable and proportionate; is in conformity with human rights principles; and the State has an adequate framework of monitoring and accountability.²⁶³ As seen, the principles of democracy, human rights, good faith, reasonableness, proportionality, and accountability play an integral role in the assessment of States compliance, which could be inferred to highlight the intention of State policies if these principles are not met.

Overall, General Comment 19 highlights the interdependence of the right to social security with other Covenant rights, the right to social security is rarely brought up or only mentioned in passing in other General Comments.²⁶⁴ However, General Comment 19 is a comprehensive elaboration to the right to social security which compliments the ILO Convention No.102 on the minimum standards of social security.²⁶⁵ Though not present in Article 9, the introduction of the adequacy in the right to social security bridges the gap in highlighting the role of social security in realising the right to an adequate living standard. Additionally, it can be argued that the enjoyment of Articles 10, 11 and 12 of the Covenant provide a baseline for the adequacy of social security to be evaluated.

With this in mind, a direct link can be formed to the affordability component in General Comment 4 to the adequacy component contained in the right to social security. In combination with the pre-requisites provided on deliberately retrogressive practices in General Comment 19,²⁶⁶ the adequacy of social welfare policies for accessing social housing in the United Kingdom and Ireland can be examined.

²⁶² Ibid, para 78.

²⁶³ Ibid, para 62.

²⁶⁴ Ibid, para 63.

²⁶⁵ Eibe Reidel (n 231) 18.

²⁶⁶ UNCESCR General Comment 19 (n 234) para 42.

2.2.3 Concluding Observations and Optional Protocol Communications under the International Covenant on Economic, Social and Cultural Rights

Examining both the Concluding Observations of the Committee and its Optional Protocol communications provides a deeper understanding of how the Committee interprets the right to social security. Furthermore, given paragraph 42 of General Comment 19, it is of interest to examine how the Committee interacts with States who have adopted retrogressive measures in relation to social security. The addition of Optional Protocol communications under the Covenant further fleshes out the right to social security through the commentary of the Committee in its adoption of views.

2.2.3.1 Concluding Observations in relation to the Right to Social

Security Concluding Observations from the Committee on Economic, Social and Cultural Rights in relation to the right to social security have often referred to the right to an adequate living standard. The Committee has expressed concern over benefits such as unemployment and basic income being insufficient to ensure an adequate living standard for low-income individuals and families.²⁶⁷ In this regard the Committee has recommended reviewing calculations of social allowances and allocating resources to ensure that beneficiaries of social assistance are guaranteed an adequate living standard.²⁶⁸ What is of interest to note is that since the adoption of the poverty statement in 2001, social exclusion and poverty have been examined separately to the right to social security despite redistributive nature of social security and its key role in poverty alleviation.²⁶⁹

Similar to the right to adequate housing, the enjoyment of the right to social security of marginalised and disadvantaged groups is of great importance. Obstacles which prevent access to social security by marginalised groups such as Indigenous peoples through mandatory income management schemes and penalties have been met with concern by

²⁶⁷ UNCESCR, 'Concluding Observations on the Sixth Report of Bulgaria' (29 March 2019) UN Doc E/C.12/BGR/CO/6, para 25; UNCESCR, 'Concluding Observations on the Sixth Periodic Report of Germany' (27 November 2018) UN Doc E/C.12/DEU/CO/6, para 46.

²⁶⁸ Ibid.

²⁶⁹ UNCESCR Poverty Statement (n 86) para 1.

the Committee.²⁷⁰ Similarly, barriers to access for to social security for marginalised groups who work in the informal sector has equally caused concern to the Committee given the negative impact on these groups.²⁷¹ As a result, General Comment 19 is recommended alongside measures which encourage increased coverage of social security such as self-registration and further ensuring access to social security without discrimination.²⁷² This approach not only emphasises the need of State Parties to meet the minimum core content of the right to social security, but also follows Article 9 in highlighting that the right to social security is to be enjoyed by everyone. As a result, there is a preference by the Committee to recommend that social security measures are to have universal coverage.²⁷³

Conditions regarding accessing social security such as registration,²⁷⁴ employment sanctions,²⁷⁵ or the refusal of benefits as a result of ‘professional fault’,²⁷⁶ has led to the Committee to recommend removal of these conditions to ensure access to social security to all groups without discrimination, referring to General Comment 19. Therefore, though the State Party holds discretion in setting the conditions of accessing social security, where marginalised groups are disproportionately impacted, this discretion does not hold validity and the Committee will recommend the State Party to review its policy and to extend coverage of social security.

²⁷⁰ UNCESCR, ‘Concluding Observations on the Fifth Periodic Report of Australia’ (11 July 2017) UN Doc E/C.12/AUS/CO/5, para 31.

²⁷¹ UNCESCR, ‘Concluding Observations on the Third Periodic Report of the Plurinational State of Bolivia’ (05 November 2021) UN Doc E/C.12/BOL/CO/3, para 36; UNCESCR, ‘Concluding Observations on the Initial Report of Mauritania, Adopted by the Committee at its Forty-Ninth Session (12-30 November 2012)’ (16 December 2012) UN Doc E/C.12/MRT/CO/1, para 14.

²⁷² Ibid.

²⁷³ UNCESCR, ‘Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia’ (12 June 2009) UN Doc E/C.12/AUS/CO/4, para 20.

²⁷⁴ UNCESCR, ‘Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation’ (01 June 2011) UN Doc E/C.12/RUS/CO/5, para 21; UNCESCR, ‘Concluding Observations on the Fourth Periodic Report of the Republic of Korea’ (19 October 2017) UN Doc E/C.12/KOR/CO/4, para 26.

²⁷⁵ UNCESCR, ‘Concluding Observations on the Fourth Periodic Report of New Zealand’ (01 May 2018) UN Doc E/C.12/NZL/CO/4, paras 34-35.

²⁷⁶ UNCESCR, ‘Concluding Observations on the Third Periodic Report of Estonia’ (27 March 2019) UN Doc E/C.12/EST/CO/3, paras 30-31.

Further statements by the Committee on social protection floors have reaffirmed General Comment 19 define social security as 'a human right an economic and social necessity for development and progress; redistributive and socially inclusive; as the primary responsibility of the State to realise.'²⁷⁷ Therefore, the State Party should recognise social security not as a policy subject to political will and ideology, but as an obligation to incorporate a human rights-based approach to alleviate poverty and encourage social mobility and improvement. Where social welfare policy is subject to reforms where the objective is to reduce welfare dependency, the Committee has shown concern at the potential discriminatory and retrogressive nature of reforms - especially in relation to the obligation to protect of Articles 9 and 11 of the Covenant - and therefore have referred the State to General Comment 19 and the Committee 2012 letter.²⁷⁸

In the context of the global financial crisis, the Committee takes a stronger approach to acts of a State Party adopting significant budget cuts on social welfare budgets which have negatively impacted the enjoyment of marginalised and disadvantaged groups. The Committee recalls the State Parties' obligations under General Comment 3 in relation to deliberately retrogressive measures as well as paragraph 42 of General Comment 19 and the Committee 2012 letter.²⁷⁹ Even in the context of austerity measures, the adequacy of benefits has to be safeguarded, highlighting the Committee 2012 letter requirements of temporariness, necessity and proportionality and non-discriminatory in nature.²⁸⁰ Should a State Party not comply to the conditions set out by the 2012 letter as a result of fiscal adjustment programmes, the Committee will recommend that austerity measures should be progressively waived and protection for Covenant rights enhanced in economic recovery.²⁸¹

²⁷⁷ UNCESCR, 'Statement on Social Protection Floors: An Essential Element of the Right to Social Security and of the Sustainable Development Goals' (06 March 2015) UN Doc E/C.12/54/3, para 5 sub-ss (a)-(c).

²⁷⁸ UNCESCR, 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural rights: New Zealand' (31 May 2012) UN Doc E/C.12/NZL/CO/4, para 17.

²⁷⁹ UNCESCR, 'Concluding Observations on the Third Periodic Report of Japan, Adopted by the Committee at its Fiftieth Session (29 April-17 May 2013)' (10 June 2013) UN Doc E/C.12/JPN/CO/3, para 9; UNCESCR, 'Concluding Observations on the Fifth Periodic Report of Australia' (11 July 2017) UN Doc E/C.12/AUS/CO/5, paras 31-32.

²⁸⁰ UNCESCR, 'Concluding Observations on the Seventh Periodic Report of Finland' (30 March 2021) UN Doc E/C.12/FIN/CO/7, paras 27-28.

²⁸¹ UNCESCR, 'Concluding Observations on the Fourth Periodic Report of Portugal' (08 December 2014) UN Doc E/C.12/PRT/CO/4, para 6.

Furthermore, the Committee statement on public debt further highlights that conditions set out in loans which envisage retrogressive practices in the area of economic, social and cultural rights that are unjustifiable would be a violation of the Covenant, in particular referencing paragraph 42 of General Comment 19 for conditions related to social security.²⁸²

In comparison to Concluding Observations in relation to the right to adequate housing, the Committee is ready to highlight potentially retrogressive measures in relation to the enjoyment of the right to social security. Furthermore, there is a comprehensive approach to recommendations in this regard, utilising General Comments 3 and 19, the Committee 2012 letter alongside further calls to review and adjust policies to ensure adequate protection of the right to social security. This readiness can be thought to stem from paragraph 42 of General Comment 19 which provides a strong basis for the Committee to consider retrogressive practices in relation to the enjoyment of social security. However, austerity measures are not outrightly labelled as retrogressive, rather the reforms or policies adopted by the State receive this commentary. Such a distinction between austerity measures and reforms can be considered strange given an austerity agenda adopted by the State encompasses measures as well as reforms and policies.

One can infer that there is a separation between austerity measures and policy reforms, highlighting a lack of intention or deliberation by the State Party in adopting austerity measures. For example, though austerity measures are mentioned in the statement on public debt, they are solely mentioned as a condition of loan agreements by international finance institutions.²⁸³ In this regard, austerity measures are not the direct intention of the State but are rather a compromise to receive finance to respond to the global financial crisis and economic emergencies. Therefore, reforms and policies highlight a deliberation or intention by the State Party in adopting a deliberately retrogressive practice if the consequence is a retrogression in the enjoyment of Covenant rights, regardless of if these measures form part of a wider austerity agenda.

²⁸² UNCESCR, 'Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights' (22 July 2016) UN Doc E/C.12/2016/1, para 4.

²⁸³ Ibid.

Overall, the Concluding Observations highlight that as a result of General Comment 19 elaborating on retrogressive practices, there is a greater ease in the Committee calling out policies and reforms as retrogressive. However, this readiness does not extend greatly to the right to adequate housing given the lack of recommendation of General Comment 19 in relation to the affordability of housing.

2.2.3.2 Optional Protocol Communications in relation to The Right to Social Security

The Committee has received several communications relating to alleged violations of the right to social security.²⁸⁴ Given the inadmissibility of most communications, there has not been a significant build-up of jurisprudence in relation to the right to social security.²⁸⁵ The *Miguel Ángel López Rodríguez* decision focuses on the reduction of the disability benefit of the author, a prisoner incarcerated in Seville prison, by the Regional Ministry on the grounds that his upkeep in prison should be treated as his revenue and income.²⁸⁶ As a result, the author claims to the Committee that there has been a violation of his rights under Articles 2 and 9 of the Covenant given the unequal treatment he has received as a prisoner in being able to exercise his right to enjoy social security.²⁸⁷

The Committee first considered the right to social security without discrimination, overall, reaffirming the integral and redistributive nature of social security in improving social cohesion to be enjoyed without discrimination and must be adequate in amount and duration.²⁸⁸ In relation to persons with disabilities, social security and income have a particular importance for in enabling the ability to enjoy the right to an adequate living standard with independence in a dignified manner, covering both them and their families.²⁸⁹ Furthermore, persons deprived of their liberty in prisons, prisoners are categorised as a group that have traditionally faced difficulties in exercising the enjoyment of their rights, thereby requiring special attention by the State.²⁹⁰

²⁸⁴ OP ICESCR Jurisprudence (n 98).

²⁸⁵ Ibid.

²⁸⁶ *Miguel Ángel López Rodríguez v Spain*, Adoption of Views (04 March 2016) CESCR 57 Comm. 001/2013.

²⁸⁷ Ibid, paras 3.1-3.2.

²⁸⁸ Ibid, paras 10.1.-10.3.

²⁸⁹ Ibid, para 10.5.

²⁹⁰ Ibid, para 11.1.

In relation to the communication facts, the Committee acknowledge that the reduction of the non-contributory benefit was in accordance with the law and the Covenant given the nature of non-contributory scheme is reliant on public funds, which the State has discretion to allocate in accordance with the progressive realisation of Covenant.²⁹¹ Additionally, the author failed to highlight discriminatory treatment given the uniformity of other reduction claims regionally, and that he faces discrimination of his rights in relation to the general public relying on benefits given the nature given the contextual nature of his criminal conviction and absence thereof in comparison.²⁹² As a result, the Committee held that there was no violations of the authors rights under Articles 2 and 9 of the Covenant.²⁹³

What can be drawn from this case is that the State holds the discretion to allocate resources accordingly with the progressive realisation of each Covenant right. Therefore, in relation to social welfare and housing, the State Party has discretion over its budget but must ensure that welfare is adequate in amount and duration. Furthermore, the role General Comment 19 has in Article 9 jurisprudence is significant, which if the United Kingdom and Ireland had ratified the Optional Protocol, social welfare would be open to adequacy examinations by the Committee.

²⁹¹ Ibid, paras 13.2-13.2.

²⁹² Ibid, paras 14.6-14.7.

²⁹³ Ibid para 15.

2.2.4 Framing the Right to Social Security for an Assessment of the Doctrine of Non-Retrogression for Housing Welfare Policies

From a wider interpretation of Article 9 of the Covenant, there are some overarching similarities between the rights to social security and adequate housing. In Concluding Observations, concern is raised by the Committee in relation to both rights where the enjoyment of both rights by vulnerable and marginalised groups are impaired. General Comment 19's introduction of the concept of adequacy and the pre-requisites of retrogressive measures provides in depth criteria to examine deliberately retrogressive practices in relation to the social housing welfare policies and the affordability of housing as seen in General Comment 4.

Normatively, the assessment combines both the General Comment 4 criteria for the affordability of housing and paragraph 42 of General Comment 19 relating to deliberately retrogressive measures. Though General Comment 19 mentions adequacy of social security in relation to its amount and duration, these terms are vague to measure normatively. Moreover, the link to measuring adequacy to right such as Article 11 provides a clearer measure of adequacy in relation to housing costs and disposable income. As a result, a holistic normative assessment on welfare schemes to access housing is provided.

Empirically, indicators are provided by the Office of the High Commissioner Human Rights Indicators report and will focus on the proportion of funding allocated to housing welfare schemes as well as the number of recipients.²⁹⁴ Furthermore, the proportion of the population at risk of poverty will also be examined as a gauge to interlink with statistics provided on at risk of homelessness from the right to adequate housing. As a result, the following criteria are formulated:

²⁹⁴ UNOHCHR, 'Human Rights Indicators' (n 128) 9

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing and Social Security: The Backwardness of the Measure

General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Affordability	<ul style="list-style-type: none"> • Is housing affordable, in the sense that housing costs do not compromise other basic needs? 	<ul style="list-style-type: none"> • Proportion of households that receive public housing assistance, including those living in subsidised rental and subsidised owner-occupied housing.
Retrogressive criteria Under General Comment 19	<ul style="list-style-type: none"> • There was reasonable justification for the action. Alternatives were comprehensively examined. • There was genuine participation of affected groups in examining the proposed measures and alternatives. • The measures were directly or indirectly discriminatory. • The measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an 	<ul style="list-style-type: none"> • Public expenditures for targeted social assistance schemes in relation to access housing. • Proportion of requests for social assistance i.e., income transfer, subsidised housing reviewed and met. • Averages of weekly social rents. • Proportion of population at risk of poverty (SILC data and ONS data on median income line) (if possible disaggregated data on gender, family type, race, disability).

	<p>individual or group is deprived of access to the minimum essential level of social security; and</p> <ul style="list-style-type: none"> • Whether there was an independent review of the measures at the national level. 	
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2.3 Conclusion

Engaging in a wider interpretation of Articles 9 and 11 of the Covenant has bolstered the need for criteria to be formulated to assess deliberately retrogressive measures in relation the rights to housing and social security. The rejection of a separate provision for the right to housing by the drafters of the Covenant highlights the limitation of the right to housing from one of immense potential as encapsulated by the Universal Declaration of Human Rights. Similarly, the vagueness of Article 9 has restricted its potential as set out in the Universal Declaration. However, both General Comments 4 and 19 significantly flesh out the interpretations of the rights to adequate housing and social security.

Concluding Observations have also highlighted the growing concerns towards the provision of social housing being insufficient or substandard for marginalised and disadvantaged groups. What also becomes further clarified is the impact of austerity policies on social housing policies from a variety of jurisdictions. Though not outrightly linked through every Concluding Observation, the role of the State Party in ensuring there is sufficient housing supply and financial measures for accessing housing accounts for both the private and social housing sector is clear. Similarly, studying the Concluding Observations of the Committee on Economic, Social and Cultural Rights has shown how integrated the right to social security is with the right to adequate housing given Committee recommendations also including financial assistance in accessing housing.

As a result of paragraph 42 of General Comment 19, the right to social security receives greater commentary on retrogressive measures in Concluding Observations. Similarly, where the enjoyment of the right to social security by marginalised and disadvantaged groups is negatively impacted by the measures adopted by a State Party, a combined approach is taken by the Committee which refers not only General Comment 19, but also General Comment 3 and the Committee 2012 letter. As a result, a mixed set of rules are utilised by the Committee to highlight concern over retrogressive practices combining both a necessity and proportionality test alongside normative criteria posited by General Comment 19.

Having set out both the normative and empirical elements for the rights to adequate housing and social security, a detailed assessment is formulated in which the doctrine of non-retrogression is not limited by conceptual ambiguity, rather is applicable and can support human rights-based analysis of legislation and policies introduced by the State Party. In particular, austerity measures adopted by the United Kingdom and Ireland in relation to social housing and related welfare can be assessed in detail. Having consolidated a specialised assessment of the doctrine of non-retrogression, the following chapter begins the assessment of the deliberateness of austerity measures adopted by the United Kingdom and Ireland.

3. Rights Lost in Translation: The Impact of Austerity on Social Housing and Welfare in the United Kingdom and Ireland

The adoption of austerity measures by States as a response to the 2008 global financial crisis until the late 2010s exacerbated existing inequality, poverty and reduced the capacity of the public sector to meet needs during the pandemic.¹ Against this backdrop, this chapter focuses on how the austerity narrative has translated the enjoyment of legally binding economic and social rights to one of cost-efficiency objectives and a minimal role of the State. The purpose behind this approach is to highlight the role of macroeconomic policies and ideologies in policy governing the enjoyment of the rights to housing and social security, where the Government public expenditure dictates how both rights should be realised. Though the Committee on Economic, Social and Cultural Rights has made clear that there is no preferred economic system in which economic and social rights can be realised,² the intent behind policies as a result of ideology and economic doctrine impact the enjoyment of Covenant rights. Therefore, an opportunity is presented through the doctrine of non-retrogression to explore the intentional element of the State adopting deliberately retrogressive measures.

Through a combination of socio-legal and qualitative analysis, the chapter explores the ‘deliberately’ element to highlight the role of ideology and economic doctrine in the adoption of austerity measures which impact the rights to adequate housing and social security. A qualitative review utilising ‘NVivo’, a QSR software, is carried out on House of Commons and Dáil debates from 2008-2020 to examine how the adoption of austerity measures are justified by the Irish and British Governments. Including part of the COVID-19 pandemic in the analysis allows for a determination of whether there was a shift in policy approach by the United Kingdom and Ireland. If there is a shift, there is an opportunity to examine whether the shift in policy approach alters the intent behind policies, thereby preventing an adoption of a measure to be thought of as deliberately

¹ Aoife Nolan, *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2015) 23.; Olivier De Schutter, ‘Looking Back to Look Ahead: A Rights-Based Approach to Social Protection in the Post-COVID-19 Economic Recovery’ (11 September 2020) A/HRC/RES/44/13, 5.

² UNCESR, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the Covenant)’ (14 December 1990) UN Doc E/1991/23, para 8.

retrogressive. The chapter engages in an exploratory approach examining literature surrounding social housing, social welfare, the global austerity narrative and bio-power to provide insight into how social policy interprets and implements economic, social and cultural rights.

3.1 The Role of Social Housing and Welfare Policy in relation to the Enjoyment of the Rights to Adequate Housing and Social Security

According to Article 2.1 of the Covenant, State Parties should undertake the realisation of Covenant rights by 'all appropriate means, including particularly the adoption of legislative measures.'³ As articulated by Article 2.1, there is a normative preference for adopting legislative measures in relation to the progressive realisation of economic and social rights. However, the Committee has mentioned that progressively realising Covenant rights 'by all appropriate means' includes administrative, financial, educational and social measures.⁴ Therefore, it is up to the State Party to determine its own 'appropriate means' in order to meet its goals under the Covenant as expeditiously as possible.

General Comment 3 highlights that the adoption of deliberately retrogressive measures would require careful consideration and justification in relation to the totality of Covenant rights provided for and maximum available resources.⁵ Furthermore, as posited by Aoife Nolan, the doctrine of non-retrogression entails both a normative and empirical dimension.⁶ Generally, the rights to housing and social security may have normative or *de jure* protection in the form of legislation which guarantees tenancy rights or a right to property or social insurance respectively. Even where social housing and social welfare may have some coverage under domestic law, through strict eligibility criteria and reductions in public spending, vulnerable and marginalised groups may not have access to housing or social security or may even receive inadequate assistance leading to their detriment. Therefore, social housing and social

³ International Covenant on Economic, Social and Cultural Rights' (Adopted 16 December 1976) UNGA Resolution 2200A, Article 2.1.

⁴ UNCESCR General Comment 3 (n 2) para 7.

⁵ *Ibid*, para 9.

⁶ Aoife Nolan (n 1) 471-2.

welfare policy plays an integral role in realising the enjoyment of the right to adequate housing and social security.

The policy approach of the State Party - or rather Government - dictates the realisation of social housing and related social welfare. Therefore, it is important to explore the differences between policies drafted with the intention to be deliberately retrogressive compared to policies which are later retrogressive in effect.⁷ Understanding the importance of political will behind measures being adopted, aids in fleshing out what the meaning of the 'deliberately' part of 'deliberately retrogressive measures' as envisaged in General Comment 3. Focusing on the narrative of the Government through socio-legal qualitative analysis helps to emphasise the overall intent behind policy measures which significantly impact vulnerable and marginalised groups and the enjoyment of Covenant rights. The 'deliberately' element and role of ideology in policy will be focused on later in this chapter.

Before doing so, it is important to provide a general description of housing and social welfare policies to understand first how these policies correlate to the rights to adequate housing and social security and relevant Committee material. Second, how the adoption of austerity measures caused a shift in these policy fields which impacted the translation of the protection of economic, social and cultural rights into policy.

3.1.1 Social Housing Policy

Housing is an expensive good to obtain, having a significant long-term impact on the individual or household's income in the form of rental or mortgage repayments and utilities.⁸ The long-term impact on the disposable income available to individuals reduces their ability to consume further goods and services in the economy, having inflationary implications dependent on the overall housing provision and supports available and may deteriorate living standards if housing costs rise substantially.⁹

⁷ Ben Warwick, 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) 19 Human Rights Law Review 467, 41.

⁸ Susan Smith, *International Encyclopedia of Housing and Home* (Elsevier Science 2012) 163.

⁹ Peter Somerville and Nigel Sprigings, *Housing and Social Policy* (Taylor & Francis 2005) 2–3.

Social housing plays an important income redistributive role and social integrating role, other than serving as being a physical and material structure.¹⁰ Though the nature of housing is ubiquitous, changes in social housing stock only impacts groups which are reliant on Government assistance to access housing.¹¹ Social housing policy forms one approach in a wide range of social policies utilised in Government interventions in the market to achieve certain social objectives, for example reducing homelessness.¹² Furthermore, social housing becomes a policy tool utilised by the Government to meet national housing needs while being balanced against private sector housing to ensure greater economic stability and growth.¹³ To meet various housing needs for persons unable to access private sector housing, social housing policy has to take into account not only the bricks and mortar - being the physical structure of the home - but further sociological and psychological meanings of home. As highlighted by Alison Blunt:

Some may speak of the physical structure of their house or dwelling; others may refer to relationships or connections over space and time. You might have positive or negative feelings about home, or a mixture of the two. Your sense of home might be closely shaped by your memories of childhood, alongside your dreams for the future.¹⁴

There are a variety of existential meanings for home which may be concrete or transitory in nature and what may be considered as home for one may not be for another.¹⁵ As a result, the concept of home holds a subjective meaning for the individual or family which may change over time. The concept of home can be viewed as a tripartite model: the personal, which notes the emotional nature of the home, tying in concepts of privacy and security and belonging; the social, where the individual's relationships take place; and the physical concerning the architecture and amenities.¹⁶ Alternatively, Maslows' hierarchy of needs highlights that housing for individuals

¹⁰ David F Clapham, Kenneth Gibb and William Clark, 'The Sage Handbook of Housing Studies' (2012) The SAGE Handbook of Housing Studies 1, 164.

¹¹ Ibid, 164; Peter Somerville and Nigel Sprigings (n 9) 2.

¹² Peter Somerville and Nigel Sprigings (n 9) 1-2.

¹³ Ibid, 3.

¹⁴ Alison Blunt, *Home* (Routledge 2006) 1.

¹⁵ John E Anison, "Towards a Clearer Understanding of the Meaning of "Home""(2000) 25 Journal of Intellectual and Developmental Disability 251, 254.

¹⁶ Ibid.

should meet three levels of need: the physiological needs of food, water and shelter; intermediate needs such as safety, security, belongingness social acceptance; and meta-growth, enabling creativity and self-actualisation of the individual.¹⁷

Moreover, the meaning of home differs for each group. For example, for the homeless, home may bring ideals of warmth and security, though in reality it may hold a minimal meaning in the sense of comfort, security and spatial position.¹⁸ In regards to the elderly or adults in later life, the meaning of home has links to the neighbourhood and community around them enabling social participation as well as further qualities such as affordability, adaptability, safety, privacy and transportation services.¹⁹ For persons with physical disabilities, social housing needs call for greater corporealisation in policy to recognise the experiences of persons with disabilities and ensure housing is accessible.²⁰ For individuals with intellectual disabilities, housing needs to: provide a sense of place and comfort and emotional base for life, where individuals can carry out a routine in a safe and secure manner; provide them with control over the home and necessary supports to live there such as selection of co residents, control of their funds and support staff; and security through tenancy or ownership providing them with personal stability and security.²¹

To address various housing needs, social housing policy can utilise a rational, structural and political approach.²² The rational approach utilises a positivist and empiricist approach, searching for social facts to prove or judge whether a particular policy approach is successful in meeting its objectives.²³ The political approach 'alerts us ... to the existence of different sets of objectives held by different groups in society', which in turn can help inform policy objectives and success.²⁴ Finally, the structural approach

¹⁷ Ibid, 259.

¹⁸ Peter Somerville, 'Homelessness and the Meaning of Home: Rooflessness or Rootlessness?' (1992) 16 *International Journal of Urban and Regional Research* 529, 5.

¹⁹ Catherine Bigonnesse, Marie Beaulieu and Suzanne Garon, 'Meaning of Home in Later Life as a Concept to Understand Older Adults' Housing Needs: Results from the 7 Age-Friendly Cities Pilot Project in Québec' (2014) 28 *Journal of Housing for the Elderly* 357, 378.

²⁰ Rob Imrie, *Disability, Embodiment and the Meaning of the Home, Towards Enabling Geographies* (Routledge 2016) 746, 761.

²¹ John E Annison (n 15) 253.

²² David Clapham, 'Housing Theory, Housing Research and Housing Policy' (2018) 35 *Housing, Theory and Society* 163, 167.

²³ Ibid.

²⁴ Ibid, 169.

encompasses examining the relationships between agency and highlights contextual factors which influence behaviours.²⁵ For example, a Foucauldian approach in social housing policy examines the mechanics of power at a local level and how population behaviour is impacted by social housing policy decisions.²⁶

Taking this into consideration, the variety of approaches can examine the success of a policy approach, but also conceptualise how social housing policy can be formulated to meet national demand. Ideology plays a part in policy, for example, the growth in neoliberal economic doctrine and ideology since the 1980s has pushed forward greater homeownership policies in social housing policy, such as right to buy schemes for social housing tenants which has contracted the supply of social housing.²⁷ As a result, housing supply is often encouraged via private construction and property developers through supply side policies, aiming to make the supply of housing competitive and efficient.²⁸ Hence, the ideology which is adopted by the Government and relevant social housing department dictates the approach taken in social housing provision which plays a role not only in supply, but who is able to access to social housing.

Taking all into consideration, how social housing policy is conceptualised in both approach and ideology plays an important role in ensuring that housing policy meets certain objectives as set out by the Government. For example, in addressing the homelessness or housing scarcity, applying a human rights-based approach to social housing, would encapsulate ensuring that social housing stock meets the adequacy requirements such as affordability, availability, accessibility and security.²⁹ Subsequently, a mixed approach of rational, political and structural analyses would be beneficial to ensure that housing meets the adequacy requirements not only in physical structure but for quality in terms of the lived in experiences of social housing recipients. Therefore, the Government has to monitor and adjust policies taking into account the experiences of affected groups in the policy making process to ensure they are ensuring the enjoyment of a right to housing.

²⁵ Ibid,170.

²⁶ Susan Smith (n 8) 217.

²⁷ Ibid, xxvii.

²⁸ Ibid, xxviii.

²⁹ UNCESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (13 December 1991) E/1992/23, para 8(a).

3.1.2 Social Welfare Policy

Social welfare policy refers to the 'principles, activities or framework for action adopted by a Government to ensure a socially defined level of individual, family and community well-being.'³⁰ Social welfare can cover many areas such as unemployment, illness, old age, familial and child benefits etc. Further terms for social welfare policy extend to 'social assistance' and 'social safety net', though still refer to providing assistance to needy populations.³¹ Social welfare policy encompasses non-contributory benefits where the Government provides monetary assistance to the specific groups, which are financed through the general taxation system.³² Social assistance models can be found primarily through poor relief carried out by charities throughout Europe or through 'Poor Laws' as seen in England during the Elizabethan era.³³

The literature on social welfare, conceptualises social welfare to be comprised of four elements: a poverty test, a social right, minimum standard of need and non-contributory character.³⁴ Social welfare often utilises a means or income test, ensuring at least minimum level of income protection to the population.³⁵ A minimum level of income support provided by the Government highlights a modern approach in welfare, emphasising the residuality of social welfare to be used as a last resort.³⁶ The development of this approach to social welfare contrasts to the original role of social welfare policy, being a Beveridgian approach which envisages support from the cradle to the grave.³⁷

In terms of social welfare being seen as a social right, there is a dual meaning when engaging both human rights and sociological models. A sociological model conceptualises social welfare as a right stemming from the concept that citizenship would be the sole requirement for an individual to receive a tax-free basic income from

³⁰ Joel Blau and Mimi Abramovitz, *The Dynamics of Social Welfare Policy* (OUP 2010) 21.

³¹ Daniel Béland and others, *The Oxford Handbook of the Welfare State* (OUP 2021) 624.

³² Patricia Kennedy, *Key Themes in Social Policy* (Taylor & Francis Group, 2013) 13.

³³ Béland and others (n 31) 625–626.

³⁴ *Ibid.*, 624.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Patricia Kennedy (n 32) 14; Daniel Béland and others (n 31) 625.

the Government.³⁸ Further tying in the concept of citizenship to welfare engages the ideal of an active citizen in society and in turn the economy.³⁹ An active approach to social welfare conceptualises the welfare recipient as citizens as well as ‘customers’ or ‘stakeholders’, emphasising social welfare as a responsibility, rather than an entitlement.⁴⁰ In comparison to Article 9 of the Covenant, which envisages that everyone as a human being has a right to social security and social insurance, it can be inferred that social welfare policy incorporates broader political and economic conceptualisations of the citizen to achieve social objectives of the Government such as full employment and reduction of poverty.

Thinking of the human being in a broader manner of citizenship and as a means to obtain social objectives, to an extent displaces the moral aspirations associated with a right to social security through being an entitlement of everyone given its eligibility and means-tested criteria. As a result, while social welfare policy plays a key role in the redistribution of income, poverty alleviation and social cohesion, there is a significant dissonance between social security as an economic right and social welfare which permits Government discretion in policy as well as space for ideology to formulate the social welfare response.

3.1.3 The Trickle Down of the Global Austerity Narrative

Understanding how austerity, as a macroeconomic concept, gained legitimacy on the global scale proves useful in understanding its legitimacy through the national context. The use of austerity in Government policy can largely be seen through the Reagan and Thatcher administrations during the 1980s. Otherwise known as fiscal austerity, these policies focused on utilising supply side policies such as cutting taxes for the rich to encourage ‘trickle down’ growth, privatisation of national industries and dismantling social welfare programmes to balance the budget and reduce national debt.⁴¹ Through the Thatcher administration the term ‘there is no alternative’ (TINA) is formed. The purpose of this slogan was to highlight to the British public that neoliberal policies were

³⁸ Patricia Kennedy (n 32) 12; Amanda Coffey, *Reconceptualizing Social Policy: Sociological Perspectives on Contemporary Social Policy* (McGraw-Hill Education 2004) 44–45.

³⁹ Amanda Coffey (n 38) 43.

⁴⁰ Patricia Kennedy (n 32) 3.

⁴¹ E Ray Canterbury, *The Rise and Fall of Global Austerity* (World Scientific Pub Co Pte Ltd 2015) 11–12.

the only way forward in handling national debt and rising unemployment.⁴² The strength of this rhetoric further paved the way in which greater privatisation and growth of the banking sector could take place.

With regards to economic theory, the influence of the Austrian School of economic thought - ordoliberalism - undermined New Liberal claims that unadulterated markets damage capitalism, rather that the market had its own evolutive structure which if distorted by Government intervention would produce harmful results.⁴³ Additionally, the Reinhart and Rogoff study which examined the economic performance of Governments noted that once national debt reached over 90 percent countries experienced lower rates of economic growth.⁴⁴ Furthermore, the Alesina and Perotti study in 1995 emphasised that Governments who adopted a tight fiscal stance such as increasing taxation and reducing public spending grew faster, which further laid out the ground work for fiscal austerity policies to become the norm in economic policies.⁴⁵ As a result, the transformation in economic scholarship heavily influenced States with large national debt to combine spending cuts in social welfare transfers, welfare programmes and public sector employments in order to obtain a successful economic adjustment to achieve growth.⁴⁶

These effects were further consolidated through the influence of neoliberal economic doctrine, banking deregulation and the financialisation of housing which created a problem so monumental that upon collapse, austerity was seen as the only solution to be able to lead economies out of recession.⁴⁷ Recent scholarship has debunked the success of austerity. For example, as posited by Mark Blyth if all Governments engaged in tighter fiscal stances there would be no Governments to spend to encourage growth.⁴⁸ As a result, the influence of the TINA rhetoric and ordoliberal and neoliberal

⁴² Asbjørn Wahl, 'Austerity Policies in Europe: There Is No Alternative' (2012) 3 Global Labour Journal 191,191.

⁴³ Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press 2013) 118.

⁴⁴ ER Canterbury (n 41) 7-8.

⁴⁵ Mark Blyth (n 43) 170-171.

⁴⁶ Ibid, 171.

⁴⁷ Ibid, 98.

⁴⁸ Ibid, 8.

scholarship and economic doctrine has damaged not only the economy but human life,⁴⁹ through exacerbating poverty and inequality in the name of reducing national deficits.⁵⁰

3.2 Examining the ‘Deliberately’: NVivo Data Analysis of National Narratives of Austerity in the United Kingdom and Ireland

In undertaking an interdisciplinary approach to the understanding of deliberately retrogressive measures, the ‘deliberately’ element is interpreted through Warwick’s distinction between deliberate retrogressive measures and deliberately retrogressive measures. Deliberate retrogressive measures are not drafted with the purpose of being retrogressive in nature however are incidentally retrogressive.⁵¹ However, deliberately retrogressive measures are constructed with the intention of being retrogressive and have a retrogressive effect.⁵²

The emphasis on separating the ‘deliberately’ element performs two functions in the assessment of deliberately retrogressive measures adopted by the United Kingdom and Ireland in relation to the rights to adequate housing and social security. First, it provides an opportunity to discuss the role of political will and ideology behind policy measures from a human rights-based perspective. It is not the intention of the thesis to claim that all austerity measures have the intention to be deliberately retrogressive. However, where the enjoyment of economic, social and cultural rights has faced continuous detriment – as has been explained in the United Kingdom and Irish context in the introduction – it is important to examine the Government narrative in relation to protecting Covenant rights.

Second, examining the ‘deliberately’ element provides a foundation for interdisciplinary research to incorporate a human rights-based analysis with political and economic disciplines which critique government policies. Though examining parliamentary debates does not set in stone the intent behind the policies adopted, it does provide an overall picture of the political climate which influences the policy process. Examining solely the speeches of relevant Ministers further informs the rationale behind the policy

⁴⁹ ER Canterbury (n 41) 8.

⁵⁰ Aoife Nolan (n 1) 123.

⁵¹ Ben Warwick, (n 7) 441. ⁵² Ibid.

drafting process. In turn these analyses can be used to link socio-political discourses with human rights.

In contrast, a purely doctrinal approach in examining deliberately retrogressive measures is possible through General Comment 19, the Committee 2012 letter and State Party reports in relation to their implementation and protection of Covenant rights. Further doctrinal approaches focus on examining state justifications utilising Article 4 of the Covenant.⁵³ Article 4 requires that limitations to the Covenant should be: determined by law; solely for the purpose of promoting general welfare in a democratic society; compatible with the nature of Covenant rights and be proportional in nature.⁵⁴ However, there may be brief or limited details provided on the policy approach and expenditure in relation to social housing. Additionally, the impact of the Committee 2012 letter has imposed an 'emergency model' of examining the steps taken by State Parties in the full realisation of Covenant rights which emphasise that measures must be temporary, non-discriminatory and necessary and proportional.⁵⁵ As a result, using Article 4 to examine the 'deliberately' element may hold some validity, however, its applicability to the use of austerity measures is undermined by the Committee 2012 letter which imposes a different set of rules. Hence, examining the Government intention through debates aids a wider understanding of intention in relation to drafting deliberately retrogressive measures.

The methodology to examine the 'deliberately' element in deliberately retrogressive measures follows the model highlighted by Maude Biquelet-Locke.⁵⁶ In her Harvard conference paper examining parliamentary debates, the model engages in: an exploratory approach with the research; a semi-inductive coding with computer based assistance; and triangulating this data with the coding scheme.

⁵³ Sandra Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression' (2021) 37(2) South African Journal on Human Rights 181, 196; Aoife Nolan (n 1) 123.

⁵⁴ ICESCR (n 3) Article 4.

⁵⁵ Ben Warwick, 'Socio-Economic Rights during Economic Crises : A Changed Approach to Non-Retrogression' (2016) 65 The International and Comparative Law Quarterly 249, 249-250.

⁵⁶ Judith Bara, Albert Weale and Aude Biquelet, 'Analysing Parliamentary Debate with Computer Assistance' (2007) 13 Swiss Political Science Review 577.

While Bicquelet-Locke utilises quantitative computer software such as Alceste and Hamlet,⁵⁷ using a qualitative software system such as NVivo alongside an inductive reasoning method provides a holistic analysis of data.⁵⁸ Engaging in an exploratory approach through exploring the economic and political underpinnings of austerity through the works of Mark Blyth and Michel Foucault, aids the construction of an inductive coding strategy which codes for public expenditure cuts and taxation measures as well as elements such as residualisation, being 'the process whereby public [services]... moves towards a position in which it provides only a 'safety net' for those who for reason of poverty, age or infirmity cannot access other services.'⁵⁹

Triangulating the results of the coding strategy allows for a greater accuracy of results and further creativity in the interpretation of results.⁶⁰ Therefore, the data obtained from parliamentary debates and exploratory approach is triangulated with coding following the criteria of the adequacy requirements under General Comment 4 and themes related to housing to highlight whether the Committee's guidance is relayed through the Government in policy decisions.

Given the devolved nature of the United Kingdom there is scope to include the parliamentary debates of the Scottish Parliament and Welsh and Northern Irish Assemblies in the qualitative review. However, attempting to include the Scottish, Welsh and Northern Irish Governments in a NVivo qualitative review significantly widens the scope of the thesis. As a result, the analysis follows the approach that while devolved Governments such as Scotland, Wales and Northern Ireland have the discretion to tailor policies to their own jurisdiction, there is also a counter policy convergence with the policies of the United Kingdom in regard to enacting Government-wide policy measures such as austerity measures.⁶¹ Following this approach allows for a focus on Westminster in relation to austerity in national budgets.

⁵⁷ Ibid, 571

⁵⁸ Salim Turkey Nefes, 'Using Content Analysis to Study Political Texts: Notes on Turkish Parliamentary Debates' (2022) 27 *Mediterranean Politics* 264, 265.

⁵⁹ Jen Pearce and Jim Vine, 'Qualifying Residualisation: The Changing Nature of Social Housing in the UK' (2014) 29 *J House and the Built Environment*, 657, 675.

⁶⁰ Salim Turkey Nefes (n 58) 265.

⁶¹ Danny MacKinnon, 'Devolution, State Restructuring and Policy Divergence in the UK' (2015) 181 *The Geographical Journal* 47, 47-48.

3.2.1 An Exploratory Approach of Austerity: The Role of Bio-power and Political Economy in Relation to Austerity Measures and the Enjoyment of Economic and Social Rights

Undertaking an exploratory approach of austerity both as an economic and political phenomenon allows for an inductive approach to coding parliamentary debates. From exploring the political and economic dimensions of austerity in the introductory chapter, codes relating to cutting public expenditure and raising taxation have been formulated and applied to parliamentary debates. However, without exploring austerity as a macroeconomic concept in policy formulation the analysis would be limited.

As posited by Mark Blyth, austerity forms one of many institutional blueprints which can be utilised by the Government to construct the economy, which in turn influences the tools used to maintain the economy.⁶² Economic theories such as austerity form one element of policy formulation, the exploration of austerity in a wider realm of bio- power and political economy is beneficial for further coding. Political economy is a field of study which examines the interrelationship of politics and economics, for example to role of politics in the governance of the economy, or the economic factors affect political decision-making.⁶³ Therefore, the interrelated nature of economics and politics in governance has an impact on policies which affect welfare policies which individuals and groups are reliant on government assistance.

Michel Foucault's 'Governmentality' lectures reflect the development of the art of governance from performing legislative-penal and disciplinary- surveillance functions to actively formulating policies which control population behaviour, otherwise known as bio-power.⁶⁴ The growth of mercantilism in the 17th Century presented a dynamic shift in the perception of Government sovereignty, providing a critique on governance in terms of its ability to facilitate mercantilism.⁶⁵ In tandem, the conceptualisation of the word 'economy' also shifted from meaning the governance of the family and of souls gradually to the governance of 'men and things',

⁶² Mark Blyth (n 43) 39.

⁶³ Andrew Heywood, *Politics* (Palgrave Macmillan 2013) 129.

⁶⁴ Michel Foucault, '*Security, Territory, Population: Lectures at the Collège de France, 1977-78.*' (Michel Senelart (ed.), Graham Burchell (tr.), Palgrave Macmillan 2007) 1.

⁶⁵ *Ibid*, 68-69.

thereby increasing the scope of Government governance to encapsulate the individual and the developing economy.⁶⁶

In tandem, the growth of political economy studies through works such as Adam Smith's *The Wealth of Nations* provided criticism to the Government governance rationality in relation to the Government's ability to accrue wealth and prosperity.⁶⁷ Therefore, the economy or market becomes a mechanism in which a truth of governing is revealed,⁶⁸ thereby producing 'legitimacy for the Government that is its guarantor.'⁶⁹ As a result, the economy performs a dual function in relation to governance. First, the economy provides the Government with additional tools for the governance of the population as well as a means of ensuring its own legitimacy upon the achievement of prosperity and wealth accumulation.⁷⁰ Second, while the economy provides legitimacy for the Government, the Government is the protector of the economy, as a result the Government safeguards its own legitimacy in relation to the policies it adopts. As can be seen, well before the appearance of austerity, the economy plays an important legitimising function for Government governance which has further strengthened over time.

The role of ideology in this regard further determines the rationality in which the Government operates. For example, as noted by Foucault, a neoliberal governmentality utilises the concept of the economy to form an art of governance different from the laissez-faire approach, which relies on competition between firms for regulation rather than government intervention.⁷¹ Instead for neoliberals, the economy is permitted to continue as is, only requiring positive Government interventions in the form of regulation to maintain price stability, prevent monopolies and maintain a balance of payments.⁷² Therefore, the neoliberal governmentality reduces the role of Government or governance of the Government of one of monitoring and regulation given market imperfections such as monopolies. Compared to an ordoliberal governmentality the

⁶⁶ Ibid, 96.

⁶⁷ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979.* (Michel Senelart (ed.), Graham Burchell (tr.) Palgrave Macmillan 2008) 13.

⁶⁸ Ibid, 32.

⁶⁹ Ibid, 84.

⁷⁰ Ibid, 85.

⁷¹ Ibid, 137.

⁷² Ibid, 138.

market has no defects given its self-regulatory nature, the Government solely has a role of supervision.⁷³

As a result of the strengthened link between the Government and the economy, the citizen becomes conceptualised as an economic subject: *homo oeconomicus*. *Homo oeconomicus* is a citizen of society that is subject to enterprise and production.⁷⁴ Hence, *homo oeconomicus* presents a malleable political-economic subject which responds to policies in a manner that further ensures greater production and enterprise in society.⁷⁵ Corresponding *homo oeconomicus* with social policy provides conflicting results dependent on the governmentality present. For example, a neoliberal governmentality would see the use of social policy as counter intuitive, producing greater inequality and damaging the economic process of the market, whereas an ordoliberal approach would not allow for its existence.⁷⁶ Therefore, the economic subject is subject to laissez-faire, to be an active product of enterprise to ensure their own prosperity and in turn the economy. From exploring bio-power and the role neoliberal and ordoliberal doctrine plays in the formation of the economy and in turn the population, the economy and growth play a large role in the legitimacy in Government governance. In terms of welfare provision by the Government, its role is minimal or is at least formulated in a manner for the individual to be of use to the economy.

⁷³ Ibid, 116.

⁷⁴ Ibid, 147.

⁷⁵ Ibid, 269.

⁷⁶ Ibid, 142-145.

As highlighted from the introduction, austerity coincides well in the neoliberal and ordoliberal doctrine. Therefore, the coding strategy obtained from exploring austerity both politically and economically aids inductive coding to include preferences for the private sector and employment and minimal government interventions where a neoliberal or ordoliberal ideology is present in Government justifications for austerity measures.

Before examining the results from the qualitative analysis, it is important to go into further depth in regard to the coding strategy and how this relates to examining the 'deliberately' aspect of deliberately retrogressive measures. Stepping aside from the empirical and normative analysis as is engaged in the following chapters, this stage of analysis focuses on bringing a qualitative and interdisciplinary understanding to assessing whether the measures adopted by the United Kingdom and Ireland are deliberately retrogressive in nature. When assessing retrogression, or rather the intent for policies to be designed to be retrogressive in nature, the focus is on how the Government justifies the use of austerity measures and whether these justifications highlight that the government has the knowledge that these measures to be adopted would be deliberately retrogressive in nature. As mentioned, this part of the assessment follows the methodology provided by Bicquelet- Locke.

The qualitative analysis relies on a three-pronged model: an exploratory approach, qualitative coding and the triangulation of data. The exploratory approach carried out in the above section is closely interlinked with the qualitative coding strategy carried out through Nvivo. The qualitative analysis, utilising NVivo, relies on a semi-inductive coding strategy. This means that from information from the exploratory approach, being austerity and the works of Mark Blyth and Michel Foucault, aids in providing some starter 'codes' for the qualitative analysis. These codes are then applied to British and Irish Debates to create data for the analysis. Beyond the starter codes established from the exploratory approach, such as 'private sector' and 'ordoliberalism', further codes are created intuitively from analysing further debates such as 'state justifications' and 'rational or logical reasoning' to categorise a form of state justification for the adoption of austerity measures. The use of these codes or terms for analysis link back to the core of the thesis by aiding the labelling of Government justifications and whether they are

deliberately retrogressive in nature.

In terms of the selection of the parliamentary debates in the United Kingdom and Ireland, debates are selected through the Hansard and Oireachtas debate archives. The main inclusion criterion focused on national debates and debates in relation to housing and social security taking place from 2008-2020. Keeping this inclusion and exclusion criteria simple allowed for it to be generally applicable to both the United Kingdom and Ireland. To find these debates, Boolean terms are used to filter through debates. For examples terms such as 'Austerity' AND 'Housing' and 'Austerity' AND 'Social Welfare' filter through the Irish and British debates databases to ensure that the selection of debates relate to the core point of the thesis, the use of austerity measures in relation to housing and social welfare. In total, 90 debates were selected in Ireland and 60 in the United Kingdom (here on described as selected debates). These debates vary in duration, focusing on shorter Minister questions to longer debates regarding the national budget. Given the long duration of some debates, to keep the focus of the qualitative analysis on the Government justifications for the adoption of austerity measures, the narratives provided by the Government officials were predominantly focused on in each debate. While there are some references to opposition commentary, the references focus on when austerity is mentioned either directly or through phrases where it can be intuitively understood that austerity is being referred to.

Though the State overall comprises of the Legislature, Executive and Judiciary, the focus on the government which proposes legislation and policies in the qualitative analysis keeps the substance in examining whether the Government intended for measures to be deliberately retrogressive in nature. Once all the debates are coded, the data is then triangulated alongside the adequacy requirements in General Comment 4.

Triangulation refers to comparing the data from coding against another set of codes. During the coding of parliamentary debates, aside from the codes created intuitively during the coding process, debates are also coded in relation to the General Comment 4's adequacy requirements: security of tenure, availability of services, habitability, accessibility and affordability. Within these overarching codes there are sub-categories such as supply, private sector supply, subsidies to ensure that any wording utilised by government which loosely refers to the adequacy components can be coded. Then using the 'Query Wizard' and various 'Matrix' tools, the shared references from semi-inductive

coding and also the coding from General Comment 4 adequacy components are compared against each other which creates data which highlights the extent to which the language from General Comment 4 is reflected through parliamentary debates. Given the nature of the tools on NVivo it is not possible to edit the graphs fully to only include the codes from General Comment 4, hence the graphs referring to triangulation contain code references from the semi-inductive coding stage.

3.3 The Irish Austerity Narrative: 2008-2020

In examining the use of austerity in parliamentary debates, Dáil budget statements have been coded and examined to provide inferences on how austerity is presented and justified at national level. The coding has focused on selected debates on the national budget and social welfare and housing debates where accessible. Furthermore, coding has focused on the monologues provided by Ministers in relation to the budget, social welfare and social housing. Some of the coding inferences are able to be visualised and support statements through graphs which are provided, others will be discussed.

Figure 1: References Made to Austerity within Irish Debates 2008-2020

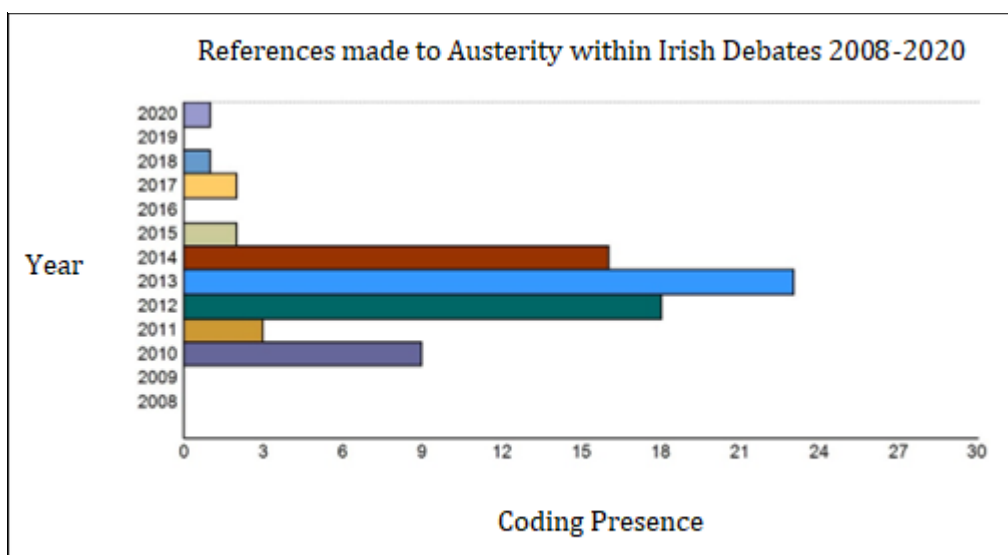


Figure 1: References made to Austerity within Irish Debates 2008-2020

From 2008 to 2020, in the selected Dáil debates, references to the term austerity are used directly by the Government party in greater quantities from 2010 onwards until 2015, where economic recovery is claimed by the Fine Gael and Labour Coalition. Figure 1 conceptualises direct and indirect references made to austerity by the Government in the selected national budget, social housing and welfare debates. What is of interest to note is that the Government rarely utilises the phrasing ‘austerity’ when referring to public expenditure cuts or raises in taxation.

Rather, austerity measures are referred to by members of the opposition in relation to the budget stance taken by the Government. When used by members of the opposition austerity is accompanied with negative language such as ‘economic treason’, utilizing strong emotive appeals to highlight the immorality associated with the adoption of austerity measures and its deliberate intention to be damaging to the economic livelihood of citizens and the economy. Contrastingly, through a variety of debates, Government officials have phrased austerity measures as ‘fiscal consolidation’, ‘difficult decisions’, ‘fiscal pruning’ or ‘balancing the budget.’ The use of these terms indirectly references austerity measures as a financial decision involving an emotional undertaking by the Government involving cuts. These indirect references demonstrate an intention or knowledge that the cuts will have a damage to the economy and people’s livelihoods, demonstrating an intent to be deliberately retrogressive.

What is also of interest to note is how the Governing Coalition also utilises negative terminology to refer to austerity measures. For example, the Fianna Fáil-Green Party Coalition links austerity to a fetish,⁷⁷ displacing the austerity agenda from its own budgetary strategy. The lack of transparency and accountability further emphasises an avoidance in acknowledging that the Government strategy will have an detrimental impact economically and population wise.

⁷⁷ Dáil Debate, Budget Statement, Tuesday 7 December 2010 Vol. 724, No.1.

Figure 3: State Justifications for the Use of Austerity Measures 2008-2020: Ireland

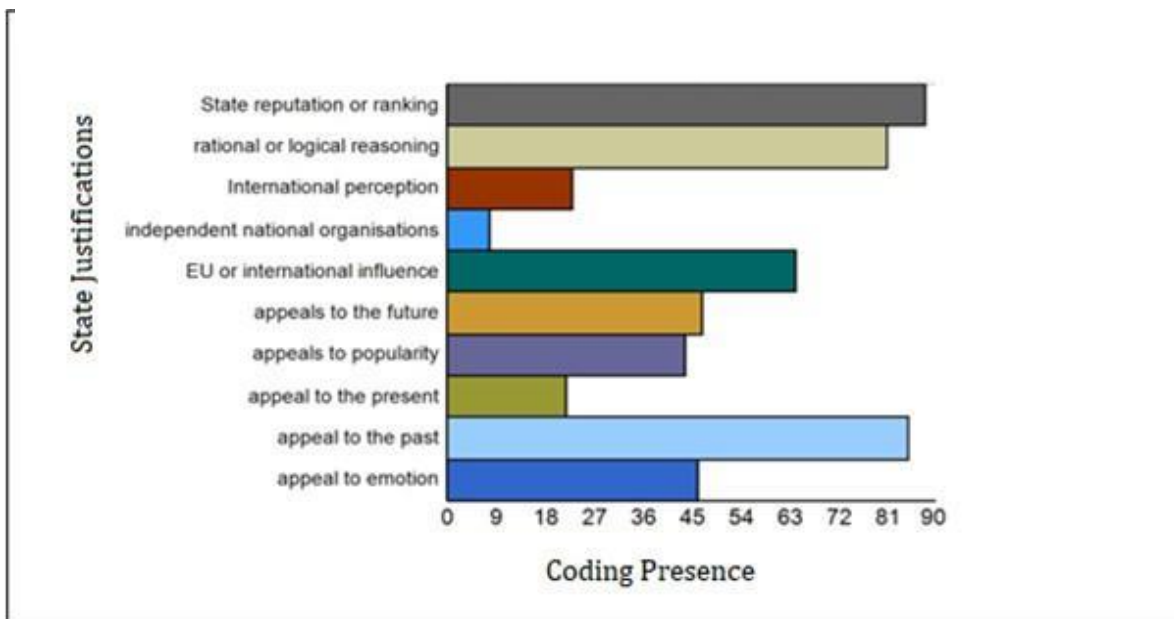


Figure 2: State Justifications for the Use of Austerity Measures 2008-2020

Figure 2: Further Justifications for the Adoption of Austerity Measures: Ireland

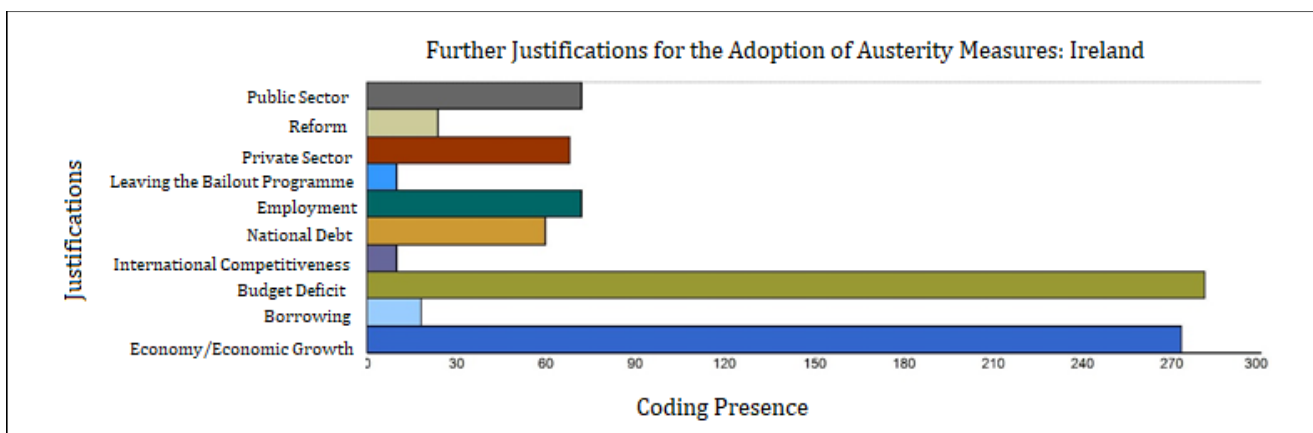


Figure 3: Further Justifications for the Adoption of Austerity Measures: Ireland

However, what is of greater interest is how austerity is justified through the Irish context. Figure 2 highlights the range of justifications utilised by the Irish Government for the adoption of austerity measures. There are several main justifications and ‘sub-justifications’ which have been labelled as further justification in Figure 3. In the Irish context there is a great use of appeals to the past, to the Government reputation, EU

influence, supported by rational or logical reasoning. The manner in which these appeals are used varies between both the Fianna Fáil and Green Coalition and Fine Gael- Labour Coalitions. The Fianna Fáil-Green Coalition primarily characterised the crisis and resulting use of austerity measures being as a result of the global financial sector and global events, with very little reference to their own economic management (as coded in EU or international influence). Strong symbolism in relation to leadership is utilised at the beginning of the 2008, for example, the Taoiseach's stated that the Government:

Will show leadership by managing the economy through this international downturn and onto a path to economic recovery... Yet during difficult times it is tempting to batten down the hatches and wait until the storm is over before figuring out where to go next, however we will not have our attention diverted from putting in place the necessary building blocks so that Ireland can take advantage of the inevitable upswing of the economy.⁷⁸

The use of symbolic imagery of the Government being in command of the ship, emphasises its role in steering the economy. Additionally, the imagery highlights an attempt to rationalise the crisis as solely a part of the economic cycle which needs to be seen through and prepared for. The separation from 'battening down the hatches' highlights that rather than protect those in the ship, the Government takes the 'risk' of action during the crisis. Symbolism such as this has been used throughout debates to undermine the opposition's claims to the economic hardships faced by various groups such as welfare recipients, families and medical card recipients.⁷⁹

Furthermore, the use of the economy or rather the pursuance of economic growth is a significant justification for the pursuance of austerity measures. There is strong emphasis on an enterprise economy and creating jobs and an economic environment which is attractive to global investors throughout the years leading to greater investments into the 'digital economy' and tax breaks for corporations.⁸⁰

⁷⁸ Dáil Debate, Financial Resolution No.15, 15 October 2008, Vol.663, No.4.

⁷⁹ Ibid.

⁸⁰ Dáil Debate, Budget Statement 2014, Tuesday 15 Oct 2013, Vol.817, No.1; Dáil Debate, Budget Statement 2015, Tuesday 14 October 2014, Vol.854, No.1.

In carrying out expenditure cuts in relation to the public sector, particularly impacting on health, educations and social welfare, the Government utilises appeals to the past on the lines that past increased spending on the public sector in the past is a justification for cuts during 2008-2012. In relation to social welfare for example, Mary Hanafin, the Minister of Social and Family affairs noted that:

Over the past decade or so, this Government has significantly improved the standard of living welfare-dependent and low-income households generally thereby making a decisive impact on poverty and social exclusion... I am conscious of the fact all departments are making savings in order to meet the expenditure pressures by increases in the live register. I am also committed to ensuring that the Department plays its part in helping to control expenditure in these more challenging economic circumstances, while protecting the improvements in welfare payments that have been put in place in recent years.⁸¹

The emphasis of past increased expenditure on welfare implies that living standards are at an optimum level, thereby justifying expenditure being cut to aid the balancing of the budget across departments. Further appeals to the past are made with reference to the resilience of the Irish people in the face of adversity to justify further sacrifices taken through the budget.⁸² These appeals to the past emphasise a collective sacrifice which must be taken by the Irish people given the nature of the crisis in being able to balance the budget and public finances.

⁸¹ Coded at Dáil Debate, National Development Plan (Motion) Resumed Debate, Thursday 10 July 2008, Vol.660, No.1.

⁸² Coded at Dáil Debate, Finance Resolution, Tuesday 16 Dec 2008, Vol.670, No.4.

In terms of social welfare, 'protecting the most vulnerable' is the general justification towards cutting social welfare over the period of governance, emphasising growing residuality of social welfare where only vulnerable individuals such as pensioners are provided with assistance.⁸³ Furthermore, as noted by the Taoiseach Brian Cowen, the success of austerity measures, or rather budgetary strategy is achieved when 'the behaviour of the people across the economy reflects and reinforces the underlying approach of budgetary choices.'⁸⁴ Therefore, the burden of success falls onto the population, rather than through Government policy choices. While such a statement can be viewed as evading accountability in relation to austerity measures, there is a further element of bio-power which can be interpreted here as the Government tries to emphasise that austerity, frugality and saving should become a general feature of the Irish experience.⁸⁵

Wider cuts have been justified with reference to the public sector under the name of reform, alluding to the under competitiveness and scale of public services to justify cuts in jobs and income of public sector servants.⁸⁶ This form of rhetoric accords with a neoliberal governmentality which aims to reduce the scale of Government by crowding out public services to make space for private sector firms. The language associated with reforming public services also centres around 'efficiency', justifying further cuts in the name of transforming the role of Government in tandem with the crisis.⁸⁷

⁸³ Budget Statement 2014 (n 80); Dáil Debate, Budget Statement 2011, Tuesday 7 December 2010, Vol.724, No.1; Dáil Debate, Budget Statement 2013, Wednesday 5 December 2012, Vol. 785, No. 2; Dáil Debate, Budget Statement 2016, Tuesday 13 October 2015, Vol.892, No.4.

⁸⁴ Finance Resolution Debate 2008 (n 82).

⁸⁵ Dáil Debate National Development Plan (n 81); Dáil Debate Financial Resolution 2008 (n 82).

⁸⁶ Ibid.

⁸⁷ Budget Statement 2013 (n 83).

In relation to the role of the 'Troika' - the triad of the European Parliament, European Central Bank and the International Monetary Fund - the Fianna Fáil-Green Coalition justified the borrowing and budget cuts such as the structural adjustment through the National Pension Reserve through rhetorical questioning. There is an emphasis that the Government cannot be expected to borrow further funds if it is not shown that they are making cuts. Public expenditure cuts and increments in taxation as a result of the 'Troika' influence emphasise a TINA rhetoric (rational or logical reasoning) which translates into the budget decisions. Furthermore, the Government utilises the 'Troika' approval of budget decisions partners as a means of further legitimacy in making cuts. Therefore, it can be inferred with the Fianna Fáil-Green Coalition there is a direct translation and embodiment of a global austerity narrative in the Government narrative for adopting austerity measures.

When compared to the Fine Gael-Labour Government (2011-2016), the Government also tries to distance itself from a pro-austerity agenda by relating it as an inheritance from Fianna Fáil-Green Government and the 'Troika'.⁸⁸ Therefore, the Government creates an imagery of being trapped in the legacy of their predecessor and must follow an austerity-based agenda. Furthermore, the Government also justifies its policy approach through contrasting its actions to the prior Fianna Fáil Government, to highlight its credibility in relation to its policy strategies. Further Government justifications for austerity measures focus largely on improving employment rates as well as revitalising the private sector as seen in Figure 3. Additionally, the Government uses its political composition to further justify its approach, as they have harmonised two different political ideologies in its overall budget strategy. Such an approach highlights the credibility in the Government setting aside its ideological differences in relation to the challenges left behind from the prior Government and global financial crisis.⁸⁹ Though the Government still utilises an austerity agenda, it is justified through gradual reductions in public expenditure in areas such as social welfare. The terms 'fairness', 'progressive' and 'equity' are utilised often when justifying public expenditure reductions in social welfare alongside with

⁸⁸ Dáil Debate, Budget Statement 2012, Tuesday 6 December 2011, Vol.748, No.6.

⁸⁹ Dáil Debate, Confidence in Taoiseach and Government Motion, Tuesday 31 December 2014, Vol. 861, No.1.

appeals to emotion and popularity in recognising the hardship faced by the Irish people, in particular the working class.⁹⁰

Over the years of governance there are greater justifications in policy approach in relation to reform. Repetitively, terms such as ‘fairness’, ‘progressivity’, ‘equity’, ‘transformation’ and ‘sustainability’ are referred to greatly when justifying adjustments in the public sector such as merging or creating new schemes in relation to unemployment and training.⁹¹ Further policy approaches are justified with the aim of encouraging a balanced sectoral growth alongside reaching employment goals. In particular, there are frequent justifications of efficiency regarding the public sector, further justifying cuts in expenditure to ensuring that the general public get value for money services.

Once the motion to leave the ‘Troika’ agreement was successful there is a shift from the austerity agenda, with Government statements proposing increases in public expenditure in relation to housing and welfare as well as other public sectors. The justifications for these policy approaches relate to encouraging both domestic and international competitiveness for Ireland as well as its attractiveness to foreign investors.⁹² In relation to housing, there is increased expenditure and investment both in private sector and public sector housing, noting the scarcity of housing and prevailing homelessness in the country. To resolve this, schemes such as Housing Assistance Payment are justified in reference to meeting housing demands through integrating public sector need with private sector supply.⁹³

As seen from Figure 1 above, references to austerity are less frequent after 2015. Through the Fine Gael and Independent Government from 2016 onwards, there is a greater use of recovery and sustainability in Government discourse. There are justifications for increasing tax revenue after 2015 in creating a savings fund, however this is in reference to Brexit and future possibilities of economic shock and uncertainty.

⁹⁰ Dáil Debate Budget Statement 2013 (n 83).

⁹¹ Ibid. Such quotes can be found from a variety of debates from 2012-2016.

⁹² Dáil Debate, Government Decision on Exiting Programme of Financial Support Motion (Resumed), Wednesday 20 November 2013, Vol.821, No.3.

⁹³ Dáil Debate Budget Statement 2014 (n 80).

Therefore, there are greater appeals to the future, or rather uncertainty to the future to justify increasing tax revenues on indirect taxation to create a ‘rainy day’ fund.⁹⁴

Figure 4: State Justifications for Covid-19 Approach: Ireland

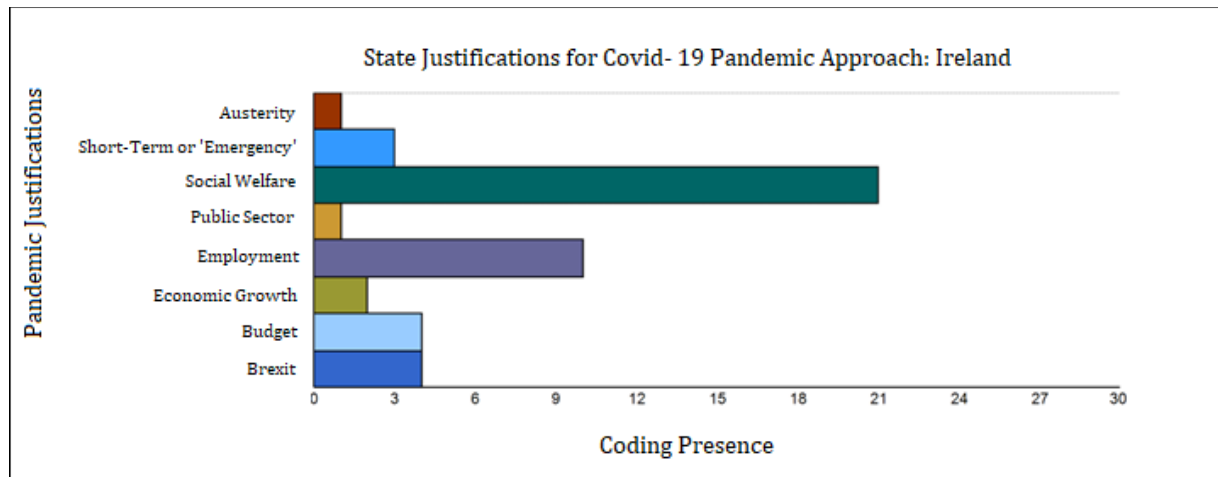


Figure 4: State Justifications for Covid-19 Pandemic Approach: Ireland

During the pandemic there was a shift in approach. Figure 4 highlights that Government justifications for their approach to the pandemic focus on ensuring healthcare capacity, protecting incomes and supporting employment. References are made to austerity, but rather as a comparison to the past which should not be followed, alongside the success of the Government in tackling the obstacles of the recession and the legacy of austerity left behind with Fianna Fáil. The policy approach follows increasing public expenditure in order to help the newly unemployed as a result of the instability caused by the pandemic. There are also references to Brexit, in the sense of utilising the savings accrued as a result of fiscal consolidation to inject into the economy through social welfare schemes in the event of instability caused through a No-Deal Brexit.⁹⁵

While there is a shift in policy approach by the Government in temporarily increasing public expenditure on social welfare, there is an overarching employment focus. In tandem, there is a smaller emphasis on protecting living standards and addressing inequality and income distribution. The justification of employment and emergency codes emphasise further future justifications is cutting or adjusting welfare such as

⁹⁴ Dáil Debate, Budget Statement 2019, Tuesday 9 October 2018, Vol.973, No.1.

⁹⁵ Dáil Debate, Budget Statement 2020, Tuesday 13th October 2019, Vol.999, No.2.

tapering benefit amounts under the Pandemic Unemployment Payment to encourage greater numbers of the population to enter the workforce and support the economy.⁹⁶

Overall, the Government justifications for austerity measures have focused on economic growth or the private sector, employment and in relation to borrowing and the ‘Troika’ influence. Further links can be made in relation to political ideology in attempt to bring efficiency into the public sector as well as a growing emphasis of employment in relation to the tailoring of public services and associated welfare.

3.3.1 Phase Two: Triangulation of Irish Debates with General Comment 4

Figure 5: Triangulation of Ireland Debates with General Comment 4 and Housing Themes

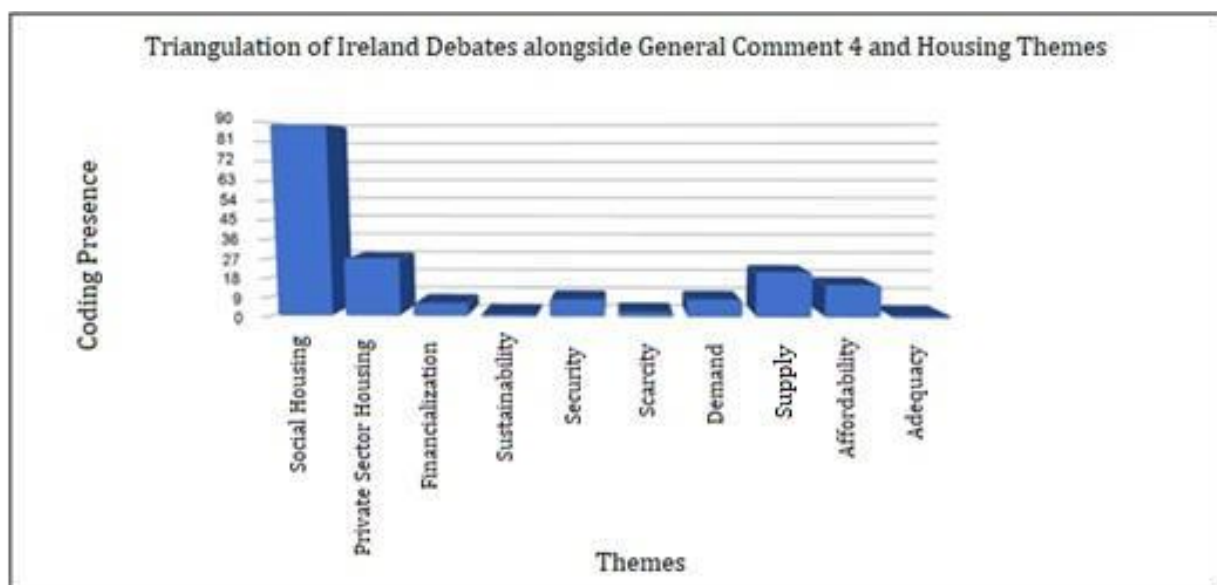


Figure 5: Triangulation of Ireland Debates with General Comment 4 and Housing Themes 2008-2020

As prior mentioned, triangulation refers to comparing the data from semi-inductive coding against further coding in relation to the General Comment 4’s adequacy components.

⁹⁶ Dáil Debate, Covid 19 Pandemic Unemployment Payment: Motion (Private Members), Wednesday 7 October 2020, Vol. 998, No.6

Within these components there are further sub-codes in relation to each adequacy component such as supply, private sector supply, subsidies to ensure that any wording utilised by government which loosely refers to the adequacy components can be coded. Then using the query wizard and various matrix tools, the shared references from semi-inductive coding and the coding from General Comment 4 adequacy components are compared against each other which creates data demonstrating the extent to which the language from General Comment 4 is reflected through parliamentary debates. Given the nature of the tools on NVivo it is not possible to edit the graphs fully to only include the codes from General Comment 4, hence the graphs referring to triangulation contain code references from the semi-inductive coding stage.

Figure 5 triangulates Irish Dáil debates with criteria from General Comment 4 and further housing themes. The main criteria mentioned in debates were in reference to affordability, security and to a lesser degree adequacy. Adequacy and the sustainability of housing receive few references and have been in relation to refurbishment of existing stockpiles of social housing provision.

Overall, in statements made in budget debates, there are greater references made to social housing provisions when housing is mentioned. During the period of austerity, the supply of housing was referred to in public expenditure cuts by the Fianna Fáil- Green Coalition. In the time of the Fine Gael-Labour Coalition there are greater references to gradual reduction in public expenditure cuts in relation to housing supply. The supply, or rather construction, of social housing is also increased upon the exit of the ‘Troika’ programme.⁹⁷ In relation to the housing sector supply the private sector is also referenced frequently through the growing incorporation of private sector firms aiding local authorities and Approved Housing Bodies in the construction of social housing.⁹⁸

⁹⁷ Dáil Debate, Budget Statement 2016 (n 83); Dáil Debate, Budget Statement 2018, Tuesday 10 October 2017, Vol.960, No.1.

⁹⁸ Dáil Debate, Budget Statement 2018, Tuesday 10 October 2017, Vol 960, No.1; Dáil Debate Budget Statement 2020 (n 95); Dáil Debate, Budget Statement 2021, Tuesday 13 October, Vol.999, No.2.

In tandem, there are references to the growing demand for housing alongside the growing

scarcity of housing supply. In this context demand for housing has focused on homeless families in various parts of the Country who have been unable to access private sector housing and have lived in temporary or emergency accommodation.⁹⁹ Where private sector housing is mentioned, there is a greater focus on taxation measures such as stamp duty to increase revenues in relation to housing, or through mentioning mortgage rates.¹⁰⁰

Affordability is largely referenced through the private sector in terms of the cost of mortgages, housing prices as well as rental properties. As a result, there is greater mention of financing schemes by the Government to subsidise housing costs. Additionally, there is a greater reference of social welfare provisions for housing such as the introduction of the Housing Assistance Payment to make accessing private sector rental properties easier for low-income individuals and families.¹⁰¹ In tandem with affordability there are frequent references to security of tenure, however tenure is largely focused on homeownership and is therefore supported with financial schemes which aid individuals and families the ability to purchase housing whether in through the public or private sector.¹⁰²

From triangulation – using data obtained from an exploratory approach, parliamentary debates and General Comment 4 adequacy requirements to inform the analysis - what can be noted is how austerity, in the Irish experience has contributed to the displacement of social housing provision as a means of meeting housing needs. Through cutting public expenditure on social housing and other public sectors as a means to meet the requirements of the ‘Troika’ Memorandum of Understanding, Government measures signalled towards finding housing in the private sector. In entering recovery, the growing preference for public private initiatives in housing construction further emphasised the legitimacy of the private sector in being able to meet housing needs, thereby justifying reduced stockpiles of social housing.

⁹⁹ Note: There is a greater reference to homelessness and families in debates from 2014 onwards.

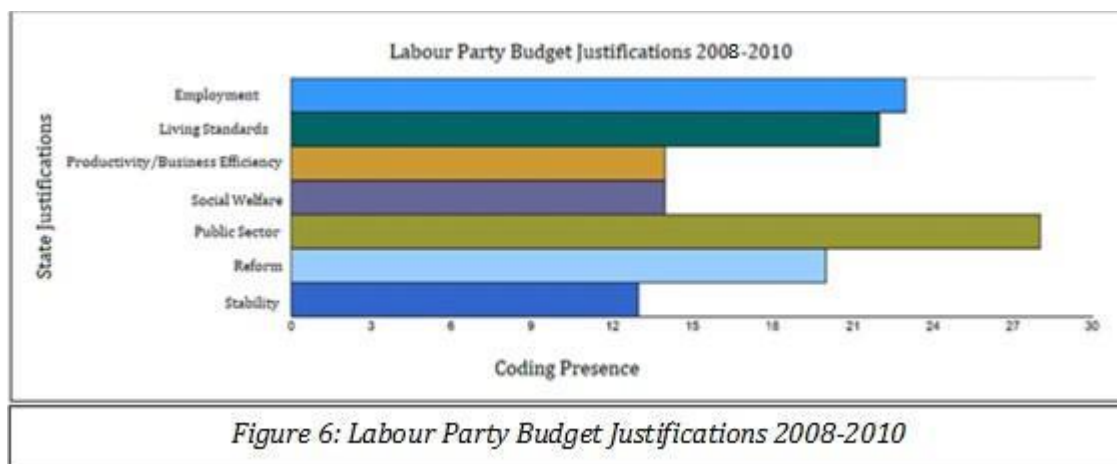
¹⁰⁰ Dáil Debate Budget Statement 2011 (n 84).

¹⁰¹ Dáil Debate, Social Housing and Homelessness Policy- Statements, Wednesday 12 March 2014, Vol.834, No.2.

¹⁰² Budget Statement 2016 (n 83); Budget Statement 2019 (n 94).

3.4 The British Austerity Narrative: 2008-2020

Figure 6: Labour Party Budget Justifications 2008-2010



On the outset of the global financial crisis, the Labour Government were in power until 2010 and utilized expansionary fiscal policies which involved increasing public spending and borrowing. Figure 6 highlights some justifications for this budgetary approach such as maintaining living standards through increasing social welfare for persons who became unemployed (coded as employment). To further justify this choice, greater appeals of emotion are used by the party in ‘refusing to walk away’, and instead increasing public spending to support families and businesses during a difficult economic period.¹⁰³ As a result, budget justifications focus greatly on ensuring stability and protecting existing living standards of families. Furthermore, in relation to the use of contractionary fiscal policies such as envisaged by the Conservative Party at the time, the Labour Party reject TINA arguments by highlighting that there is a choice.¹⁰⁴

¹⁰³ House of Commons Pre-Budget Report 24 November 2008, Vol. 483.

¹⁰⁴ Ibid.

Figure 7: State Justifications for the Use of Austerity Measures: United Kingdom

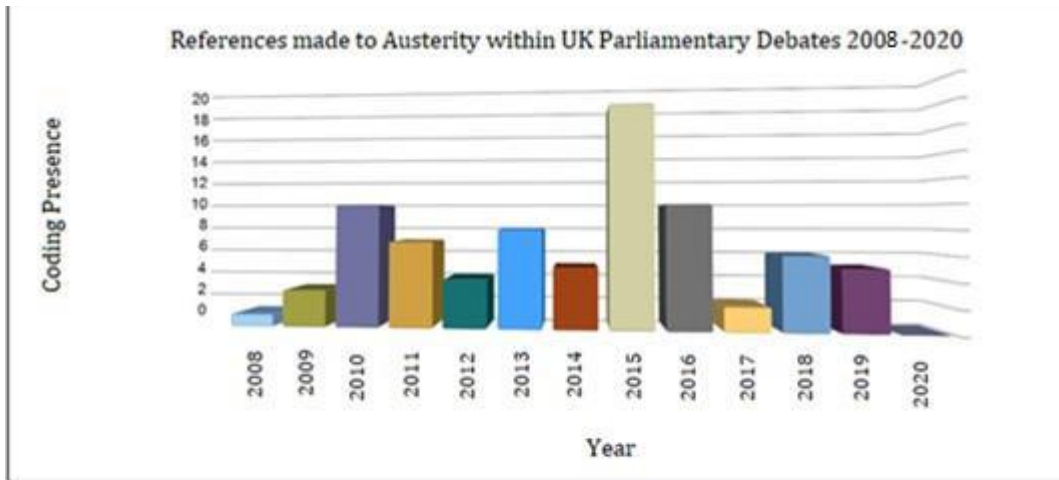


Figure 7: References made to Austerity within United Kingdom Parliamentary Debates 2008-2020

Figure 8: References made Austerity within United Kingdom Parliamentary Debates 2008-2020

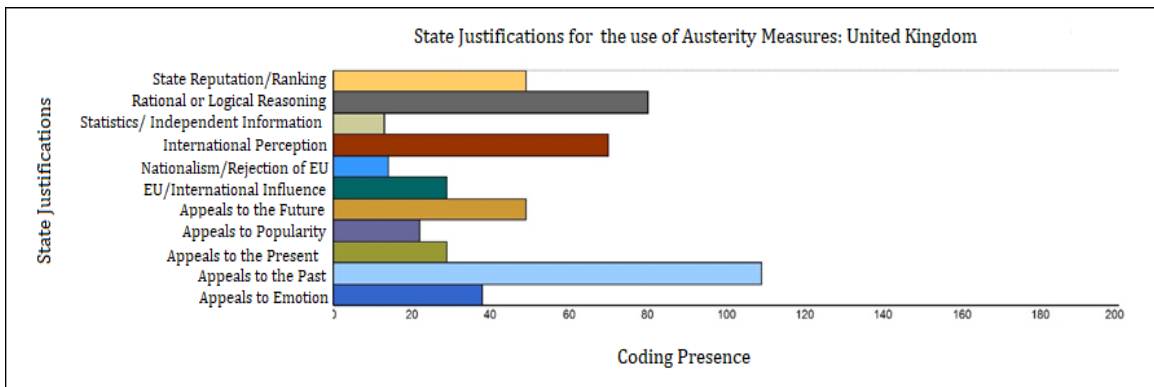


Figure 8: State Justifications for the Use of Austerity Measures: United Kingdom 2010-2020

What is of interest to note in relation to increases in social welfare spending, there is greater references to employment, in ensuring that 'social welfare makes work pay'.¹⁰⁵ The use of this rhetoric indicates a neoliberal approach to social welfare policy through ensuring the rate of welfare does not exceed the amount of money an individual is able to receive through employment. In relation to the increases in public sector spending, further justifications are in relation to reforming the public sector to ensure that it is of 'value for money' for the taxpayer.¹⁰⁶ What can be inferred here is that though the adoption of austerity measures is not taken by the Labour Party in power, there is still a prominent shift towards neoliberal doctrine in social welfare or public sector spending in ensuring that the Government services are competitive/cost-effective in relation to private sector services.

As can be seen from Figure 7, from selected debates, there are greater references to austerity made by the Conservative-Liberal Democrat Coalition and Conservative Governments from 2009/10 onwards consistently until 2019. Similar to the Irish experience, austerity is not mentioned directly by the Conservative-Liberal Democrat Coalition until 2019, where austerity is mentioned directly as coming to an end. Terminology utilised to describe austerity ranges from 'living within our means', 'responsible fiscal management', 'fiscal headroom', 'making difficult choices', 'balancing the budget deficit', or directly as spending cuts.¹⁰⁷

¹⁰⁵ House of Commons Financial Statement 20 December 2008, Vol. 485.

¹⁰⁶ House of Commons, Financial Statement 03 December 2008, Vol 485.

¹⁰⁷ From a range of debates from 2009-2019. One example is House of Commons Autumn Statement 23 November 2016, Vol. 616.

The justifications – as shown in Figures 8 and 9 - for adopting austerity measures have largely stemmed from appeals to the past, largely focusing on the inherited ‘mess’ from the previous Labour Government. The frequency of the failures of the Labour Government to justify the use of austerity measures is consistently utilised until 2019 and is further strengthened through the interventions made by Government backbenchers whenever a Minister has been faced with a question by the opposition. Alongside this, there are greater references to the reputation of the Government party, for example in knowing ‘what makes the economy tick’,¹⁰⁸ and having to make tough decisions. For example:

One party made this mess. Two parties are working together to clear it up. We will hold firm. Where we have faced tough choices, we have asked, what are the fair choices? What are the choices that support growth? How can we achieve more with less? We have made the right choices for the right reasons.¹⁰⁹

But we also have to make the tough decisions to take action on the deficit once the recovery is secured. We must live within our means, because money will be tighter in the years to come, and that means that choices will be even more important.¹¹⁰

In these examples the Coalition Government makes an appeal to emotion in having to make the tough budget decisions and ask the difficult questions in relation to fairness and growth. Similar to the Fine Gael-Labour Coalition Government, the mixed ideological composition of the Government is used to further Government legitimacy and also rebrand the Government as more compassionate in approach. Throughout the period of governance makes frequent references to recovery as a future goal that must be obtained through austerity measures by ‘living within our means’. As seen in Figure 9, similar justifications are made in this way, the use of austerity being the only way forward to achieve recovery as a result of the prior governing parties’ choices.

¹⁰⁸ House of Commons Budget and Resolutions and Economic Situation Debate 20 March 2015, Vol. 594.

¹⁰⁹ House of Commons Comprehensive Spending Review Debate 28 October 2010, Vol. 571.

¹¹⁰ Ibid. Coded at House of Commons Economic Recovery Debate 22 October 2009 Vol. 49

Figure 9: Further Justification for the Use of Austerity Measures: United Kingdom

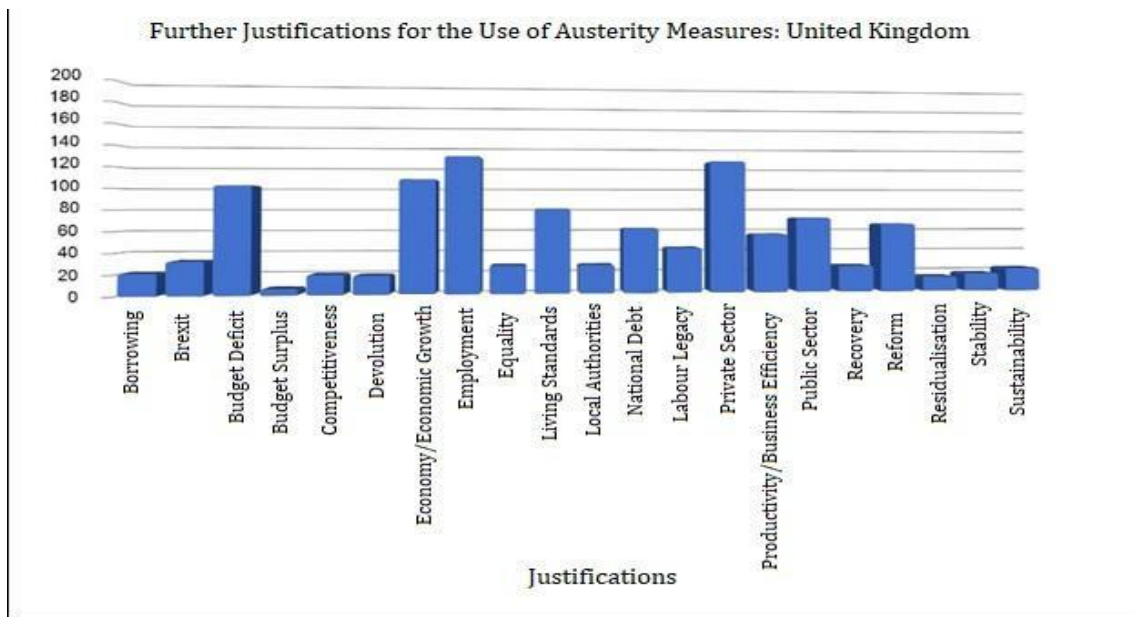


Figure 9: Further Justifications for the Adoption of Austerity Measures: United Kingdom

What is of interest in this regard is the extent to which the Conservative-Liberal Democrat Coalition further justify austerity measures through the use of Government statistics. Through the establishment of the Office of Budget Responsibility (OBR) the Government utilises the statistics formulated by this office to further justify budget decisions and also undermine further statistics that are utilised by the opposition in debates.¹¹¹ Further statistics by the Institute of Fiscal Studies, IMF and OECD are utilised to highlight the exceptional approach taken by the Government which sets its recovery position in a favourable light in comparison to the United States Government and European Union Member States.¹¹² In relation to the TINA rhetoric, its effectiveness in undermining the oppositions is clear in Government responses which have utilised the following arguments:

What is remarkable about the Labour Party is that in all its questions at Treasury questions, Prime Ministers questions and the like, it complains about every cut, but never tells us about a single cut that it supports.¹¹³

¹¹¹ House of Commons Autumn Forecast 29 November 2010, Vol 519.

¹¹² House of Commons Budget Resolutions and Economic Situation 03 March 2020, Vol. 709.

¹¹³ House of Commons Economic Policy Debate 25 February 2013, Vol. 557.

As a result, the TINA rhetoric produces an environment in which bipartisanship can only occur where there is convergence on the idea that cutting public expenditure and taxation are the only ways forward in budget approaches. Further justifications, As shown in Figure 9, have largely focused on achieving economic growth and reducing the budget deficits to a point of surplus, supported by OBR statistics to try to highlight that the use of austerity measures is working in bringing recovery and economic stability. Greater references are made to the private sector in ensuring that businesses are able to compete, though there is a clear neoliberal economic doctrine utilised by the party through Mr Hammond:

We believe that a market economy is the best way of delivering sustained prosperity for the British people. We will always support a market-led approach, but we will not be afraid to intervene where there is evidence of market failure.¹¹⁴

The preference towards budget stances such as lower taxation rates for businesses highlight the neoliberal approach in enabling the private sector to function, for example through providing lower corporation tax rates and enterprise zones to encourage growth and employment through private sector growth. Additionally, the statement notes positive intervention to ensure that the market is able to function such as the work by the Government in tax evasion and avoidance policies. What can also be drawn here is how the budget stance of austerity follows an institutional blueprint, which benefits the private sector in comparison to the living standards of individuals and households.

¹¹⁴ Ibid. Coded at House of Commons Autumn Statement 2016 (n 107).

While the Government achieves legitimacy through the generation of further private sector employment, the living standards of the population are referred to by the Government in statements on 'protecting the most vulnerable' in social welfare.¹¹⁵ The rhetoric of making social welfare pay is further built upon by the Conservative-Liberal Democrat Coalition through the formulation of Universal Credit as a means of reforming and bringing efficiency to the public sector.¹¹⁶ Universal Credit as social welfare is referenced as helping and protecting 'hard working families' from the trap of welfare dependency, thereby highlighting the behavioural signal of the policy to push more of the population into employment as means to improve their own living positions.¹¹⁷ The same rhetoric is applied to the concept of housing, being a place of resilience for hardworking families, thereby displacing the dichotomy of housing being a public good entitled to everyone regardless of employment status.¹¹⁸

Austerity measures are further justified through the push for greater devolution to local authorities and engaging the 'North-South' divide in growth over the country. Justifications in this regard centre around 'that local people are best placed to make decisions about their area.'¹¹⁹ This argumentation extends through neoliberal economic doctrine by localising services the individual receives, but also pushes the local authority to obtain its own revenue rather than being reliant on Government public expenditure, which further facilitates reductions in Government public spending.

¹¹⁵ House of Commons Budget Resolutions and Economic Situation Debate 22 March 2016, Vol.606.

¹¹⁶ Ibid; House of Commons Budget Resolution and Economic Situation Debate 22 March 2013, Vol. 559.

¹¹⁷ Ibid.

¹¹⁸ House of Commons Budget Resolutions and Economic Situations Debate 20 March 2015, Vol. 593.

¹¹⁹ Ibid.

Figure 10: United Kingdom Brexit Budget Justifications

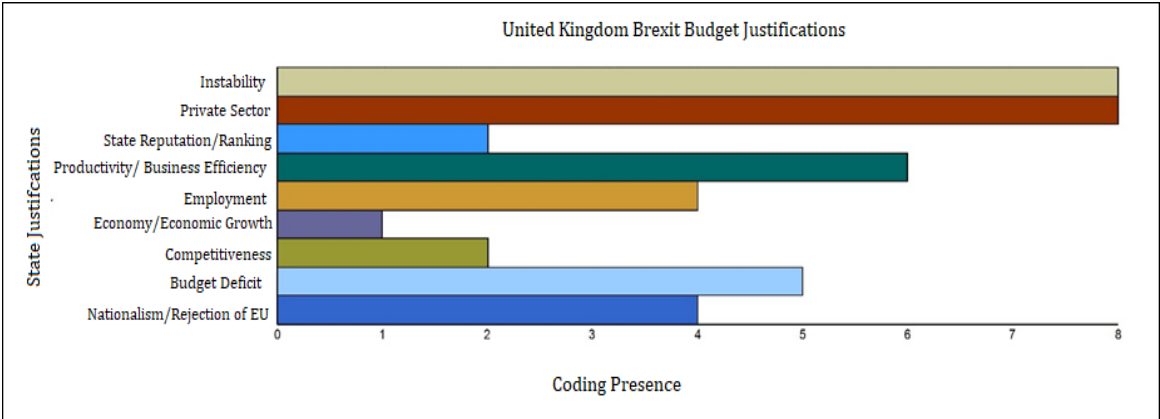


Figure 10: United Kingdom Brexit Budget Justifications

The onset of Brexit amplifies the use austerity measures in the budget given the instability and risk associated with obtaining a trading deal (at the time) with the European Union. Figure 10 shows greater references to future instability; therefore the Government must continue a ‘responsible’ or cautious budget plan to ensure there is sufficient headroom to support the economy through the transition.¹²⁰ Moreover, there are greater references made by May’s Conservative Government which emphasise ‘British exceptionalism’ or nationalism when justifying budget decisions. In attempting to create a ‘global Britain’, the budget pushes towards addressing productivity gaps and training the population to become a high skilled workforce.¹²¹ In justifying public expenditure cuts, the aim is to improve international perception of the British economy as ‘if businesses know that we can keep our house in order, they will base themselves here in the UK, creating highly skilled and well-paid jobs.’¹²²

¹²⁰ House of Commons Budget Resolutions and Economic Situations Debate 12 March 2017, Vol.662.

¹²¹ Ibid.

¹²² House of Commons, The Economy Debate 22 March 2018, Vol. 636.

As a result, austerity becomes a means of ensuring the United Kingdom has a competitive portfolio to attract foreign direct investment. The Government attempts to reform the public sector and residualise welfare to prompt the self-sufficiency of its population and transform the public sector into a form of enterprise in order to cater to the needs of the private sector and future investors. Furthermore, the private sector is seen as the solution to improve living standards through employment in which the Government operates in so far as to ensure that human capital of the workforce is attractive for investment.

Figure 11: United Kingdom Covid-19 Pandemic Budget Justifications

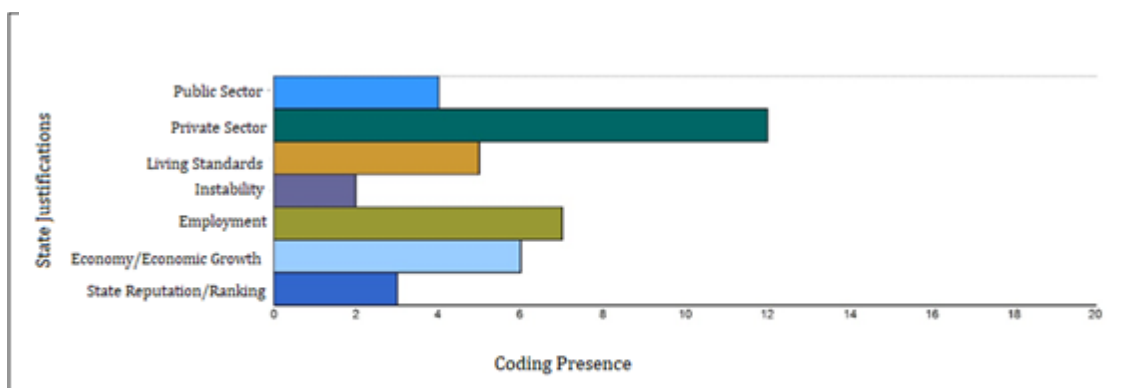


Figure 11: United Kingdom Covid-19 Pandemic Budget Justifications

Therefore, austerity becomes the vehicle in which these results can be obtained.

The year 2019 brings the end of austerity measures adopted by the Conservative Government. The start of the pandemic compelled the Government to increase public spending to support the private sector and public healthcare services. Additionally, there are increments in supports in the form of the furlough scheme to ensure existing employment in the private sector is protected. From selecting codes most prominent during the pandemic time frame alongside codes referenced in relation to state justifications, figure 11 compiled the most prominent codes in relation to state justifications and the timeframe.

Figure 11 highlights that the Government emphasised a need to protect existing levels of economic growth and private sector employment to ensure that the economy is able to function.¹²³ Despite greater references to instability, resilience of the economy is noted by leadership given the frequent rounds of austerity budgets from the past which have stabilised existing growth and employment.¹²⁴ Therefore, the adoption of austerity measures becomes a point of further legitimacy for the Government reputation in handling the pandemic.

Overall, though there is a partial shift from the austerity agenda as a result of the pandemic. The emphasis on protecting the private sector and economic growth highlights the predominant neoliberal economic doctrine which remains in Government discourse. Furthermore, austerity, rather than becoming taboo becomes a legacy upon which the Conservative Government is able to achieve further legitimacy.

¹²³ House of Commons Spring Statement, 13 March 2009, Vol. 665.

¹²⁴ House of Commons Spring Statement, 13 March 2019, Vol. n/a

3.4.1 Phase Two: Triangulation of United Kingdom Debates with General Comment 4

Figure 12: Triangulation of United Kingdom Parliamentary Debates with General Comment 4 and Housing Themes

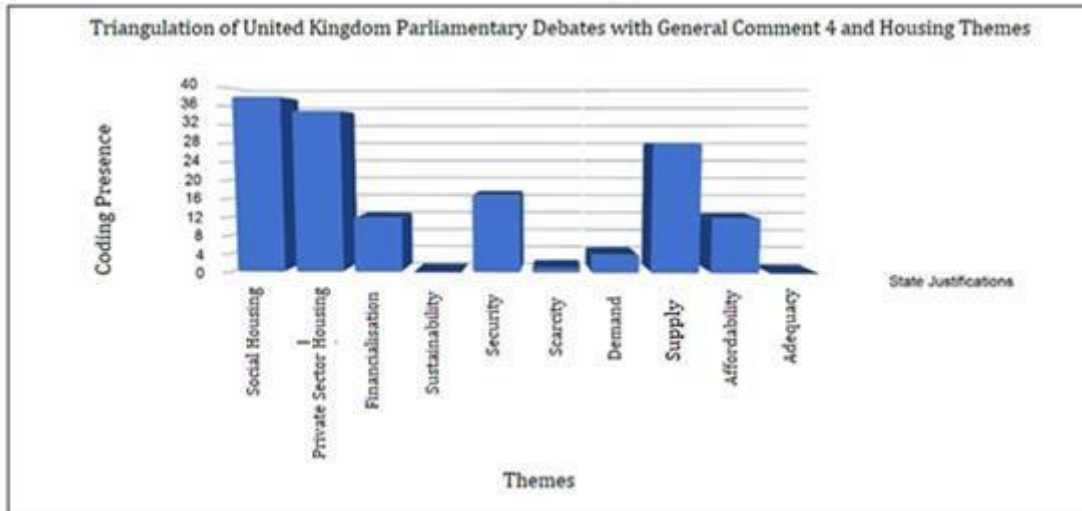


Figure 12: Triangulation of the United Kingdom Parliamentary Debates with General Comment 4 and Housing Themes

As prior mentioned, from triangulation of the semi-inductive coding strategy formulated from the exploratory approach and parliamentary debates with General Comment 4 subcodes, the most prevalent themes from parliamentary debates focus on affordability and security.¹²⁵

¹²⁵As mentioned earlier, the 'Query Wizard' tools and Matrices, provide little means to amend the codes placed on the axes of the graph.

What is of concern are the few references to housing adequacy, especially in relation to the Grenfell Tower Fire and resulting inquiries which brought the quality of social housing units into question. Rather, Government statements make brief appeals to emotion in the voiceless process of social housing tenants, relating the Grenfell Tower incident as fault of the prior Labour Government.¹²⁶

Affordability and security are interlinked with each other, with an emphasis on the affordability of homeownership.¹²⁷ There is a growth of schemes and tax breaks to ensure that first time homeowners are able to step onto the property ladder both in the private and social sector through help to buy schemes.¹²⁸ As a result, there is a growth of reference to the financialising of housing through the availability of housing loans through the Government to support households in accessing housing. In relation to security, there are also references to providing temporary accommodations schemes for the homeless communities as a result of the pandemic, however these options provide short term security to homeless individuals.¹²⁹

¹²⁶ House of Commons Housing and Social Security Debate 22 June 2017, Vol. n/a.

¹²⁷ House of Commons Spending Review and Autumn Statement 25 November 2015, Vol. 601.

¹²⁸ House of Commons Budget Resolutions 01 November 2018, Vol. 648.

¹²⁹ Ibid.

Throughout Government statements in debates, there has been a greater focus on the supply and construction of housing to meet demand. A large amount of construction has been encouraged through the private sector in terms of deregulating the access to land for the construction of housing. Social housing is also heavily linked to supply through successive promises of increased production of social housing units through local authorities in partnership with private property developers.¹³⁰ The justifications for the increase in social housing units have focused on references to the legitimacy of the Government in allocating budget provisions for social housing rather than speaking to general needs.

Taking all into consideration, there is very little translation from General Comment 4 guidance into Government statements. The focus on homeownership and the related costs to housing present an imbalanced understanding of the enjoyment to the right to housing in the United Kingdom context. Similar to the Irish experience, it can be argued that austerity further compounded the financialisation of housing schemes geared towards homeownership as a form of ‘stronger’ security of tenure for households.

3.5 Conclusion

While both the Fine Gael-Labour and Conservative-Liberal Democrat Coalitions inherited the budget conditions from their predecessors, austerity is a matter of political choice.¹³¹ Though Fine Gael-Labour implemented the pro-austerity agendas as envisaged by the ‘Troika’ and prior Government, the reductions in spending cuts and increments in Government spending over time highlighted the lack of presence of a TINA rhetoric, rather one of legacy left behind. Compared to the Fine Gael-Labour Coalition, the Conservative-Liberal Democrat Coalition demonstrates a systematic use of austerity over a decade on the basis of encouraging economic recovery, growth of the private sector and balancing the budget deficit.

¹³⁰ House of Commons Budget Resolutions and Economic Situations 2015 (n 118).

¹³¹ UNHRC Special Rapporteur Olivier De Schutter (n 1) 5.

The political nature of austerity is greatly evident in the United Kingdom context to the degree of fashioning policies such as Universal Credit to encourage employment amongst the population. The advancement and protection of the economy becomes paramount.

In terms of contextualising deliberately retrogressive measures in this regard, it can be argued that the nature of measures initiated by the Conservative-Liberal Democrat Government are deliberate in nature given the duration of austerity measures for decades in the budgetary stance despite reaching economic recovery. Austerity becomes the default policy approach, which is incompatible with Committee commentary on the nature of austerity measures being temporary in nature.¹³² In comparison, in the Irish context, the deliberateness is more unclear. It is not apparent whether post the Fianna Fáil-Green Coalition party if there is an intent to carry out deliberately retrogressive measures such as austerity. The gradual reductions of public expenditure cuts and taxation measures to increase balanced sectoral growth, indicates a gradual shift from austerity measures which upon leaving the ‘Troika’ programme is abandoned through increases in social housing and welfare spending.

On the other hand, it can be argued that the Fianna Fáil-Green Coalition Government meets the deliberately retrogressive intention. While there are further complications given the obligations of the memorandum of understanding with the ‘Troika’, the justifications to past expenditure in forming a sufficient level of protection for citizens is a justification contrary to the *raison d’être* of the Covenant. However, it must be noted that there is no expectation for the Government to engage in expansionary fiscal policy in a time of recession and the minimum core content is justified through protecting the most vulnerable. Despite this, the justifications of the Party centre on burdens being taken by everyone on the basis that public expenditure was at a prior satisfactory level can be argued as an attempt to suspend the progressive realisation and deterioration of Covenant rights to be picked up again in the future. Through this approach it can be argued that measures adopted by the Fianna Fáil-Green Coalition measures meet the deliberate element for retrogressive measures.

¹³² UNCESCR, ‘Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights’ (16 May 2012) UN Doc CESCR/48th/SP /MAB/SW.

The lack of reference to General Comment 4 adequacy requirements in Government statements highlight a lack of implementation of human rights guidance in relation to the Government social policy approach to social housing. On the one hand, this lack of incorporation can be indicative of the prominence of different social policy approaches with social housing policy. On the other hand, social housing may be perceived as a stepping-stone for the recipient for housing in the private sector. As a result, adequacy criteria may be more focused and regulated via legislation through private sector housing.

In relation to social housing, there have been larger references from both the narratives in the United Kingdom and Ireland in increasing the provision of socially affordable housing. However, there are fewer references to quality of social housing except from rehabilitating existing stock. What can be garnered here is that affordability is one adequacy requirement which translates over given how it can be interpreted to produce cost-effective social housing units.

Aside from this, the austerity narrative in Government provision translates the rights to housing and social security to one of eligibility and last resort consolidating the approach taken in neoliberal ideology. The most vulnerable have sole legitimacy to Government provisions, as a result of reduced supply because of austerity measures minimising the scale of the Government and its public services. Contextualising this approach in the context of the 2012 Committee letter - prior to applying a normative and empirical assessment - residualising social housing and welfare may meet the minimum core content of the rights to housing and social security in providing basic minimum to vulnerable groups provided they are temporary and non-discriminatory in nature given the global financial crisis.¹³³

¹³³ Ibid.

When entering economic recovery there is a prevalence of residualisation of social housing and welfare to a greater extent in the United Kingdom than Ireland, which further highlights the lack of temporariness in measures relating to housing and social welfare. Though there is a growth in providing affordable housing units, it comes across that the adequacy requirements are cherry picked to compliment neoliberal economic doctrine. Given the links between austerity and neoliberalism, neoliberalism provides a vehicle in which austerity measures are able to influence political decisions to reduce State assistance during and beyond crisis to citizens when needed the most.

As a result, a great amount of doubt is casted as to whether these measures are even necessary and proportional objectively when contextualised against the growing need for housing in both jurisdictions.

4. Assessing the Doctrine of Non-Retrogression in relation to Social Housing and Welfare Legislation and Policies in the United Kingdom: From the Global Financial Crisis to Covid-19 Pandemic

The right to adequate housing under the International Covenant on Economic, Social and Cultural Rights is a 'relative, not an absolute right.'¹ As highlighted in General Comment 3 of the Committee on Economic, Social and Cultural Rights, Covenant obligations are neutral and not predicated on a particular economic and political system.² Despite this, the realisation of the right to housing has been at the centre of 'an historic structural transformation in global investment and the economics of the industrialised world with profound consequences for those in need of adequate housing.'³ As noted by Padraic Kenna, globalisation and increased investment in market financed housing was a key contributor to the global financial crisis.⁴ Furthermore, the adoption of austerity measures and lack of supply side policies investing in social housing has reduced the access of housing to the poorest of the population.⁵ As a result, in a capitalist and neoliberal system the right to housing faces many obstacles in order to be enjoyed by all.

Against this backdrop, this chapter assesses the doctrine of non-retrogression in relation to the rights to housing and social security regarding the United Kingdom's social housing provision from 2008 until 2020/21. Utilising the assessment developed in the first chapter, both legislation and policy for social housing and related welfare provision are examined normatively and empirically to gauge the extent to which the United Kingdom has complied with Covenant obligations. The criteria for the normative

¹ Katrin Anacker, Mai Thi Nguyen and David Varady, *The Routledge Handbook of Housing and Planning* (Taylor and Francis 2019) 10.

² UNCESCR, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 8.

³ UNHRC Special Rapporteur Leilani Farha, 'Report of 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' (18 January 2017) UN Doc A/HRC/34/51, para 3.

⁴ Padraic Kenna, *Contemporary Housing Issues in a Globalized World* (Routledge 2014) 8.

⁵ UNHRC Special Rapporteur Raquel Rolnik, 'Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (10 August 2012) UN Doc A/67/286, para 12.

and empirical assessment are as follows: security of tenure, availability of services, accessibility, habitability and affordability and social housing welfare.

Normatively, the assessment focuses on legislation and policies referred to in United Kingdom State Party reports to the Committee on Economic, Social and Cultural Rights. The rationale behind using the United Kingdom State Party reports is that it provides a beneficial starting point in normatively tracing the evolution of legislation and policy in relation to the right to housing in England, Scotland, Wales and Northern Ireland. Though relying on State Party reports is based on the assumption that the reports are comprehensive, developments in legislation have also been tracked through the 'legislation.gov' website. Empirically, in light of the lack of social housing statistics found from the Office of National Statistics, the thesis relies on the statistic bulletins provided by local authorities. These bulletins are consolidated into further reports which are accessible through the 'gov.uk' website.

The chapter first examines the Concluding Observations of the Committee on Economic, Social and Cultural Rights and State Party reports submitted by the United Kingdom in relation to the rights to adequate housing and social security to understand the recent approach of the Country. Second, a brief history of the social housing provision system in England, Scotland, Wales and Northern Ireland is provided to understand how each social housing system has developed. Finally, an assessment of the doctrine of non-retrogression is carried out to examine legislative and policy protections for social housing and related welfare in England, Scotland, Wales and Northern Ireland. The conclusion considers whether, as a whole, if the United Kingdom has adopted deliberately retrogressive measures in relation to the rights to housing and social security in the context of its social housing provision.

4.1 The View of the Committee on Social Housing and Welfare in the United Kingdom

Examining the Concluding Observations and State Party reports of the United Kingdom allows for an insight into the development of the relationship between the State Party and its obligations under the International Covenant on Economic, Social and Cultural Rights. Additionally, through studying State Party reports submitted by the United

Kingdom, a paper trail of the legislation surrounding social housing and welfare is consolidated for analysis within this chapter.

Since 1997, the Committee has noted with concern the United Kingdom's position on their international obligations under the Covenant as 'principles and programmatic objectives',⁶ rather than legally justiciable obligations, thereby restricting access of citizens to effective legal remedies for violations of Covenant rights.⁷ In response, the United Kingdom has emphasised that 'the Government is progressively realising without discrimination the rights contained in the Covenant by way of domestic legislation and administrative measures.'⁸ In comparison, civil and political rights enjoy domestic justiciability through the Human Rights Act 1998 from the United Kingdom's ratification of the European Convention on Human Rights in 1951.⁹

As has been posited by the United Kingdom Fifth State Party report, though civil and political rights are domestically enforceable, economic, social and cultural rights do not require an identical approach and are provided protection in so far as practical and beneficial for the United Kingdom.¹⁰ As a result, economic, social and cultural rights enjoy piecemeal legislative protection in the United Kingdom. Their lack of direct enforceability through the domestic court system demonstrates a political choice to restrict legally accessible Covenant rights by the public unless it serves to bolster the economy.

With particular reference to Article 11 of the Covenant, the United Kingdom emphasises the lack of definition in being able to implement the right to an adequate living standard

⁶ UNCESCR, 'Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Britain and Northern Ireland' (05 June 2002) UN Doc E/C.12/Add.79, 2-3, para 11; UNCESCR, 'Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland' (12 December 1997) UN Doc E/C.12/Add.19, para 10.

⁷ UNCESCR, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (14 July 2016) UN Doc E/C.12/GBR/CO/6, para 6.

⁸ UNCESCR, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Fifth Periodic Report submitted by State Parties under Articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland' (31 January 2008) UN Doc E/C.12/GBR/5, para 21.

⁹ Gov.uk, 'Human Rights: The UK's International Human Rights Obligations.' available at <<https://www.gov.uk/government/collections/human-rights-the-uks-international-human-rights-obligations>> ¹⁰ UNCESCR United Kingdom Fifth State Party Report (n 8) para 74.

as 'it is unclear how domestic courts would fairly assess claims... since standards are likely to vary between individuals.'¹¹ Additionally, enabling domestic justiciability in this regard would permit courts to provide commentary on the State's economic policy, compromising the sovereignty of the Government.¹² Given this, the United Kingdom has stated that through administrative rules, legislation and regulations, the individual is empowered to challenge the Government's policies in the area of economic, social and cultural rights.¹³ For example, the Equality Act 2010 is thought by the State Party to tackle poverty and social mobility obstacles through allowing employees and service users to bring multiple claims through the court process, rather than conferring a socio-economic duty on public bodies.¹⁴ Therefore, there is an indirect approach to seek legal redress for Article 11 of the Covenant, with other administrative measures focusing on poverty alleviation via benefits or national programmes.

In justifying this approach to implementing their Covenant obligations, the United Kingdom relies upon General Comment 3 which highlights that a State Party may, aside from legislative measures, implement financial, administrative and social measures where appropriate.¹⁵ The Committee in Concluding Observations 1997 and 2002 has referred the State Party to examine General Comment 9 which provides further guidance to Covenant obligations.¹⁶ General Comment 9 emphasises that in spite of the flexibility afforded to States in utilising a plethora of measures, these measures coexist with requirements of international human rights law and Covenant norms which ensure that an 'appropriate means of redress, or remedies, must be available to any aggrieved individual or group.'¹⁷ In response to the Committee's Concluding Observations, the United Kingdom's Fifth and Sixth reports has highlighted that General Comment 9 does not impose an obligation to incorporate Covenant obligations domestically.¹⁸ Selectively

¹¹ Ibid, para 74.

¹² Ibid.

¹³ Ibid.

¹⁴ UNCESCR, 'Seventh Periodic Report Submitted by the United Kingdom of Great Britain and Northern Ireland under Articles 16 and 17 of the Covenant' (23 June 2022) UN Doc E/C.12/GBR/7, para 40.

¹⁵ UNCESCR General Comment 3 (n 2) para 7; United Kingdom Fifth Report (n 8) paras 72-73.

¹⁶ UNCESCR, Concluding Observations 1997, 2002 (n 6) paras 10, 11 respectively.

¹⁷ UNCESCR, 'General Comment No.9: The Domestic Application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24, para 2.

¹⁸ UNCESCR United Kingdom Fifth State Party Report (n 8) paras 72-73; UNCESCR, 'Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Sixth Periodic Reports of State Parties due in 2014: United

interpreting General Comments 3 and 9 to oppose the domestic justiciability of Covenant rights in some ways be derived from the drafting process behind the Covenant.

Delegations such as the United Kingdom favoured a vaguer drafting of Article 11 when the Covenant was being prepared. Keeping the text of Article 11 vague, ensured flexibility for States in implementing the right which includes the use of administrative, financial, social and educational measures. However, in the context of the United Kingdom, vagueness has served an underlying purpose, being to uphold the long-term aversion towards the incorporation of economic, social and cultural rights domestically in UK law.¹⁹ The reconceptualisation of binding Covenant obligations as 'programmatically objectives' places economic and social rights as part of a wider economic agenda, as long as they are 'practical and beneficial' to the United Kingdom.²⁰ Certain Covenant rights such as the right to work will enjoy some form of legal enforceability in comparison with other rights such as the right to an adequate living standard.²¹ However, the protections of Covenant rights on a legislative basis pale in comparison to the protections afforded to civil and political rights through the Human Rights Act 1998.

The Human Rights Act 1998 provides some protection of Covenant rights with respect to housing and social security.²² For example, to claim an alleged violation of Article 11, it would have to be expressed through Article 3 of the European Convention of Human Rights relating to inhuman and degrading treatment.²³ Courts consistently interpret that State policy decisions in relation to economic, social and cultural rights are made in line with treaty obligations.²⁴ Such an assumption, provides a barrier to State accountability for policy decisions which directly or indirectly lead to the deterioration of the enjoyment of economic, social and cultural rights as there are few directly

Kingdom of Great Britain and Northern Ireland' (25 September 2014) UN Doc E/C.12/GBR/6, 7, para 10.

¹⁹ Edward Bates, 'The United Kingdom and the International Covenant on Economic, Social and Cultural Rights.' in Mashood Baderin *et al*, *Economic, Social and Cultural Rights in Action* (OUP 2007) 263.

²⁰ UNCESCR United Kingdom Fifth State Party Report (n 8) para 75.

²¹ UNCESCR United Kingdom Seventh State Party Report (n 14) paras 61-72.

²² UNCESCR United Kingdom Fifth State Party Report (n 8) para 74.

²³ Joint Committee On Human Rights (UK), 'Twenty First Report' (20 October 2004) <<https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/183/18305.htm>> para 21.

²⁴ *Ibid*, para 16.

enforceable Covenant rights for policy measures that impact the enjoyment of economic, social and cultural rights.

In the context of austerity measures adopted in relation to social security and housing, the United Kingdom has attempted to reform the benefits system through the Welfare Reform Act 2012 by introducing one umbrella benefit payment.²⁵ Furthermore, in terms of social housing welfare schemes, the removal of the Spare Rooms Subsidy has encouraged mobility within the social rented sector, strengthening work-incentives and usage of available social housing.²⁶

The Committee has noted the disproportionate impact of austerity measures and a lack of impact assessments conducted to determine the impact of these measures on the enjoyment of Covenant rights.²⁷ As a result, the Committee emphasised the need for the United Kingdom to review of the impact of policies enacted since 2010 on vulnerable and marginalised groups.²⁸ Second, the Committee has referred the 2012 letter to the United Kingdom.²⁹ The reference to the 2012 letter by the Committee highlights that the ongoing adoption of austerity measures by the United Kingdom no longer satisfy the criteria of being temporary, necessary and proportional and non-discriminatory in nature.³⁰ While concern has been noted at the use of austerity measures by the United Kingdom, there still is a reluctance by the Committee to label the adoption of these measures as deliberately retrogressive.

Delving further into the right to housing, the Committee on Economic, Social and Cultural Rights has noted the continued housing deficits experienced in the United Kingdom.³¹

²⁵ UNCESCR, United Kingdom Sixth State Party Report (n 18) para 96.

²⁶ UNCESCR, United Kingdom Seventh Periodic Report (n 14) para 83.

²⁷ UNCESCR Concluding Observations 2016 (n 7) para 18.

²⁸ *Ibid*, para 19.

²⁹ *Ibid*.

³⁰ UNCESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (16 May 2012) UN Doc CESCR/48th/SP /MAB/SW.

³¹ UNCESCR Concluding Observations 2016 (n 7) para 49.

These chronic shortages in housing include social housing as being inadequate which has forced poorer households into the private sector.³² In tandem, the Committee has noted concerns as to the level of homelessness³³ and the *de facto* discrimination faced by marginalised groups such as ethnic minorities within housing.³⁴ In its 2016 Concluding Observations, the Committee has referred the State Party to General Comment 4 for guidance over the right to adequate housing, alongside highlighting a need to develop effective strategies which address the housing deficit and take corrective measures which address costly rents, bad and uninhabitable housing conditions.³⁵

³² Ibid, 49.

³³ UNCESCR, Concluding Observations 2002 (n 6) para 19.

³⁴ UNCESCR, 'Consideration of Reports Submitted by the State Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic Social and Cultural rights: United Kingdom of Great Britain and Northern Ireland' (12 June 2009) UN Doc E/C.12/GBR/CO/5, para 16.

³⁵ UNCESCR Concluding Observations 2016 (n 7) para 49.

In its most recent State Party submission, the United Kingdom has highlighted the commitment to deliver one million new homes by the mid-2020s.³⁶ Furthermore, a fall in homelessness by 43 percent has been reported alongside provision of a £375 million grant to help local authorities to help vulnerable households with rent arrears.³⁷ Additionally, the Homelessness Reduction Act 2017 introduces duties on local authorities to prevent or relieve a person's homelessness. Furthermore, though there is no legislation that directly relates to housing affordability,³⁸ the State report mentions that the Housing Act 2004 aims to improve the overall housing standard.³⁹

On the surface, the breadth of measures taken by the United Kingdom to implement the right to housing can be seen. For example, the United Kingdom aside from increasing social housing supply has adopted budgetary measures to alleviate homelessness, and reformed social housing welfare to provide the individual with subsidies to access and afford housing. From this, it can be argued that the United Kingdom has taken on board the Committee's recommendations given its commitments to increase the supply of housing and increased funds to alleviating homelessness. However, what is pertinent to note is the increasing residualisation - the process of public services only providing a 'safety net' for certain circumstances such as poverty, infirmity etc.⁴⁰ - of social housing through removing subsidies which facilitate individuals to access and live in social housing. The predominant focus on subsidising the private sector only serves to highlight the outright denial of the role social housing plays in meeting housing needs. However, given the devolved nature of the United Kingdom it is unclear whether this

³⁶ UNCESCR United Kingdom Seventh State Party Report (n 14) para 116.

³⁷ Ibid, 23.

³⁸ UNCESCR, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Fourth Periodic Report Submitted by State Periodic Parties under Articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland' (28 February 2001) UN Doc E/C.12/4/Add.8, paras 11, 63.

³⁹ UNCESCR United Kingdom Fifth State Party Report (n 8) 22.

⁴⁰ Jen Pearce and Jim Vine, 'Qualifying Residualisation: The Changing Nature of Social Housing in the UK' (2014) 29 J House and the Built Environment, 657, 675.

approach of prioritising the private sector is adopted by Scotland, Wales and Northern Ireland. In delving deeper into the policies and legislation which governs social housing provision in the United Kingdom, the criteria formed through the prior chapters will be applied to the English, Welsh, Scottish and Northern Irish Contexts.

4.2 A Brief History of the Social Housing Systems in the United Kingdom

Providing a brief history and overview of the social housing system in each devolved jurisdiction facilitates an in depth understanding of how legislation and policies have shaped social housing to its current state. Furthermore, a comparative human rights-based analysis of the social housing policy approach of England, Wales, Scotland and Northern Ireland can be considered. What is important to note is that prior to devolution and the transfer of powers and governing competences to Scotland, Wales and Northern Ireland, there is policy convergence in terms of social housing provisions. Therefore, this section sets out the overall development of the social housing system in the United Kingdom. Variances in the social housing systems of Scotland, Wales and Northern Ireland are discussed in separate sections.

The provision of social housing is provided by both local authorities and housing associations in the United Kingdom.⁴¹ Social housing has played a vital role in meeting housing needs across the country unable to access private sector housing.⁴² Through a series of Public Health and Labouring Classes Acts during the 19th Century local authorities obtained powers to regulate, construct and demolish housing, however, the lack of will and Government subsidy rendered these powers ineffective.⁴³

After both the First and Second World Wars, to address chronic housing shortages, the Government intervened to provide housing to meet demand.⁴⁴ Local authorities and housing associations had built 4.4 million social homes, averaging at approximately

⁴¹ Paul Reeves, *Social Housing in Context: An Introduction to Social Housing* (Arnold 1996) 1.

⁴² Shelter, 'The Story of Social Housing'
<https://england.shelter.org.uk/support_us/campaigns/story_of_social_housing> Accessed January 30 2023.

⁴³ Paul Reeves (n 41) 5.

⁴⁴ *Ibid*, 6.

126,000 a year.⁴⁵ However, after the 1940's, social housing has battled against the private sector to provide housing.⁴⁶ The economic depression of the 1960s brought housing finance to the forefront politically, leading to heavy reductions in council house building and a favouring of refurbishing existing private sector stock.⁴⁷ The policy approach of the Government in providing subsidies to local authorities was to produce cost-effective housing, leading to the creation of higher density units such as middle or high rise buildings.⁴⁸ These units were later found to be problematic in both design and management, further delegitimising the role of social housing in meeting housing needs.⁴⁹ Therefore, the systematic underfunding of social housing construction pushed local authorities to construct inadequate housing units to access funding to meet housing needs. As a result, a foundational belief is formed that social housing cannot meet housing needs and that everyone, including the poor, should rely on the private sector to purchase housing.

The role of local authorities and housing corporations in meeting housing needs expanded during the 1960s and 1970s. The Cullingworth Report 1969 recommended lifting existing restrictions on local authorities and expanding their roles to produce housing strategies for their area and introduce statutory duties towards homeless households.⁵⁰ Furthermore, the Housing Act 1974 removed the private finance requirement for housing corporations by introducing a grant system, thereby ensuring further housing supply alongside that of local authorities.⁵¹ The effects of these reports side-lined local authorities into monitoring and facilitating allocation of housing rather than being a direct provider. The Thatcher Government further displaced the role of social housing in meeting housing needs via legislation and policies.⁵²

⁴⁵ Shelter 'The Story of Social Housing'(n 42).

⁴⁶ Paul Reeves (n 41) 7.

⁴⁷ Ibid, 8.

⁴⁸ Anne Power, *Hovels to High Rise: State Housing in Europe Since 1850* (Taylor and Francis 1993) 176.

⁴⁹ Paul Reeves (n 41) 7.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Stuart Hodgkinson, Paul Watt, Gerry Mooney, 'Introduction: Neoliberal Housing Policy-Time for Critical Re-Appraisal' (2012) 33(1) *Critical Social Policy* 3, 4.

The preference for homeownership to form a property-owning democracy introduced policies such as right to buy policies for council tenants and greater banking deregulation policies.⁵³ Additionally, the Housing Act 1988 provided greater opportunities for housing associations to construct housing with private finance. Furthermore, private landlords were provided the opportunity to acquire local authority housing stocks subject to a vote of tenants involved.⁵⁴ The rationale behind these policy approaches stem from the 1987 Housing White Paper where Ministers were convinced that the poor performance of local authorities in meeting housing needs meant that tenants would welcome a change of landlords through Housing Action Trusts.⁵⁵

As a result, social housing provision slowed, unable to replace units being purchased by tenants at a discount. Furthermore, the transfer of housing from local authorities to housing associations fragmented local governance by shifting their role in meeting housing needs to voluntary organisations.⁵⁶ In terms of social security, the Thatcher Government introduced the reforms on the housing benefit to provide rebates to social renting tenants.⁵⁷ Originally, rent rebates have been provided through local authorities to enhance housing affordability.⁵⁸ Through the Thatcher Government, rent rebates returned to providing brick and mortar payments which provided a safety net only for households with low incomes, as a means to control public expenditure.⁵⁹ Therefore, the policy choice to residualise the housing benefit through removing its affordability objective, leading to a fall in claimants. As a result, more households had to rely on other private resources such as employment in order to meet housing costs.

⁵³ Paul Reeves (n 41) 9.

⁵⁴ Shelter 'The Story of Social Housing' (n 42).

⁵⁵ Peter Malpass, David Mullins, 'Local Authority Housing Stock Transfer in the UK: From Local Initiative to National Policy' (2002) 17(4) *Housing Studies*, 673, 675-676.

⁵⁶ *Ibid*, 674.

⁵⁷ Paul Reeves (n 41) 9.

⁵⁸ Mark Stephens, 'An Assessment of the British Housing Benefit System' (2005) 5(2) *European Journal of Housing Policy*, 111, 112.

⁵⁹ *Ibid*, 114.

The global financial crisis further consolidated the 'necessity' of cutting back public expenditure in areas such as social housing and social welfare. Through a mixture of public expenditure cuts and legislation, the social housing sector has shrunk, greatly relying on housing associations and private registered landlords for supply.⁶⁰ These legislation and policy developments will be explored in more depth in the assessment.

More recently, Grenfell Tower Fire highlighted the dismissal of social tenants' voices in relation to safety of housing.⁶¹ While an inquiry as to the events of Grenfell is ongoing,⁶² a perspective remains that instead of provoking change, pre-existing Government policy has only become consolidated.⁶³ The events speak to an ongoing process of neoliberal policy through underfunding and stigmatising social housing.⁶⁴

Overall, the impact of conservative policies has pushed for a greater employment and homeownership, which has gradually rendered social housing supply ineffective to meeting demand. Additionally, through adjusting welfare to merely cover the basic costs of housing also silences the demand for social housing, as tenants are encouraged to access private housing as social housing becomes cost ineffective and inadequate to live in. From a bio-power lens, it is understandable how through the adoption of legislation and policies favouring private ownership has altered population behaviour to stigmatise social housing to the point of last resort, rather than as an accessible means of living in safety and in dignity.

⁶⁰ Mark Stephens and Christine Whitehead, 'Rental Housing Policy in England: Post Crisis Adjustment or Long Term Trend?' (2014) 29(2) *Journal of Housing and the Built Environment* 201, 211.

⁶¹ Helen Carr, Dave Cowan and Ed Kirton-Darling, 'Marginalisation, Grenfell Tower and the voice of the social-housing resident: a critical juncture in housing' (2022) 18 *International Journal of Law in Context* 10, 10.

⁶² Grenfell Tower Inquiry, 'About Us' <<https://www.grenfelltowerinquiry.org.uk/about>>.

⁶³ Helen Carr, Dave Cowan and Ed Kirton-Darling (n 61) 10.

⁶⁴ Gideon Macleod, 'The Grenfell Tower Atrocity: Exposing Urban Worlds of Inequality, Injustice, and an Impaired Democracy' (2018) 22(4) *Urban Change, Theory, Action* 460, 460.

4.2.2 Wales

Social housing policy in Wales was adjunct to policy in England until the 1960s.⁶⁵ Compared to Scotland, Wales has enjoyed fewer powers under devolution.⁶⁶ However, the establishment of the Welsh Office in the 1960s and Tai Cymru - the Welsh Housing Agency operating from 1988 to 1998 - present some minor policy divergences in this period.⁶⁷ The Housing Act 1988 was instrumental in conferring responsibilities for funding and regulation of Welsh housing associations to Tai Cymru before devolution took place.⁶⁸ In terms of transfer of social housing stock from local authorities to housing associations, there have been few transfers, mainly occurring through the Tenants Choice Scheme.⁶⁹

The transfer of housing policy to the Welsh Assembly under Section 22 of the Governing Wales Act 1998 has meant that policy divergences in the areas of social housing policy have taken place in the 21st Century.⁷⁰ The impact of the Government of Wales Act 2006 permits the Welsh Assembly to produce primary legislation, which in the sphere of housing has led to the introduction of various acts which have, *inter alia*, abolished the right to buy and diversified the Welsh social housing system.⁷¹

⁶⁵ Bob Smith, 'Social Housing in Wales' (2018) Social Housing Policy Working Group R2018_SHPWG_04, 8.

⁶⁶ Mark Stephens, 'Social Rented Housing in the (DIS) United Kingdom: Can Different Social Housing Regime Types Exist within the Same Nation State?' (2019) 12(1) Urban Research & Practice 38, 47.

⁶⁷ Bob Smith (n 65) 8.

⁶⁸ Stuart Ropke, 'Social Housing: How Can We Do More?' (Cartrefi Cymunedol Cymru, 21 November 2019) <<https://chcymru.org.uk/blog/social-housing-how-can-we-do-more>> accessed 01 March 2023.

⁶⁹ Peter Malpass and David Mullins (n 55) 675.

⁷⁰ Memorandum from the Welsh Assembly: The National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010, para 4.

⁷¹ Bob Smith (n 65) 8.

4.2.3 Scotland

Compared to England, the Scottish experience of housing has been one of overcrowding and uninhabitable housing.⁷² The 1900s onwards encapsulate experiences of families living in one or two bedrooms without basic amenities as a result of high rental costs pushing families to share a room.⁷³ Changes to these circumstances are seen through the Housing and Town Planning Act 1919, which began allocating State provided social housing.⁷⁴ The legislation passed in Scotland followed English legislation in regards to housing, which granted local authorities powers to clear slums and inhabitable housing as well as construction of local housing units in the 1940s.⁷⁵

During the Thatcher Government, the Housing Act 1980 and Housing Act and Housing (Tenants' Rights) Scotland Act 1980 removed the discretionary power of local authorities and introduced a uniform and national scheme on right to buy policies for council tenants as well as new public sector tenancies with new rights.⁷⁶ The effect of these policies significantly increased homeownership rates in Scotland while decreasing social housing provision.⁷⁷

Since the 1980s there has been a significant policy divergence in social housing policy in Scotland. The Scotland Act 1998 established the Scottish Parliament and devolution of housing policy under the Scottish Government has shifted away from a privatisation agenda.⁷⁸ However, the Scotland Act 1998 sets out that overarching macroeconomic policies are a reserved power held by the sovereign.⁷⁹ Therefore, macroeconomic policy adopted in England such as the use of austerity measures and welfare reform have held some influence regarding the Scottish policy programme.

⁷² W.W Knox, 'Urban Housing in Scotland 1840-1940' in *A History of the Scottish People* (SCRAN 2004) 1.

⁷³ Ibid, 4; Shelter, 'Scotland's Housing Emergency: A Timeline' <https://scotland.shelter.org.uk/about_us/our_history> Accessed February 27, 2023.

⁷⁴ W.W Knox (72) 5.

⁷⁵ Ibid, 6; Shelter 'Scotland's Housing Emergency' (n 73)

⁷⁶ Paul Reeves (n 41) 9; Kim Mckee, 'The End of a Right to Buy and the Future of Social Housing in Scotland' (2010) 25(4) *Local Economy* 319, 319.

⁷⁷ Bilge Serin, Keith Kintrea, Keneth Gibb, 'Social Housing in Scotland' (2018) *Social Housing Policy Working Group R2018_SHPWG_06*, 5.

⁷⁸ Stuart Hodkinson *et al* (n 52) 9.

⁷⁹ UNCESCR United Kingdom Fifth State Party Report (n 8) 13-14.

In terms of social housing, This shift entails, *inter alia*, dismantling right to buy schemes, extending the rights of the homeless to housing and engaging in enhanced social housing construction programme.⁸⁰ Compared to England, Scotland has a larger social housing sector which represents a quarter of social housing stock.⁸¹ Though after the global financial crisis, the transfer of local housing stock to community-based ownership programmes and 2,000 properties to housing associations further reduced local authority housing stock.⁸² However, this process of voluntary stock transfers has taken place on a smaller scale than seen in England.⁸³

The push away from the privatisation of housing represents a major policy divergence as a result of devolution. This shift in the policy agenda of Scotland through increasing affordability of housing, private rented sector reforms and abolition of right to buy schemes,⁸⁴ can be thought to greater reflect the adequacy requirements for housing as found in General Comment 4, which will be explored in the following section.

4.2.4 Northern Ireland

The development of the social housing system in Northern Ireland begins in the mid-1960s against a background of political turbulence and violence.⁸⁵ Public housing was mainly allocated by local councils, however, there was evidence of discrimination in allocation against members of the Catholic community.⁸⁶ As a result, protests occurred with regards to long-term grievances about poor housing conditions and housing administration.⁸⁷ During the 1960s, violence in Belfast and Derry-Londonderry led to houses being burnt to the ground, displacing 2,000 families.⁸⁸

⁸⁰ Bilge Serin *et al* (n 77) 5-6.

⁸¹ *Ibid*, 5.

⁸² Peter Malpass and David Mullins (n 55) 674-675.

⁸³ Hal Pawson, Filip Sosenko, 'The Supply-Side Modernisation of Social Housing in England: Analysing Mechanics, Trends and Consequences' (2012) 27(6) *Housing Studies* 783, 784.

⁸⁴ *Ibid*.

⁸⁵ Housing Executive, 'Our History' < <https://www.nihe.gov.uk/about-us/our-mission-vision/our-history> > Accessed 01 March 2023; Paddy Gray, 'What Future for Social Housing in Northern Ireland in The 21st Century?' (2000) 48(3) *Administration* 42,42; Brendan Murtagh, 'Integrated Social Housing in Northern Ireland' (2001) 16(6) *Housing Studies* 771, 771.

⁸⁶ Fionnuala McKenna, 'Background Information on Northern Ireland Society-Housing' < [https://cain.ulster.ac.uk/ni/housing.htm#:~:text=Since%201971%2C%20the%20Government%20has,Ireland%20Housing%20Executive%20\(NIHE\).>](https://cain.ulster.ac.uk/ni/housing.htm#:~:text=Since%201971%2C%20the%20Government%20has,Ireland%20Housing%20Executive%20(NIHE).>) Accessed 01 March 2023.

⁸⁷ Housing Executive 'Our History'(n 85).

⁸⁸ *Ibid*.

The Housing Executive Act 1971 established the Northern Ireland Housing Executive (NIHE) which assumed local housing functions of all 60 local councils,⁸⁹ representing the largest transfer of local authority stock.⁹⁰ The aim of the body is to: improve the delivery of housing, improve house conditions and meet housing need.⁹¹ Against a background of political violence and discrimination in the field of housing, the NIHE had an ongoing review and modification of governance structures in relation to social housing as part of the Good Friday Agreement 1998.⁹²

During the 1970s, 63 percent of Catholic homes in Northern Ireland had hot water, a fixed bath and an inside WC in comparison with 72 percent of Protestant homes.⁹³ Since 1971 until the 1990s, the Government has invested over £9,000 million in public housing, which has eradicated this gap.⁹⁴ However, the Committee on Economic, Social and Cultural Rights in its Concluding Observations in 1997 notes concern at unacceptable levels of poverty and *de facto* discrimination faced by ethnic minorities and Catholics in Northern Ireland, recommending targeted social assistance measures to alleviate poverty.⁹⁵ Additionally, the 1990s social housing waiting lists stood at 23,355 and rose to 24,468 in 1985,⁹⁶ thereby highlighting existing inequalities after the establishment of the NIHE and Good Friday Agreement 1998.

⁸⁹ Ibid.

⁹⁰ Peter Malpass and David Mullins (n 55) 675.

⁹¹ Fionnuala McKenna (n 86).

⁹² Joe Frey, 'Social Housing in Northern Ireland: Challenges and Policy Options' (2018) Social Housing Policy Working Group, R2018_SHPWG_02, 5.

⁹³ Fionnuala McKenna (n 86).

⁹⁴ Ibid.

⁹⁵ UNCESCR Concluding Observations 1997 (n 6) paras 9, 22.

⁹⁶ Fionnuala McKenna (n 86).

Social housing policy in Northern Ireland has little policy divergence to England. However, there are two differences: the lack of voluntary local transfers of housing stock and the different approach to social housing allocations and community participation to combat discrimination in accessing housing.⁹⁷ Though local transfers were unpopular in the early 2000's, the Housing (Northern Ireland) Order 2003 introduced the House Sales Scheme to council tenants which was quite popular.⁹⁸ Therefore, the policy approach of homeownership on the one hand follows the England approach, however also provides a means of greater security of tenure to both Catholic and marginalised groups.

Though social housing policy is the responsibility of the Department for Social Development which appoints boards to regulate the NIHE and housing associations, through the Housing (Amendment) (Northern Ireland) Order 2006, the management of development programmes was transferred to the NIHE.⁹⁹ The NIHE works in partnership with local councils and housing associations and community groups in order to deliver housing and improve local cohesion.¹⁰⁰ Therefore, the role calculating housing need and resulting allocation falls in the duties of the NIHE.¹⁰¹ The social housing policy context differs in Northern Ireland as the formation of the social housing system serves to maintain balance and stability given its political environment. However, there is some policy convergence in following homeownership policy goals similar to England.

4.2.5 Comparing Social Housing Histories in the United Kingdom

The central United Kingdom Government has held overall policy control over macroeconomic policies such as social security, national defence and foreign affairs.¹⁰² However, through devolution greater policy divergence in the field of social housing has occurred in Scotland, Wales and Northern Ireland. Greater value is held over the role of

⁹⁷ Jenny Muir, 'Policy Difference and Policy Ownership under UK Devolution: Social Housing Policy in Northern Ireland' (2012) The Institute of Spatial and Environmental Planning Working Papers (QUB), 2.

⁹⁸ Ibid, 6.

⁹⁹ Jenny Muir (n 97) 5-7.

¹⁰⁰ Housing Executive (n 85).

¹⁰¹ Jenny Muir (n 97) 4.

¹⁰² UNCESCR United Kingdom Fifth State Party Report (n 8) 13.

social housing in Scotland which holds the largest social housing provision.¹⁰³ Wales has a greater focus on the sustainability of housing to ensure needs are met without compromising the ability to meet the needs of future generations.¹⁰⁴ Additionally, the background of conflict in Northern Ireland has shaped the NIHE to have a localised role in the provision of housing. Aside from England and Northern Ireland, Scotland and Wales have abolished right to buy policies, highlighting the recognition of the role that social housing has to play in meeting housing needs.

From a Foucauldian perspective, all devolved powers in the United Kingdom demonstrate similar liberal governmentalities which focus on 'the efficacy of market processes in housing management, the desirability of empowering tenants as autonomous and accountable consumers.'¹⁰⁵ However, the means utilised by each jurisdiction varies. In constructing their own identities through devolution, there is further variation on a localised level through local authority action concerning social housing management, emphasising schemes of tenant empowerment which envisage the tenant as active agents in their own life outcomes.¹⁰⁶ Given these variations, it is of interest to gauge in what ways legislation and policies in regards to social housing differ from each other, especially upon entering recovery from the global financial crisis and COVID 19-pandemic.

4.3 Assessing the Doctrine of Non-Retrogression in relation to the Social Housing and Welfare Legislation and Policies in the United Kingdom

To assess the doctrine of non-retrogression in relation to the rights to adequate housing and social security, the tables containing the criterion formulated in the chapters exploring the right to housing and social security above are used. The chapter undertakes in a section-by-section analysis examining each criteria from the table through a normative and empirical lens. Therefore, in England, Scotland, Wales and Northern Ireland, the following criterion are addressed: security of tenure, availability of services, accessibility, habitability and affordability and social housing welfare.

¹⁰³ Bilge Serin *et al* (n 77) 5.

¹⁰⁴ Bob Smith (n 65) 7.

¹⁰⁵ John Flint, 'Reconfiguring Agency And responsibility in the Governance of Social Housing in Scotland' (2004) 41(1) *Urban Studies* 157, 151.

¹⁰⁶ *Ibid*; Graham Burchell, *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 88.

Rather than examine each jurisdiction separately, each criteria examines the respective legislation and statistics in England, Scotland, Wales and Northern Ireland together to provide a holistic understanding of the enjoyment of the right to housing and social security in the United Kingdom as a whole.

As some the main pieces of social housing legislation introduced in the 1980s and 1990s are currently in operation, they will be examined in the normative sections alongside further legislation impacting social housing regulation during the period 2008-2020/21. Empirically, statistics are utilised to provide indicators as to the adequacy and enjoyment of social housing to highlight the role legislation and policies have in the adequacy and enjoyment of social housing. There are some gaps in the data provided as a result of the sparseness in relation to social housing and local authority data, which does impact the assessment of empirical retrogression in each of the criteria.

4.3.1 Security of Tenure

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Security of Tenure	<ul style="list-style-type: none"> • Is the security of tenure guaranteed in law for all forms of public and private accommodation? • Do all persons have a guarantee against forced evictions? 	<ul style="list-style-type: none"> • Number and proportion of displaced or evicted persons rehabilitated or resettled in the reporting period. • Proportion of households with legally enforceable, contractual, statutory or other protection providing security of tenure or proportion of households with access to secure tenure.

In relation to social housing, security of tenure focuses on eviction of social housing tenants from the property. While the normative assessment is fully provided, there is an absence of statistics regarding evictions and repossessions by the housing executive in the context of Northern Ireland.

4.3.1.1 England: Normative and Empirical Assessment

Security of tenure of social housing recipients is provided for through the Housing Act 1996. The 1996 Act replaces the Housing Act 1988, introducing 'assured tenancies' for tenancies beginning after the 1988 Act.¹⁰⁷ Assured tenancies provide a contractual tenure for recipients compared to the legislative basis provided by secure tenancies existing before the 1988 Act.¹⁰⁸ The effect of this provision has an integrating effect on both the private and social sector through providing the same tenure rights.

Although the Housing Act 1996 sets out the tenure of social housing tenancies, the addition of the Localism Act 2011 introduces flexible tenancies which the local authority may provide to social tenants.¹⁰⁹ Flexible tenancies are secure tenancies lasting a minimum of two years which can be provided by local authorities and housing associations to provide social landlords the ability to provide tenancies with a range of fixed periods.¹¹⁰ Further rationales behind the Localism Act 2011 are to 'create a flexible system so that scarce resources can be focused on those who need it most.'¹¹¹

In relation to evictions, the Housing Act 1996 requires local authorities and social landlords to utilise introductory tenancies which offer a year trial period to new social tenants.¹¹² In order to end the introductory tenancy, a social landlord must make an order for possession of a dwelling house,¹¹³ which will only be entertained by the court when notice has been served by the landlord to the tenants.¹¹⁴

¹⁰⁷ Housing Act 1996, Part III, Chapter II, s 96 sub-ss (a)-(b) (HA 1996).

¹⁰⁸ UNCESCR United Kingdom Fourth State Party Report (n 38) paras 129-130.

¹⁰⁹ Localism Act 2011, Part 7, Chapter 1, ss 154, 107A subs 2(a).

¹¹⁰ Wendy Wilson, House of Commons Library, *Social Housing: Flexible and Fixed Term Tenancy (England)* (Number 7173, 2018) <briefing paper-Wendy><https://researchbriefings.files.parliament.uk/documents/CBP-7173/CBP-7173.pdf>> 5.

¹¹¹ Ibid.

¹¹² HA 1996 (n 107) ss 124(1), 125(2).

¹¹³ Ibid, s 127 subs 1(a).

¹¹⁴ Ibid, s 128(1).

For secure and assured tenancies, repossession follows a similar process where the landlord must serve notice and request and order from the court on the grounds of nuisance, annoyance, domestic violence or convictions for immoral or illegal purposes.¹¹⁵ The Court then dispenses a notice where it considers it just and equitable to do so.¹¹⁶ As a result, *prima facie*, social landlords must respect the incorporation of notice and court orders before evicting a social tenant.

The overall tenures provided to social tenants remains the same through the pandemic, however, there are alterations in relation to eviction notices. The Coronavirus Act 2020 extends eviction notices to a three month in relation to secure, assured, introductory and flexible tenancies.¹¹⁷ Furthermore, the Secretary of State is able to amend the three month period to sixth months or a specified period.¹¹⁸ While there is coverage provided to all forms of tenancies through the pandemic legislation, rather than outrightly ban evictions from occurring in the period of the pandemic, they are only delayed until a certain time period.

On the one hand, security of tenure is met in this regard as social tenants already are protected via legislation in being provided with notice and a court order, the protections are extended to ensure that recipients are protected from forced evictions in the private sector. As the pandemic period has passed since entering recovery, ¹¹⁹ security of tenure has normatively returned to provisions covered in the Housing Act 1996.

¹¹⁵ Ibid ss 144 sub-ss (1) (a)-(b), 147 "83 sub-ss(1)(a)-(b), 148 sub-ss (a)-(b), 149.

¹¹⁶ Ibid, s "83 subs 1(b).

¹¹⁷ Coronavirus Act 2020, Schedule 29 sub-ss 3, 5, 6, 8 (CA 2020).

¹¹⁸ Ibid, s 13 sub-ss (1)(a)(i)-(ii).

¹¹⁹ Ibid, s 14(2).

Table 1: Eviction Orders on Grounds of Rent Arrears and Anti- Social Behavior 2008-2022

Evictions Orders On Grounds Of Rent Arrears And Anti-Social Behaviour 2008-2022¹²⁰				
Year	Eviction	Anti-Social Behaviour	Rent Arrears	Local Authority Lettings
2008/9	-	-	-	151,700
2009/10	-	1,123	-	155,800
2010/11	6,000	1,180	25,860	146,400
2011/12	6,140	-	5,158	140,900
2012/13	6,140	-	4,973	134,700
2013/14	6,870	-	5,918	142,900
2014/15	6,750	-	5,800	127,300
2015/16	6,430	-	5,510	120,500
2016/17	5,800	-	4,959	112,600
2017/18	5,482	-	4,661	108,300
2018/19	5,289	403	4,229	30,578
2019/20	4,427	361	3,540	99,938
2020/21	224	59	69	80,171
2021/22	1,102	702	702	88,591

¹²⁰ Gov.uk, 'Collection: Local Authority Housing Data' <<https://www.gov.uk/Government/collections/local-authority-housing-data>> Accessed February 20 2023.

4.3.1.2 Wales: Normative and Empirical Assessment

Following the Housing Acts 1985 and 1996, secure, assured and introductory tenancies - as seen in the England section - operated in Wales in regard to social housing tenancies. The Renting Homes (Wales) Act 2016 'brings together and modernises the existing complex raft of legislation, and in doing so seeks to improve the arrangements for renting a home in Wales.'¹²¹ The Act sets out that individuals who rent their homes under a tenancy or licence are now referred to as 'contract holders' who hold an occupation contract.¹²²

The Act covers both private and social renters, setting out two types of occupation contracts: secure and standard contracts which operate for a fixed term or periodic basis.¹²³ Each kind of contract provides different rights and obligations on the landlord and contract holder, for example a standard contract is less secure than a secure contract.¹²⁴ Social Landlords are also re-labelled as community landlords who in general make or adopt secure contracts.¹²⁵

¹²¹Welsh Government, '*Renting Homes (Wales) Bill: Explanatory Memorandum*' (2015) <<https://senedd.wales/laid%20documents/pri-ld10098-em-r/pri-ld10098-em-r-e.pdf>> 7, para 7.

¹²² Renting Homes (Wales) Act 2016, s 1(1)(a) (RHWA 2016).

¹²³ Ibid, s 1 sub-ss (b)(i)-(ii), (c)(i)-(ii).

¹²⁴ Ibid, s 2.

¹²⁵ Ibid, Part I, s 2 subs (2)(a).

Furthermore, both contracts contain different fundamental terms in the contract which can be modified if it benefits the contract holders' position.¹²⁶ All occupation contracts fundamental provisions focus on, *inter alia*, requiring a deposit, anti-social behaviour, possession and death of the sole-contractor.¹²⁷ In relation to secure contracts, a fundamental provision is that the landlord may vary the rent payable to a secure contract holder through a minimum of two months-notice, listing the date it will commence.¹²⁸ Fundamental supplementary provisions can be incorporated into all occupation contracts by Welsh Ministers such subject to or without modification after consulting affected groups.¹²⁹

Evictions or terminating the contract must be made through the landlord making a claim to court for recovery of possession of a dwelling through a possession notice on the grounds of breach of contract, estate managements, notice provided by the contact holder or serious rent arrears.¹³⁰ Similar to England, the Coronavirus Act 2020 extends the notice period for a period of three, six or twelve months.¹³¹

Table 2: Total Evictions and Grounds in Wales: 2008-2011

Total Evictions and Grounds in Wales: 2008-2011 ¹³²					
Year	Rent Arrears	Anti-Social Behaviour	Other	Total Evictions	Total Lettings
2008/9	4,066	166	42	4,274	21,243
2009/10	3,676	108	31	3,815	22,649
2010/11	3,199	163	52	3,414	22,327

¹²⁶ Ibid, Part I, s 3 sub-ss (1), (2), (3).

¹²⁷ Ibid, Ch. 3, s 20(3) sub-ss (a)-(j).

¹²⁸ Ibid, s 10(3) sub-ss (a)-(b).

¹²⁹ Ibid, s 23 sub-ss (1), (2),(5).

¹³⁰ Ibid, ss 150(1), 158 (1), 160(1), 163(1).

¹³¹ CA 2020 (n 117) s 13(1)(a) sub-ss (i)-(ii).

¹³² Gov.Wales, 'Possession Orders By Tenancy, Reason for Action and Procedure <<https://stats.wales.gov.wales/Catalogue/Housing/Possessions-and-Evictions/PossessionOrders-by-Tenancy-ReasonForAction-Procedure>> Accessed February 20 2023.

4.3.1.3 Scotland: Normative and Empirical Assessment

The Housing (Scotland) Act 1987 originally set out secure tenancies for social housing tenants, however has been replaced by the Housing (Scotland) Act 2001.¹³³ The 2001 Act sets out the Scottish Secure Tenancies, which may not be terminated on grounds of possession unless notice has been provided by the social landlord or local authority.¹³⁴ Scottish Short Tenancies are tenancy agreements of six to twelve months for prospective tenants which can be renewed via express agreement or tacit relocation.¹³⁵ In regard to the drafting of both tenancies, social landlords must follow regulations as stipulated by Scottish Ministers.¹³⁶

Evictions may also be carried out in relation to anti-social behaviour twelve months after the person was convicted forming a ground for repossession.¹³⁷ Repossession of Scottish Short Tenancies follow similar rules of notice, however, a social landlord may raise a summary cause for recovery.¹³⁸ In relation to the Covid-19 pandemic, the Coronavirus (Scotland) Act 2020 extends the notice periods for possession in regards to assured tenancies for a period, of two, three or six months dependent on the grounds for possession.¹³⁹ Notice periods may be modified, however not to an excess of six months.¹⁴⁰

¹³³ Housing (Scotland) Act 2001, Part III, s 44(1) as enacted, repealed by Ch.1, s 11(1) (HSA 2001).

¹³⁴ Ibid, s 14 sub-ss(1)-(2)(a).

¹³⁵ Ibid, ss 34, 6A sub-ss (1), (5) (a)-(b).

¹³⁶ Ibid, ss 34(8), 14 (2)(c).

¹³⁷ Housing (Scotland) Act 2014. s 14 (2)(a)(ii)(A) (HSA 2014).

¹³⁸ Ibid, s 36 sub-ss (1)-(2).

¹³⁹ Coronavirus (Scotland) Act 2020, Sch. 1, ss 7, 2 sub-ss (b), (4A) (CSA 2020).

¹⁴⁰ Ibid, Sch. 1, s 8 sub-ss (1)-(2).

Table 3: Number of Evictions in Scotland 2008-2021

No. Evictions in Scotland: 2008-2021¹⁴¹					
Year	Permanent Lettings Provided by Local Authorities	Total Eviction Orders Issued	On Grounds of Rent Arrears	On Grounds of Anti-social Behaviour	Total Evictions
2008/9	24,737	5,246	n/a	59	896
2009/10	27,939	4,613	4,539	46	748
2010/11	25,668	3,743	3,520	35	586
2011/12	27,263	3,371	3,328	39	608
2012/13	27,546	2,829	2,778	43	550
2013/14	28,679	2,728	2,658	59	550
2014/15	27,006	3,803	3,520	47	694
2015/16	26,258	4,167	3,922	54	859
2016/17	25,788	4,248	4,193	36	927
2017/18	25,666	4,133	4,066	42	1,023
2018/19	26,455	3,688	3,640	29	1,007
2019/20	26,006	3,033	2,997	21	812
2020/21	19,630	17	11	5	11

¹⁴¹ Gov.Scot, 'Housing Statistics: Management of Local Authority Housing'
<https://www.gov.scot/publications/housing-statistics-management-of-local-authority-housing/> Accessed 07 March 2023.

4.3.1.4 Northern Ireland: Normative and Empirical Assessment

Security of tenure is set out in the Housing (NI) Order 1983. Where a dwelling is let through the NIHE or a registered housing association, the tenant shall enjoy a secure tenancy.¹⁴² Possession of the dwelling house by the landlord will only be entertained by the court where the landlord has served a notice to the tenant specifying the date not less than four weeks from which the tenancy will terminate.¹⁴³ Schedule 3 lists the grounds for possession of a dwelling such as nuisance or annoyance, or an offence committed in or near the dwelling or using or allowing the dwelling to be used for immoral or illegal purposes.¹⁴⁴ Further reasons focus on rent arrears or contractual abuse,¹⁴⁵ perpetration of domestic abuse,¹⁴⁶ and neglect of dwelling house.¹⁴⁷

The Housing (NI) Order 2003 sets out introductory tenancies which may be elected to be revoked at any time without prejudice to the making of a further election.¹⁴⁸ Introductory tenancies may only be brought to an end by the landlord through a court order for the possession of the dwelling.¹⁴⁹ The landlord is required to provide the tenant with notice setting out that a court order has been requested, the reasons for the order decision and the specified date when possession will ensue.¹⁵⁰

¹⁴² Housing (NI) Order 1983, s 25 sub-ss (1), (2) (a)-(b) (HNIO 1983).

¹⁴³ *Ibid*, s 27 sub ss (1), (2), (3).

¹⁴⁴ *Ibid*, Sch. 3, Grounds 2.

¹⁴⁵ *Ibid*, Grounds 1.

¹⁴⁶ *Ibid*, Grounds 2.

¹⁴⁷ *Ibid*, Grounds 3, 4.

¹⁴⁸ Housing (NI) Order 2003, s 6 sub-ss (1), (5) (HNIO 2003).

¹⁴⁹ *Ibid*, s 9(1).

¹⁵⁰ *Ibid*, s 10 sub-ss (1)-(4).

Furthermore, the notice shall inform the tenant of their rights to review the landlords decision and the time frame in which it can be made.¹⁵¹ In relation to the Covid-19 pandemic, the Coronavirus Act 2020 extends the protections as to evictions to Northern Ireland by extending the notice period for the length of the emergency period.¹⁵² However, this order only covers private tenancies, it is unclear whether there is similar legislation covering protections from evictions as to NIHE properties.

4.3.1.5 Assessing Security of Tenure in the United Kingdom

Assessing security of tenure establishes whether social housing - which is often accessed by vulnerable and marginalised groups - provides stability to tenants be able to self-actualise and enjoy further rights. Overall, since devolution there has been a variation in the form of tenure provided in all jurisdictions.

In Northern Ireland, it seems that secure tenancies remain in place, enabling greater security and stability for social housing tenants. In the English context, the mixture of secure, assured and flexible tenancies as a result of the Housing Act 1996 and Localism Act 2011 creates a form of tenure in favour of social landlords, creates greater instability and isolation for social housing tenants.¹⁵³ As the Localism Act 2011 was introduced by the Conservative-Liberal Democrat Coalition after the global financial crisis, what becomes of interest to note is how the concept of residualisation – the process where public services only provide a safety net to recipients in most need¹⁵⁴ - has been entrenched in legislation.

Through emphasising that State services such as social housing should only be accessed by those who need it most, reforms to tenure in this respect may promote flexibility for social landlords and families. Rather, these reforms introduce insecurity for tenants as their tenure operates for shorter terms, thereby further stigmatising and pushing them into positions where they may have to find private sector accommodation.¹⁵⁵

¹⁵¹ Ibid, s 10(6).

¹⁵² Private Tenancies (Coronavirus Modifications) Act (Northern Ireland) 2020, s 1.

¹⁵³ Suzanne Fitzpatrick and Beth Watts, 'Competing Visions: Security of Tenure and the Welfarisation of English Social Housing' (2017) 32(8) Housing Studies 1021, 1033.

¹⁵⁴ Jen Pearce and Jim Vine, 'Qualifying Residualisation: The Changing Nature of Social Housing in the UK' (2014) 29 J House and the Built Environment 657, 675.

¹⁵⁵ Suzanne Fitzpatrick and Beth Watts (n 153) 1035.

Therefore, concepts such as scarcity of housing become entrenched in legislation, providing greater tenure powers to social landlords under the guise of flexible tenure terms.

Similar to this approach is the Scottish Short Tenancies Act. The tenancies set out in Scottish Short Tenancies also provide greater flexibility to social landlords in offering social housing lettings. However, there is greater adaptation of Scottish Short Tenancies by the Ministers regulations. For example, in 2019, the Minister updated the 2002 Scottish Short Tenancies – which highlighted key tenant and landlord obligations and terms - agreements to include core tenant and landlord obligations, additional contractual terms for maintenance and disrepair and any additional clauses felt necessary in accordance to the Scottish Housing Acts.¹⁵⁶ The active role of the Minister in this regard, provides a dynamic approach to tenancy agreements which set out the range of rights available to tenants, providing a more secure tenancy agreement.

The greatest variation can be seen in Wales with the differentiation in offering standard and secure contracts which offer different levels of protection to contract holders. Having the addition of fundamental terms in occupation contracts provides for a legal basis of protection for social housing tenants. The intended effect behind the Welsh legislation is to simplify housing law to be easily understood by practitioners, landlords and tenants.¹⁵⁷ Additionally, the change of terminology of social housing tenants to ‘contract holders’ not only modernises but removes stigmatisation of social housing tenants as they are, like private renters, contract holders all the same.¹⁵⁸

¹⁵⁶ Gov.Scot, ‘Scottish Secure Tenancy: Model Agreement 2019’, available at <
<https://www.gov.scot/publications/model-scottish-secure-tenancy-agreement-2019/>>

¹⁵⁷ Welsh Government, ‘Renting Homes Bill (n 121) paras 15, 16, 28.

¹⁵⁸ Ibid, 11, para 30.

The legal procedure as to eviction remains similar in England, Scotland, Wales and Northern Ireland, requiring the landlord to provide notice to the tenants and seek a possession order from the courts. Although the statistics regarding the number of evictions are limited with respect to Wales and Northern Ireland, what can be seen is how apart from England, both Wales and Scotland experience falls in the rate of evictions after 2008 until 2015. In the case of Scotland, these falling rates can be attributed in part to the guidance produced by Scottish Ministers in regard to landlords carrying out 'pre-actions' in relation to requesting a possession order, such as making reasonable efforts to agree on a plan for future payments and providing advice with regards to debt management and the housing benefit.¹⁵⁹ Through creating guidance as such, there are further uniformity in practice with regards to evictions, as well as providing tenants with greater certainty and security in regards to their tenure.

England has higher eviction rates in comparison to Scotland and Wales during the period 2008-2022. Furthermore, evictions from social housing increased until 2016 before falling, predominantly as a result of rising rent arrears amongst tenants. It could be inferred that rent arrears are a means to eviction from social housing in the English context.¹⁶⁰ However, evictions are a last resort in Scotland as a result of greater consultations with the general public.¹⁶¹ When comparing number evictions to the total social housing population, measured through total lettings or stock,* some observations can be made in relation to England, Wales and Scotland.

¹⁵⁹ Gov.Scot, 'Housing (Scotland) Act 2001-10: Pre-Action Guidance for Social Landlord' <<https://www.gov.scot/publications/housing-scotland-act-2001-2010-guidance-social-landlords-pre-action/>> Accessed February 20 2023.

¹⁶⁰ Helen Carr, David Cowan, Caroline Hunter and Alison Wallace, 'JRF Housing Market Taskforce Programme Paper: Tenure Rights and Responsibilities' (December 2010) 28.

¹⁶¹ Shelter, 'Research Report: Evictions by Social Landlords in Scotland in 2008-9' (December 2009) Shelter Policy Library, 3.

In relation to England the number of social renters via the local authority falls for the entire 2008-2021 period regardless of the rising and falls in evictions. From the limited data provided in Wales, it can be seen that as evictions decrease, the number of social renters increase. In the case of Scotland, the size of the social housing population is volatile against the overall fall in evictions until 2013/14. When the number of evictions until 2017/18 increase there is an overall decrease in the social housing population. Overall, there does not seem to be a clear correlation between the social housing population and the rate of evictions.

While the rates of evictions drop in both England and Scotland due to the pandemic, the numbers of evictions only drop significantly in 2020-2021 from the introduction of the Coronavirus Act 2020 and imposition of late lockdowns. Therefore, the Coronavirus Acts 2020 provided greater protection from evictions in the emergency period. What can be inferred here is an overall compliance to legislation which protects social housing tenants who have lost their jobs as a result of Brexit and the Covid-19 pandemic. Furthermore, there is a strong correlation between welfare cuts, the bedroom tax, freezes and caps and tenure insecurity for social tenants.¹⁶² Without data on eviction rates from Wales and Northern Ireland, it is difficult to provide a holistic assessment as to how legislation is acted upon in practice.

¹⁶² Anna Clarke, Charlotte Hamilton, Michael Jones and Kathryn Muir, 'Poverty, Evictions and Forced Moves' (July 2017) Joseph Rowntree Foundation, 9.

*The statistics for total social housing population has relied upon the statistics for total lettings/stock provided by statistics in later sections. The thesis recognises the limitations in using this approach when analysing the data, however, the reason for this is because of significant financial barriers in accessing the data which has been sold to a third-party website which charges expensive subscriptions for the access of such data.

4.3.2 Availability of Services

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Availability of Services	<ul style="list-style-type: none"> • Is an adequate level of services, materials and infrastructure provided for? 	<ul style="list-style-type: none"> • Number of and total public expenditures on housing reconstruction and rehabilitation of Evicted/displaced persons during the reporting period. • Share of public expenditure on provision and maintenance of sanitation, water supply, electricity and other services of homes.

Though availability of services refers to housing having services such as sanitation, heating etc.,¹⁶³ there are further interpretations. While both private and social housing should have the same services, in order for social housing tenants to enjoy these services, social housing has to be available in the first place. Therefore, the supply of social housing and statistics regarding supply and expenditure on services to maintain, rehabilitate and construct social housing units are focused on in this part of the assessment.

¹⁶³ UNCESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (13 December 1991) UN Doc E/1992/23, 5-6.

4.3.2.1 England: Normative and Empirical Assessment

The availability of social housing is provided for through the Housing Acts 1985 and 1996 and the Housing and Regeneration Act 2008. The Housing Act 1985 sets out the role of local authorities to review housing conditions and supply of housing in their district.¹⁶⁴ Furthermore, a local housing authority may provide housing accommodation through the erection, conversion or acquisition, alteration and improvement of houses.¹⁶⁵ The local authority may also supply furniture, facilities of board and laundry and recreation facilities, shops and welfare services to recipients.¹⁶⁶ A housing subsidy was also payable to local authorities which comprised of calculations of a base amount, housing cost differential and local contribution differential.¹⁶⁷ However, the Housing Urban Regeneration Act 2008 amended the payment to be payable to development corporations.¹⁶⁸ Local authorities may also borrow money.¹⁶⁹

Under the Housing Act 1996, grants and other financial assistance are granted to social landlords in respect of expenditure incurred by them in connection with their housing activities.¹⁷⁰ Furthermore, the Treasury may lend money to a registered social landlord for the 'purposes of constructing or improving, or facilitating or encouraging the construction, improvement of dwellings, purchase or development of land.'¹⁷¹ The funds shall not exceed two thirds of the value of the purchase of land or mortgage.¹⁷²

¹⁶⁴ Housing Act 1985, s 8(1) (HA 1985).

¹⁶⁵ Ibid, ss 9 sub-ss(1)(a)-(b), 2.

¹⁶⁶ Ibid, ss 10, 11, 11A, 12.

¹⁶⁷ Ibid, ss 421, 422.

¹⁶⁸ Housing and Urban Regeneration Act 2008 (Consequential Provisions) Order 2008, Art. 4, Sch. 1 para 11(2).

¹⁶⁹ HA 1985 (n 164) s 428.

¹⁷⁰ HA 1996 (n 107) Chapter III, s 18(1).

¹⁷¹ Ibid, s 23 sub-ss (1)(a)-(c).

¹⁷² Ibid, s 23(2).

Local authorities may also provide financial assistance in the form of grants or guaranteeing money and shares of capital issued by social landlords such as housing associations.¹⁷³

The introduction of the 1996 Act places an emphasis of funding for the social landlords such as housing associations of which local authorities play a side role in aiding and supplying capital. Therefore, through legislative provisions the role of the local authority as the constructor of social housing is displaced to one of facilitation.

The Housing and Regeneration Act 2008, *inter alia*, regulates social housing and building regulations for housing.¹⁷⁴ The Act establishes the Homes and Communities Agency (HCA),¹⁷⁵ whose roles are to improve the supply and quality of housing in England, secure and support regeneration or development of land and contribute to the achieving sustainable development of housing to meet housing needs in England.¹⁷⁶ In carrying out these roles, the HCA may provide or facilitate the provision of housing or land through acquisition, construction, conversion, improvement or repair.¹⁷⁷ In terms of financial assistance, the HCA with the consent of the Secretary of State gives financial assistance comprising of grants, loans, indemnity or benefits for persons assisted.¹⁷⁸

In tandem with the Localism Act 2011, and the Legislative Reform (Regulator of Social Housing) (England) Order 2018 the HCA operates in tandem with the Regulator of Social Housing.¹⁷⁹ The Regulator of Social Housing may direct the HCA not to give financial assistance to registered providers on the basis of ongoing inquiries or notice received of the registered provider.¹⁸⁰ The Regulator of Social Housing is not a departmental body but is appointed by the Secretary of State.¹⁸¹

¹⁷³ Ibid, s 22 sub-ss (3)(a)-(b).

¹⁷⁴ Housing and Urban Regeneration Act 2008, Introductory Text (HURA 2008).

¹⁷⁵ Ibid, s 1.

¹⁷⁶ Ibid, s 2 sub-ss (1)(a)-(d).

¹⁷⁷ Ibid, s 5 sub-ss (1)-(3).

¹⁷⁸ Ibid, Chapter 3.

¹⁷⁹ Homes England, Ministry of Housing, Community and Local Government, *Framework Document* (2018) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/754034/Homes_England_Framework_Document_2018.pdf> para 1.1.; Legislative Reform (Regulator of Social Housing)(England) Order 2018, s 100F.

¹⁸⁰ Ibid, s 100 G, sub-ss (1)-(2).

¹⁸¹ Ibid, ss 80A 3(a), 80B(a).

The reform of the social housing system by providing both a parliamentary and non-parliamentary body to ensure that housing needs such as affordability are met in areas that need it the most, in addition to forming a more resilient and diverse housing market.¹⁸² The impact of these reforms coincide with the complex social housing system which comprises of local authority and private housing providers.

¹⁸² Homes England Framework Document (n 179) para 4.3.

Table 4: Local Authority Owned Dwellings and Housing Association Stock 2008-2021

Local Authority Owned Dwellings and Housing Association Stock 2009-2021¹⁸³						
Year	Total Local Authority Stock	Housing Authority Stock	Total Capital Expenditure Works by Local Authorities (£k)	Locally Financed Capital Expenditure (£Bns)	Locally Financed Current Expenditure (£ Bns)	Total Public Expenditure (£Bns)
2008	-	-	639,384	-	-	-
2009	1,819,696	2,195,195	655,397	7.5	26.8	43.5
2010	1,786,427	2,242,657	600,723	5.8	26.1	46.4
2011	1,725,912	2,319,511	720,562	13.4	27.9	45.7
2012	1,692,631	2,358,527	846,101	6.2	26.9	44.6
2013	1,681,785	2,392,124	996,361	7.1	28.1	44.0
2014	1,668,685	2,407,281	961,674	7.0	33.6	42.4
2015	1,643,262	2,451,983	781,513	7.7	36.2	42.0
2016	1,612,239	2,493,952	644,369	9.1	41.4	41.1
2017	1,601,573	2,511,258	461,317	13.3	45.0	40.2
2018	1,592,008	2,539,112	409,675	12.7	47.7	39.9
2019	1,587,164	2,560,993	446,215	13.2	51.5	39.4
2020	1,582,946	2,583,208	411,978	11.7	54.6	39.6
2021	1,581,554	2,598,546	606,929	10.0	39.2	53.0

¹⁸³ Gov. UK, 'Statistical Data Set: Live Tables on Dwelling Stock <<https://www.gov.uk/Government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants>> Accessed 25 February 2023; Office for Budget Responsibility 'Historical Official Forecast Database 2023' <https://obr.uk/data/> > Accessed 16 January 2024; Office for Budget Responsibility, 'EFO-PSF Aggregate Data Bank Nov 2022 <https://obr.uk/public-finances-databank-2022-23/>> Accessed 16 January 2024

4.3.2.2 Wales: Normative and Empirical Assessment

The basis of local authority powers in constructing, improving and demolishing social housing follows the Housing Act 1985. There is some variation through the Housing (Wales) Act 2014 which provides for the finance of social housing. The Act abolished house revenue accounts as found under the Local Government and Housing Acts 1985 and 1989. Rather, settlement payments are paid to the local authority to bring the Housing Revenue account and subsidy system to a close and may supply further payments to this effect.¹⁸⁴

¹⁸⁴ Housing (Wales) Act 2014, Part 5, ss 132, 133 (HWA 2014)

Table 5: Total Housing Stock in Wales 2008-2021

Total Social Housing Stock in Wales 2008-2021¹⁸⁵							
Year	Total Local Authority Stock	Total Registered Social Landlord stock	Total Stock	Total Housing Capital Expenditure (£k)	Total Housing Current Expenditure (£k)	Total Capital Expenditure Receipts (£mns)	Total Current Expenditure (£k)
2008/9	129,900	89,400	1,355,300	238,170	700,425	1,128,396	6,431,811
2009/10	113,000	106,900	1,365,800	217,445	819,018	934,126	6,805,878
2010/11	110,600	110,500	1,375,200	210,084	926,790	997,663	7,149,619
2011/12	88,700	133,600	1,383,800	230,148	1,000,774	1,036,262	7,279,456
2012/13	88,400	134,700	1,391,600	216,368	1,033,142	1,088,056	7,407,508
2013/14	88,200	134,800	1,399,500	223,592	1,055,672	1,040,587	7,541,765
2014/15	88,100	135,400	1,407,600	260,290	1,056,956	1,015,213	7,527,425
2015/16	87,800	136,300	1,416,000	316,476	1,064,909	2,009,567	7,329,444
2016/17	87,300	137,200	1,425,200	330,462	1,051,356	1,113,214	7,392,919
2017/18	87,200	138,600	1,434,500	318,273	1,037,768	1,174,158	7,522,123
2018/19	87,300	139,900	1,443,500	336,702	995,410	1,230,717	7,630,801
2019/20	87,300	141,200	1,451,700	382,520	901,941	1,245,556	7,873,754
2020/21	87,331	142,600	1,460,200	310,995	877,971	1,323,925	8,636,175

¹⁸⁵ Gov.Wales, 'Dwelling Stock Estimates by Local Authority and Tenure'

<<https://statswales.gov.wales/Catalogue/Housing/Dwelling-Stock- Estimates/dwellingstockestimates-by-localauthority-tenure>>Accessed 25 February 2023; StatsWales,'Capital Outturn Expenditure by Service (£ thousand)'

<<https://statswales.gov.wales/Catalogue/Local-Government/Finance/Capital/Outturn/capitaloutturnexpenditure-by-service>> 16 January 2024;StatsWales,'Revenue Outturn Expenditure Summary(£thousands)''>Accessed 19 January 2024

4.3.2.3 Scotland: Normative and Empirical Assessment

The Housing (Scotland) Act 1987 states that the Secretary of State shall make housing support grants for 'the purpose of assisting local authorities to meet reasonable housing needs in their area.'¹⁸⁶ Annually, the overall estimate for grants for all local authorities is determined by the aggregate amount of eligible expenditure incurred and income expected to be credited by local authorities.¹⁸⁷

Furthermore, the Housing (Scotland) Act 1987 sets out the duties owed by local authorities with respect to the provision of social housing. Aside from considering the housing conditions and need for further supply,¹⁸⁸ the local authority may provide housing accommodation through the erection of houses on land acquired by them; the conversion of properties into houses; acquirement, conducting repairs and improvements etc.¹⁸⁹ Additionally, the local authority may also provide shops and recreation grounds,¹⁹⁰ furniture,¹⁹¹ as well as board and laundry facilities and other amenities.¹⁹²

¹⁸⁶ Housing (Scotland) Act 1987, Part IX, s 191(1) (HSA 1987).

¹⁸⁷ *Ibid*, Part IX, s 191(2) sub-ss (a)-(b).

¹⁸⁸ *Ibid*, Part I, s 1(1).

¹⁸⁹ *Ibid*, Part I, s 2(1) sub-ss (a)-(d).

¹⁹⁰ *Ibid*, s 3(1).

¹⁹¹ *Ibid*, s 4(1).

¹⁹² *Ibid*, ss 5(1), 6(1).

Table 6: Total Public Sector Dwellings in Scotland 2008-2020

Total Public Sector Dwellings in Scotland 2008-2020¹⁹³						
Year	No. Local Authorities Stock	Total Housing and Communities Current Expenditure (£mns)	Total Housing and Communities Capital Expenditure (£mns)	Total Capital Expenditure (£mns)	Total Current Expenditure (£mns)	Total Budget Expenditure (£mns)
2008	329,524	333	1,413	6,760	52,681	59,440
2009	325,648	281	1,521	6,681	55,406	62,087
2010	323,138	261	1,709	5,968	58,127	64,095
2011	319,878	332	1,440	5,960	58,909	64,869
2012	319,384	75	1,436	8,316	59,778	68,094
2013	318,160	123	1,407	7,050	60,532	67,581
2014	317,572	125	1,423	7,134	61,353	68,487
2015	317,005	160	1,406	6,193	62,135	69,048
2016	316,553	200	1,486	8,856	66,860	75,716
2017	314,816	2,979	8,377	9,038	68,487	77,525
2018	3124,433	3,086	8,961	8,738	70,508	79,246
2019	315,625	3,257	10,901	8,802	73,175	81,977
2020	316,908	3,697	9,884	10,887	87,552	98,439
2021	318,369	3,446	11,813	11,874	85,628	87,502

¹⁹³ Gov.Scot, 'Housing Statistics: Local Authority Housing Stock' <<https://www.gov.scot/publications/housing-statistics-local-authority-housing-stock/>> Accessed 25 February 2023; Gov.Scot, 'Housing Revenue Account (HRA) Statistics: Scottish Local Authority Housing Income and Expenditure 1997-98 to 2022-23' <<https://www.gov.scot/publications/housing-revenue-account-hra-statistics-scottish-local-authority-housing-income-expenditure-1997-98-2022-23-actuals-2022-23-estimates/documents/>> Accessed 16 January 2024; Scottish Government, 'Government Expenditure & Revenue Scotland reports 2021-22 to 2010-2011' 38.

4.3.2.4 Northern Ireland: Normative and Empirical Assessment

The Housing (NI) Order 1981 sets out the NIHE as having functions such as regularly examining housing conditions and need, submitting programmes to the department of the Executive stipulating these needs, publishing housing information and services, conduct research and promotion of its functions as well carrying out surveyance and inspections where considered desirable.¹⁹⁴

Every financial year the NIHE submits estimates of income and expenditure for the following year to the Department of Finance.¹⁹⁵ In tandem, the Department of Finance in respect each financial year pays a grant to towards the expenditure incurred by the NIHE.¹⁹⁶ The Department of Finance may make advances to the Executive of amounts on terms the department thinks fit.¹⁹⁷ Furthermore, the NIHE may with the approval of the Department of Finance, borrow money.¹⁹⁸

The Housing (NI) Order 1992 states that the Executive may provide financial assistance in the form of grants to housing associations in respect to housing expenditure incurred by them in connection to housing activities.¹⁹⁹

¹⁹⁴ Housing (NI) Order 1981, s 6 sub-ss (1)(a)-(c), (3), (4), (5) (HNIO 1981).

¹⁹⁵ Ibid, s 19(1).

¹⁹⁶ Ibid, s 20(1).

¹⁹⁷ Ibid, s 15(1).

¹⁹⁸ Ibid, s 16(1).

¹⁹⁹ Housing (NI) Order 1992, ss 33(1), 33A(2) (HNIO 1992).

Table 7: Completed Social Housing Units in Northern Ireland 2010-2021

Completed Social Housing Units in Northern Ireland 2010-2021²⁰⁰							
Year	Total Supply of Completed Social Housing Units	NIHE Current Expenditure (£mln)	NIHE Capital Expenditure (£m)	Housing Association Current Expenditure	Housing Authority Capital (£mln)	Total Current Budget (£mnl)	Total Capital Budget (£mlns)
2008/9	-	223.7	-7.60	-1.4	103.4	88,308	1,318
2009/10	-	220.9	-46.9	-1.4	166.6	8,596	1,393
2010/11	1,409	214.1	-24.1	-1.4	200.7	10,316	1,488
2011/12	1,310	187.6	-24.3	-1.4	199.4	10,329	1,191
2012/13	1,254	190.6	-32.9	-2.3	154.4	10,353	1,172
2013/14	1,967	191.3	-38.6	-1.0	121.7	10,413	1,116
2014/15	1,658	166.0	-30.2	-0.8	112.6	10,519	1,399
2015/16	1,209	155.5	89.9	-0.7	120.2	10,723	1,117
2017/18	1,387	156.4	96.5	-0.6	-	10,071	1,009
2018/19	1,507	137.3	123.1	-	-	-	-
2019/20	1,682	-	-	-	-	11,914	1,430
2020/21	1,626	147.4	171.3	-	-	12,773	1,831
2021/22	1,304	145.5	167.8	-	-	11,596	1,652

²⁰⁰ Department for Communities, 'Housing Statistics Bulletins' <<https://www.communities-ni.gov.uk/topics/housing-statistics>>.

4.3.2.5 Assessing Availability of Services in the United Kingdom

Availability of services is an integral criterion to assess the doctrine of non- retrogression for the right to housing. The thesis contends that social housing is a government provided good, of which its supply plays a significant role in allocation and enjoyment of housing as a good and a right. Each respective Housing Act provides for a legislative duty which permits local authorities to construct, build and provide further services to social housing tenants. However, legislation has begun to integrate housing associations and private registered landlords to be able to acquire and provide housing to social housing tenants. The abilities of the housing associations to access housing finance have become impactful in the construction of social housing. Where the local authority was once the predominant force behind social housing construction, now monitors and facilitates on the side lines.

As previously mentioned, the Localism Act 2011 facilitated greater large scale social transfers of local authority housing stock - mostly seen in England and Wales, and to a lesser extent Scotland - to housing associations and Registered Social Landlords.²⁰¹ These shifts are visible empirically, as all jurisdictions experience a fall in local authority provided housing as a result of programmes such as large scale voluntary transfers and the imposition of right to buy schemes. The rate of housing stock loss is slower in the case of Wales and Scotland, whereas housing loss is starker in the case of England. It is estimated by the Joseph Rowntree Foundation that housing authorities could supply 5 percent of housing units per annum if they have sufficient organisational capacity, however there are greater cost barriers in producing new homes.²⁰² In terms of Northern Ireland, the dwindling social housing stock is attributable to the fact that the NIHE has not constructed social housing for decades, relying on housing associations to construct social housing units.²⁰³ The slower rate of loss of social housing stock in Wales and Scotland can be attributed to the phasing out and abolition of right to buy scheme to preserve existing social housing stock.²⁰⁴

²⁰¹ Mark Stephens (n 66) 675-66.

²⁰² Mark Lupton and Dermot McRoberts, 'Smaller housing associations' to develop new homes' (2 May 2014) Joseph Rowntree Foundation, 3.

²⁰³ Joe Frey (n 92) 7.

²⁰⁴ Bob Smith (n 65) 20; Bilge Serin *et al* (77) 4.

When taking into account the capital and current expenditure in relation to social housing against the overall budget set in all jurisdictions in the United Kingdom some interesting developments are seen empirically. In the English context, taking into account total capital expenditure carried out by local authorities throughout the 2008-2021 period, we see that there are gradual increases in expenditure until 2014 where there is a decrease in capital expenditure by local authorities until 2021. What can be gathered here is that while capital expenditure does increase over the austerity period, in the wider context of the locally financed capital and current expenditure of local authorities, capital expenditure only forms a small percentage of the local authority budget both in terms of its capital and current expenditure.

As seen through the locally financed capital expenditure (which consists of all the spending of the local authority from housing, road works etc, and investments) is volatile until 2013, locally financed current expenditure increases throughout this whole time-period. In the context of total public expenditure after 2009, the cutbacks in public expenditure become greatly apparent throughout the 2008-2020 period. With these in mind it becomes clear how in the long term, despite increases in local authority financed expenditure, the overall budget expenditure decreases which places greater pressure on local authorities to reduce capital spending on *inter alia* construction and acquisitions. The pandemic further impacts capital expenditure in terms the inability of local authorities to be able carry out capital works given the impositions of lockdowns.

In Wales, there is an initial decrease in the capital expenditure of local authority housing from 2008- 2013 which undergoes volatility but gradually increases until 2016 before gradually falling until 2021. What can be understood from this is that austerity did impact capital expenditure, however not significantly as housing authorities and local authorities are able to some degree recover in the financing of housing and carrying out capital works. Comparatively, housing current expenditure by the local authority recovers faster than capital expenditure, increasing until 2015 before falling in amount until 2021. On the surface, it seems that the Welsh social housing system is quite resilient against the financial shocks brought on by the global financial crisis as well as Brexit. However, when compared to the overall total capital and total expenditure, the expenditure on social housing forms a small fraction of both total capital and current expenditure respectively.

As can be seen, total capital expenditure experiences a decrease until 2009 and increases

until 2014 before falling significantly and rebuilding until 2021. Total current expenditure increases until 2013 and experiences volatility until rebuilding from 2017 onwards until 2021. From this perspective, given the smaller local housing funding as a proportion of total expenditure, the social housing system funding has remained consistent in between periods of significant economic shocks such as Brexit and the global financial crisis.

In the Scottish case, in terms of the overall current spending carried out in relation to housing and communities, the amount of expenditure decreases from 2008-2010. From 2010 onwards there is some volatility in amount on current expenditure, with expenditure dropping to its lowest in 2012 and significantly increasing in 2017 until 2021. Comparatively, capital expenditure on housing and communities increases until 2010 before decreasing in amount until 2015. From 2016 onwards there is a significant increase in capital expenditure until 2021 despite some falls in expenditure amount over this period. With these figures in mind, it can be seen that current expenditure is heavily hit by austerity measures in comparison to capital expenditure which has been more stable in its fluctuations in expenditure.

In relation to capital and current expenditure, the funding allocated to housing and communities forms a small proportion of expenditure in relation to both budgets. Taking into consideration total current expenditure, there are increases in the budget throughout the entire period. Upon reaching 2019/2020, there are significant increases in budget allocation which begins to decrease in the 2021 period. In relation to total capital expenditure, there are decreases in capital expenditure until 2012 where expenditure then goes through a series of falls and increments until 2019 where expenditure increases until 2021. What can be seen is that there are correlations between expenditure on capital on total capital expenditure and housing and communities' capital. Comparatively, current expenditure in housing and communities has an inverse relationship in comparison to total current expenditure, which speaks to wider policy decisions that have allocated fewer sums to social housing despite current expenditure increasing.

In relation to Northern Ireland, total NIHE current expenditure, we can see that NIHE funds decrease until 2012 before undergoing a series of rises and falls until 2021. What is of interest to note is that capital expenditure for the NIHE remains in the negatives until

2014, and then from then on increases in expenditure until 2021. When compared with capital and current expenditure of housing associations, we can see that there is an inverse relationship. The current expenditure of housing associations has remained in negatives which gradually reduced, whereas its capital expenditure increases from 2008 until 2010 before gradually decreasing over time and slightly increasing in 2021. What can be drawn here is that there was a predominant focus on the NIHE to provide services to its communities and step back from engaging in capital works such as housing construction. As a result, housing associations were given preference in meeting the demands of housing.

The total current budget significantly decreases in amount from 2008 until 2021. However, there are gradual increments in current expenditure from 2009 onwards, though the level of expenditure in 2021 is significantly below the budget in 2008/9. In relation to total capital, there are increments until 2010 before expenditure undergoes a series of reductions and increments until 2021. In relation to the overall current and capital budgets, it can be seen that the allocations for the NIHE and housing associations forms a small percentage of the budgets.

With this in mind, it is of interest to note that while expenditure on social housing is impacted by the global financial crisis, the level of capital and current expenditure recovers to varying degrees in the English Welsh and Scottish contexts. However, when considering both the capital and current expenditure of local housing authorities against the wider budget, the proportion of the budget dedicated to housing is quite small in proportion. The thesis does not contend that each all governments in the United Kingdom should dedicate their spending on social housing provision when there is a financial crisis. However, the thesis does contend that from a supply point of view, the reductions in social housing stock as a result of smaller proportions of the budget being dedicated to housing provision and construction by the local authority have had a detrimental impact on members of the population needing access to social housing.

As can be seen in the case of England, expenditure on social housing has fallen from millions to thousands from 2008 until 2020. Even before the pandemic, there have been calls for increments in social housing stock.²⁰⁵ More recently, there have been increased demands for increments in affordable social housing stock,²⁰⁶ and funding for social housing by the social landlords in Northern Ireland.²⁰⁷ Against this background, the extent austerity budgets has decimated expenditure of local authorities and housing associations in maintaining and acquiring further stock via legislation and sales is significant.

²⁰⁵ David Hall and Kenneth Gibb, 'Joseph Rowntree Foundation Housing Market Taskforce: Increasing Supply Within the Social rented Sector' (December 2010) 25.

²⁰⁶ Emily Twinch, 'MPs call on Sunak to build 90,000 socially rented homes a year' *Housing Today* (09 February 2023).

²⁰⁷ Stephen Delahunty, 'NI Landlords call for at least 10% increase in government funding in social housing' *Inside Housing* (21 June 2023).

4.3.3 Accessibility

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Accessibility	<ul style="list-style-type: none"> • Are the housing measures accessible to disadvantaged groups? • Are the special housing needs of disadvantaged groups taken into consideration? • Do the measures directly or indirectly discriminate against these groups in accessing housing? 	<ul style="list-style-type: none"> • Disaggregated homelessness statistics from CSO and ONS on barriers to accessing housing by race, gender, disability and household type. Proportion of specialized social housing bodies for persons with disabilities. • Number of specialised housing units for persons with disabilities. • Percentage of minorities and marginalised groups living within shelters and emergency accommodation.

Accessibility according to General Comment 4 of the Committee on Economic, Social and Cultural Rights focuses on the access of housing by vulnerable and marginalised groups.²⁰⁸ In the social housing context, legislation regarding the allocation of social housing as well as the rates of homelessness are examined. The rationale behind this examination is that it is the local authorities' duty to allocate housing to individuals and households who are homeless or threatened with homelessness. Where available, desegregated data on allocations in regard to race will be provided. There is no legislative provision introduced which safeguards the homeless during the COVID- 19 pandemic.

²⁰⁸ UNCESCR General Comment 4 (n 163) 5-6.

4.3.3.1 England: Normative and Empirical Assessment

The allocation of social housing is carried out by local authorities under the Housing Act 1996, the Localism Act 2011, the Homelessness 2002 Act and Homelessness Reduction Act 2017. Parts VI and VII of the Housing Act 1996 set out the allocation of housing accommodation for local authorities as well as defining homelessness and the relevant duties accorded to local authorities. A local housing authority provides free of charge advice and necessary assistance to people in their district.²⁰⁹ Additionally, local authorities must have an allocation scheme in place, determining their priorities as to the allocation of housing accommodation and the choices available for applicants.²¹⁰ The priorities for social housing allocation are for: people who are homeless, owed a duty under the Housing Act 1985, persons living in overcrowded and unsatisfactory housing conditions, people needing to move on medical or welfare grounds i.e. disability and people who need to move to that district where a failure to meet that need would cause hardship to themselves or others, as well as members of the armed forces.²¹¹

In relation to homelessness, Part VII defines homelessness as a person who has no accommodation for their occupation,²¹² or are threatened by homelessness in fifty-six days via notice of possession or eviction.²¹³ Local authorities are also afforded the various duties to the homeless such as providing services and advice free of charge on preventing homelessness, securing accommodation, the rights of the homelessness and help available from the authority.²¹⁴ These services must meet the needs of various groups such as persons with mental illnesses, victims of domestic abuse, members of the armed forces and other groups at risk of homelessness.²¹⁵

²⁰⁹ HA 1996 (n 107) Part VI, s 166.

²¹⁰ Ibid, s 166A sub-ss (1), (2)(a)-(b).

²¹¹ Ibid, s 166A sub-ss (3), (2)(e)(i)-(iv).

²¹² Ibid, Part VII, s 175(1).

²¹³ Ibid, sub-ss (4), (5).

²¹⁴ Ibid, s 179(1) sub-ss (a)-(e).

²¹⁵ Ibid, s 179(2) sub-ss (a)-(e); Homelessness Reduction Act 2017, s 2 (HRA 2017).

Furthermore, a local authority may make an inquiry into an application where it is believed that an individual may be homeless or threatened by homelessness to determine the applicant's eligibility for assistance and the duty afforded to them.²¹⁶ These inquiries assess the circumstances in which the applicant has become homeless or threatened with homelessness, their housing needs and necessary supports they require.²¹⁷ There is a distinction in support provided by local authorities where a person has become homeless or is threatened with homelessness intentionally. A person who is intentionally homeless is a person who has fails to act as a result of ceasing to occupy available accommodation that they would otherwise reasonably occupy.²¹⁸ For example, if a person enters an agreement in which they cease to occupy their accommodation in order to apply to social housing would be categorised as becoming homeless intentionally.²¹⁹

There is an initial duty owed by local authorities to homeless persons and those eligible for assistance through securing accommodation for a period of six to twelve months.²²⁰ Where the local authority determines an applicant is a priority need and having a local connection, they must secure them accommodation.²²¹ A priority need is defined as someone such as a pregnant women and persons she resides with, persons threatened with homelessness or homeless as a result of emergencies such as natural disasters or domestic abuse and persons who are vulnerable as a result of old age, disabilities old age etc.²²²

²¹⁶ Ibid, s 184(1) sub-ss (a)-(b).

²¹⁷ Ibid s 189A(2) sub-ss (a)-(c).

²¹⁸ Ibid, s 191(1).

²¹⁹ Ibid, s 191(3) sub-ss (a), (b).

²²⁰ Ibid, s 189B sub-ss (1), (2).

²²¹ Ibid ss 188(1), 199.

²²² Ibid, s 189(1) sub-ss (a)-(e).

Further duties are imposed on local authorities in relation to homelessness. The Homelessness Act 2002 requires local authorities to formulate a homelessness strategy from reviewing homelessness in their own district.²²³ Additionally, the Act states that local authorities must supply a policy statement in regards to its allocation of accommodation in relation to the choice of accommodation and opportunities to express preferences of housing accommodation allocated to them.²²⁴ Allocation through the chosen schemes provide reasonable preferences to priority need and preferred groups as set out in part VII of the 1996 Act.²²⁵

Local housing authorities may not allocate social housing to persons from abroad who fall under Section 118 of the Asylum and Immigration Act 1996, unless they are of a class prescribed by the regulations made by the Secretary of State.²²⁶ Furthermore, the local authority is able to determine their own criteria on who qualifies for social housing.²²⁷ On the outset, it can be determined that asylum seekers which do not fall under the class of persons prescribed by the Secretary of State are unable to access social housing.

Overall, the allocation of social housing focuses on vulnerable and marginalised groups who either are already welfare recipients or face hardship or inadequate housing conditions. However, there are also restrictions as to eligibility of social housing in relation to asylum seekers.

²²³ Homelessness Act 2002, s 1 sub-ss (a)-(b) (HA 2002).

²²⁴ Ibid, s 16 sub-ss (2), (1A)(a)-(b).

²²⁵ Ibid, s 16(3).

²²⁶ HA 1996 (n 107) Part VI, s 160ZA sub-ss (1)(a)-(b), (2), (4) as amended via LA 2011.

²²⁷ Ibid, s 9.

Table 8: Homelessness, Waiting Lists and Housing Allocation: 2008- 2022

Homelessness, Waiting Lists and Housing Allocation: 2008-2022²²⁸						
Year	Housing Waiting List	Local Authority Lettings	Total Local Authority Stock	Housing Authority Stock	Cases of Homelessness Prevention and Relief	Rough Sleeping²²⁹
2008/9	1,764,056	151,700	-	-	130,000	-
2009/10	1,759,439	155,800	1,819,696	2,195,195	165,200	1,768
2010/11	1,837,973	146,400	1,786,427	2,242,657	188,800	2,181
2011/12	1,851,884	140,900	1,725,912	2,319,511	199,000	2,309
2012/13	1,687,899	134,700	1,692,631	2,358,527	202,400	2,414
2013/14	1,369,273	142,900	1,681,785	2,392,124	227,800	2,414
2014/15	1,256,574	127,300	1,668,685	2,407,281	220,800	2,744
2015/16	1,184,750	120,500	1,643,262	2,451,983	14,780	4,134
2016/17	1,158,034	112,600	1,612,239	2,493,952	13,640	4,751
2017/18	1,126,173	108,300	1,601,573	2,511,258	66,960	4,677
2018/19	1,159,833	30,578	1,592,008	2,539,112	104,844	4,266
2019/20	1,137,234	99,938	1,587,164	2,560,993	288,470	2,688
2020/21	1,183,103	80,171	1,582,946	2,583,208	119,400	2,440
2021/22	1,214,657	88,591	1,581,554	2,598,546	278,110	3,069

²²⁸ Gov.UK 'Local Authority Housing Data'(n 120).

²²⁹ Gov. UK, 'Collection: Homelessness Statistics, Rough Sleeping' <<https://www.gov.uk/Government/collections/homelessness-statistics>> Accessed 26 February 2024.

4.3.3.2 Wales: Normative and Empirical Assessment

The Housing Act 1985 and 1996 are still operational in Wales which put in place provisions regarding the allocation of social housing as covered above in the England section.²³⁰ The Housing (Wales) Act 2014 includes assessing the needs of Gypsies and Traveller communities, including a report of the consultation process, responses and accommodation needs mentioned in assessment.²³¹ The local authority must exercise its powers under the Mobile Homes Wales Act 2013 to provide sites for mobile homes to meet these needs,²³² otherwise a Minister will direct the steps to be taken by the local authorities if there is a failure to comply.²³³

The Housing (Wales) Act 2014 defines homelessness as 'if there is no accommodation available for the person's occupation, in the United Kingdom or elsewhere'²³⁴, and threatened with homelessness if the person is likely to become homeless in fifty-six days.²³⁵ The local authorities' duty to assess arises where the individual has applied for accommodation of help to obtain it, or the local authority suspects that the individual is homeless.²³⁶ The assessments consider the circumstances which have caused the applicant to become homeless or threatened with homelessness and whether a duty is owed to the applicant as well as their housing needs and support required.²³⁷

Sections 66 to 79 of the Housing (Wales) Act reiterates the Housing Act 1996 on the focus on the main duties of local authorities to secure accommodation for a homeless applicant who is a priority need and has a local connection. Furthermore, the local authority may secure the availability of accommodation through itself, another person or arranging for the providing of accommodation,²³⁸ payments, supports, advocacy or representation.²³⁹ These sections allow for greater co-operation between local authorities and other actors such as housing associations to secure accommodation for homeless applicants.

²³⁰ HA 1985 (n 164) s 66A sub-ss (3), (2) (e)(i)-(iv).

²³¹ *Ibid*, ss 101, 102 sub-ss (1)(a), (b)(i)-(ii), (c).

²³² *Ibid*, s 56.

²³³ *Ibid*, s 104(1).

²³⁴ HWA 2014 (n 184) s 55.

²³⁵ *Ibid*, s 55(4).

²³⁶ *Ibid*, s 62 sub-ss (a)-(b).

²³⁷ *Ibid*, s 62(5) sub-ss (a), (d).

²³⁸ *Ibid*, s 64(1) sub-ss (a)-(c).

²³⁹ *Ibid*, s 64(2) sub-ss (a)-(h).

The Act also emphasises the duty of local authorities to carry out a homeless review in its areas and formulate and adopt a homelessness strategy on the basis of that review every four years from 2018 onwards.²⁴⁰ The review must include the likely future levels of homelessness, current resources and activities carried out by the local authority for the achievement of the prevention of homelessness as well as suitable accommodation available and supports provided for people who may become homeless.²⁴¹ The homelessness strategy must include how the local authority hopes to achieve the prevention of homelessness, suitable accommodation for the homeless and those threatened with homelessness and supports available and any focuses on groups with particular needs.²⁴² Advice for persons on preventing homelessness, securing accommodation and other help for homeless or threatened with homelessness individuals free of charge.²⁴³

²⁴⁰ Ibid, s 50 sub-ss (1)(a)-(b), (2).

²⁴¹ Ibid, s 51, sub-ss (b)(i)- (iii), (c).

²⁴² Ibid, s 52(6) sub-ss (a)-(e).

²⁴³ Ibid, s60(1) sub-ss (a)-(b).

Table 9: Total Lettings and Homelessness Statistics 2008-2022

Total lettings and Homelessness Statistics 2008-2022²⁴⁴							
Year	Total Lettings	Total Stock	Housed From Waiting list	Rehoused on a Priority Basis Due to Homelessness	Total Rough Sleepers	Total Homelessness	Homeless White groups (W) Non-White Ethnic Groups (BME)
2008/9	21,243	1,355,300	23,001	4,317	-	12,835	11,710 (W) 645 (BME)
2009/10	22,649	1,365,800	12,869	4,480	-	12,910	11,720 (W) 735 (BME)
2010/11	22,327	1,375,200	12,989	4,097	-	14,315	12,715 (W) 1,095(BME)
2011/12	21,446	1,383,800	11,943	4,196	-	14,985	13,195 (W) 945 (BME)
2012/13	21,492	1,391,600	11,948	3,663	-	15,360	13,365 (W) 1,050 (BME)

²⁴⁴ Gov.Wales, 'Number of Lettings By Year and Type' <<https://statswales.gov.wales/Catalogue/Housing/Social-Housing-Lettings/numberoflettings-by-year-lettingtype>> Accessed 27 February 2023; Gov.Wales, 'Rough Sleepers By local Authority'<<https://statswales.gov.wales/Catalogue/Housing/Homelessness/Rough-Sleepers/roughsleepers-by-localauthority>>Accessed 27 February 2023;Gov.Wales, 'Eligible Households By Ethnicity and Year'< <https://statswales.gov.wales/Catalogue/Housing/Homelessness/Pre-April-2015/eligiblehouseholds-by-ethnicity-year>> Accessed 27 February 2023.

2013/14	24,471	1,399,500	14,421	3,131	-	15,855	13,755 (W) 1,340 (BME)
2014/15	22,061	1,407,600	13,516	3,051	-	14,160	12,110 (W) 1,295 (BME)
2015/16	22,246	1,416,000	13,717	3,160	82	-	-
2016/17	22,589	1,425,200	14,070	3,376	141	-	-
2017/18	20,374	1,434,500	12,592	3,225	188	-	-
2018/19	21,135	1,443,500	12,863	3,722	158	-	-
2019/20	-	1,451,700	-	-	158	-	-
2020/21	17,852	1,460,200	9834	4,318	-	-	-

4.3.3.3 Scotland: Normative and Empirical Assessment

Both the Housing (Scotland) 2001 and 2014 Acts build upon the 1987 Act in regard to the definition of homelessness and allocation of social housing. The Housing Scotland Act 1987 states that persons who are homeless or occupy houses of intolerable, overcrowded and unsatisfactory housing conditions are to be given priority in the allocation of social housing.²⁴⁵ Additionally, no account of the length of time individuals have resided in these areas or any outstanding liabilities shall be taken into account in terms of allocation.²⁴⁶ The Housing (Scotland) Act 2014 includes a reasonable preference for applicants that have unmet housing needs, as well as tenants of houses held by social landlords.²⁴⁷ Current practice also provides different social housing strategies regarding the allocation of social housing for potential tenants who have committed crimes such as sex offenders, or persons who have a history of anti-social behaviour.²⁴⁸

The 1987 Act defines homelessness a person who has no accommodation in Scotland, England or Wales.²⁴⁹ The definition extends to persons who are unable secure entry to their accommodation, live in a moveable structure, or threatened with homelessness in twenty-eight days.²⁵⁰ The Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012 removes the requirement of priority need from the 1987 Act.²⁵¹ As a result, local authorities can make inquiries into individuals of reasonable preference, as well as individuals or households who are homeless or threatened with homelessness.²⁵²

²⁴⁵ HSA 2001 (n 133), s 20(1) sub-ss (a)(i)-(iv), (b).

²⁴⁶ Ibid, s 20(2) sub-ss (a)(i)-(iii).

²⁴⁷ HSA 2014 (n 137) s 3 sub-ss (1ZA), (b)(iicii)

²⁴⁸ Scottish Government, 'Social Housing: Housing Management' <https://www.gov.scot/policies/social-housing/housing-management/?fbclid=IwAR3_qaxzrx76kvMcB6ET6IZYRzHsQsILkuuCo-KTGsTwTlha0XDgTtr_nik> Accessed 07 March 2023.

²⁴⁹ HSA 1987 (n 186) s 24(1).

²⁵⁰ Ibid, ss 3 sub-ss (a)-(d), 4.

²⁵¹ Homelessness (Abolition of Priority Need) (Scotland) Order 2012, s 4.

²⁵² HSA 1987 (n 186) s 28(2) sub-ss (a), (b).

Where the local authority is satisfied that the applicant is homeless or threatened with homelessness unintentionally and are a reasonable preference, they have a duty to secure accommodation for them.²⁵³ In cases of intentional homelessness, housing is secured for a reasonable period of time or advice and support is provided to the applicant.²⁵⁴ The Housing (Scotland) Act 2001 requires local authorities to carry out an assessment of homelessness in their areas and submit a strategy for preventing and alleviating homelessness in its area.²⁵⁵ Advice and information about homelessness and its prevention and related services must be provided by a local authority.²⁵⁶

Table 10: Applicants on the Housing Register Lists in Scotland 2008-2021

Applicants on the Housing Register Lists in Scotland 2008-2021²⁵⁷		
Year	Number of Applicants	No. Local Authorities Stock
2008	202,235	329,524
2009	199,554	325,648
2010	198,754	323,138
2011	194,992	319,878
2012	187,935	319,384
2013	184,158	318,160
2014	179,954	317,572
2015	175,333	317,005
2016	167,122	316,553
2017	162,152	314,816
2018	157,806	3124,433
2019	158,439	315,625
2020	164,946	316,908
2021	178,260	318,369

²⁵³ Ibid, ss 31(1), 32(1).

²⁵⁴ Ibid, ss 31(2), 32(3).

²⁵⁵ HSA 2001 (n 133) Part 1.

²⁵⁶ Ibid, Part 1, s 2 sub-ss (a), (b).

²⁵⁷ Gov.Scot 'Housings Statistics: Management of Local Authority Housing' (n 141)

Table 11: Local Authority Lettings and Homelessness 2008-2021

Local Authority Lettings and Homelessness: 2008-21²⁵⁸			
Year	Lettings Made to Homelessness	Homelessness	Permanent Lettings Provided by Local Authorities
2008/9	11,029	-	24,737
2009/10	12,232	-	27,939
2010/11	11,790	-	25,668
2011/12	11,445	-	27,263
2012/13	11,299	-	27,546
2013/14	10,656	-	28,679
2014/15	10,390	-	27,006
2015/16	9,913	-	26,258
2016/17	10,436	34,100	25,788
2017/18	10,805	34,972	25,666
2018/19	10,952	36,465	26,455
2019/20	10,901	31,333	26,006
2020/21	9,488	33,792	19,630

²⁵⁸ Gov.Scot, 'Collection: Homelessness Statistics' < <https://www.gov.scot/collections/homelessness-statistics/> > Accessed 07 March 2023.

4.3.3.4 Northern Ireland: Normative and Empirical Assessment

The Housing (NI) Order 1981 sets out the housing allocation scheme of the NIHE. The NIHE shall submit to the Department a scheme for the allocation of housing for prospective tenants or occupiers which the Department may approve with or without modifications.²⁵⁹ Any person may be allocated housing by the department,²⁶⁰ however, NIHE housing will only be allocated to eligible persons.

Persons who are ineligible for social housing are persons from abroad, and persons subject to immigration control under Section 118 of the Immigration and Asylum Act 1999.²⁶¹ The NIHE may also decide to treat an applicant as ineligible if they are a member of a household guilty of an unacceptable behaviour sufficient to make them unsuitable at the time of the application.²⁶² These grounds of unsuitable behaviour are listed in the security of tenure listed in Schedule 3 of the Housing (NI) Order 1983.²⁶³

Persons classed as priority need for accommodation are pregnant women and persons they may reasonably reside with; vulnerable persons as a result of old age, mental illness or physical disabilities or other special reasons; homeless persons or persons threatened with homelessness as a result of an emergency such as food fire or other disaster; a person without dependent children that the executive is satisfied has been subject to violence and subject to violent pursuit; a young person who has satisfied the executive of being at risk of sexual or financial exploitation.²⁶⁴ The NIHE also must provide and managed caravan sites as considered appropriate for members of the Irish Traveller Community.²⁶⁵

²⁵⁹ HNIO 1981 (n 194) Ch, IV, s 22(1).

²⁶⁰ Ibid, s 22A(2).

²⁶¹ Ibid, s 22A(1) sub-ss (a)-(b).

²⁶² Ibid, s 22A(6) sub-ss (a)-(b).

²⁶³ Ibid, s 22A(7)(a).

²⁶⁴ Housing (NI) Order 1988, Part II, s 5(1) sub-ss (a)-(f) (HNIO 1988).

²⁶⁵ HNIO 1981 (n 194) s 28A(1)(a).

The Housing (NI) Order 1988 defines a homeless person as having no accommodation available for their occupation in the United Kingdom or elsewhere.²⁶⁶ A person threatened with homelessness is classed as someone who is to become homeless in twenty-eight days from then on which he gives written notice to the executive that he is threatened with homelessness.²⁶⁷

Intentional homelessness and threatened with homelessness are classed as deliberate acts or failure of a person to do anything in consequence of ceasing to occupy accommodation or being forced to leave accommodation whether in Northern Ireland or elsewhere which is reasonable for their occupation.²⁶⁸ Intentional homelessness also extends to the individual entering into an arrangement where they are required to cease occupying accommodation in order to be entitled to housing assistance, and there is no other good reason they are homeless.²⁶⁹ The NIHE may carry out an assessment of persons applying for housing or assistance that they suspect to be homeless and make further inquiries as to whether they are a priority need and homeless intentionally.²⁷⁰

The Housing (Amendment) Act (Northern Ireland) 2010 states that the NIHE may formulate and publish a homelessness strategy every five years which includes homelessness prevention strategies and provision of satisfactory advice and support services.²⁷¹

²⁶⁶ HNIO 1983 (n 142) Part II, s 3(1).

²⁶⁷ Ibid, Part II, s 3(6).

²⁶⁸ Ibid, s 6 sub-ss (1), (2).

²⁶⁹ Ibid, s 6(3)(a).

²⁷⁰ Ibid, s 7 sub-ss (1)(a)-(b), 2(a)-(b).

²⁷¹ Ibid, s 6A; Housing (NI) Order 2010, ss 1(4), 6(a).

Table 12: Social Housing Waiting Lists, Allocations and Homelessness

Social Housing Waiting Lists, Allocations and Homelessness²⁷²					
Year	Total Homelessness Applications	Total Supply of Completed Social Housing Units	Total Households on Waiting List	Rough Sleeping	Social Housing Allocations
2008/9	-	-	-	-	-
2009/10	-	-	-	-	-
2010/11	-	1,409	-	-	-
2011/12	-	1,310	-	-	-
2012/13	-	1,254	-	-	-
2013/14	18,862	1,967	-	-	-
2014/15	19,621	1,658	-	-	-
2015/16	18,628	1,209	-	-	-
2016/17	18,573	1,387	-	-	-
2017/18	18,180	1,507	36,198	-	9,998
2018/19	18,202	1,682	37,859	38	10,444
2019/20	16,802	1,626	38,745	36	9,301
2020/21	15,991	1,304	43,971	18	8,278
2021/22	15,758	-	44,426	23	8,708

²⁷² Department for Communities, 'Housing Statistics Bulletins' (n 200).

4.3.3.5 Assessing Accessibility in the United Kingdom

Assessing accessibility in relation to the doctrine of non-retrogression ensures that legislation and policies are examined on their ability to cater to the needs of vulnerable and marginalised groups. Furthermore, if vulnerable and marginalised groups such as the homeless and disabled persons and single parent households are unable to access social housing, the minimum core content of the right to housing may not be met. While, individual targeted subsidies aid these individuals to access housing in the private sector which also address the minimum core content of the right to housing, for the purposes of this assessment, as social housing is allocated to the individuals and households who need it the most, if these individuals face barriers to access social housing, this creates a cause for concern given the emphasis by the Committee that marginalized groups should be able to access social housing.²⁷³⁶⁵

The Housing Acts set out the variety of duties owed by local authorities in the United Kingdom. The allocation of social housing towards reasonable preference or priority need groups can be thought to be double edged from a human rights-based approach. On the one hand, there is a prioritisation of vulnerable groups such as pregnant women, persons with disabilities and the homeless etc. On the other hand, such prioritisation in a way precludes that a right to access and enjoy housing is not the right available to everyone, when it comes to State provided housing.²⁷⁴⁶⁶

²⁷³ UNCESCR, 'Consideration of Reports Submitted by State Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Estonia' (16 December 2011) UN Doc E/C.12/EST/CO/2, para 22

²⁷⁴ See: Kevin Gulliver, 'Racial Discrimination in UK Housing Has a Long History and Deep Roots' (2017) British Politics and Policy at LSE 1. 2; Equality and Human Rights Commission, 'Housing and Disabled People: Wales's Hidden Crisis' (2018) 6

While Northern Ireland follows the English approach in restricting access of social housing to refugees and asylum seekers, the approach is more restrictive by excluding persons who exhibit unacceptable behaviour at the time of application. Wales and Scotland follow a more universal approach. Providing legislation and provisions in regard to providing accessible housing to refugees, Travellers, Gypsies as well as prisoners and sex offenders - in the Scottish context - highlights significant policy divergence from England. Secondly, accessibility of marginalised groups to social housing meets the essence of universality behind the right to housing.

In relation to statutory homelessness, all jurisdictions retain a similar definition of a homeless person being a person without access to accommodation either in the United Kingdom or England. However, Northern Ireland has the most inclusive provision by expanding homelessness to all of the United Kingdom. There is variation in the definition of a person being threatened with homelessness ranging from twenty-eight to fifty-six days, which theoretically could impact the time in which a local authority owes a duty to the applicant. The addition of the requirement of unintentional homelessness or threatened with homelessness can be thought to act as a siphon which aids the local authority in determining which services to offer recipients, such as providing advice or support services to persons threatened with homelessness intentionally. While Scotland, Wales and England define unintentional homelessness, Northern Ireland defines intentional homelessness as a deliberate act of the applicant to fail to occupy housing. Defining intentional homelessness in this way opens up circumstances in which the local authority or housing body may deem an applicant ineligible to access social housing.

Additionally, Scotland has varied its approach towards homelessness through removing the priority need and local connection requirement. Such an approach permits local authorities to allocate housing to homeless individuals regardless of their residence or status. From a human rights-based approach, removing these requirements compliments the universality principle as social housing becomes more accessible to all.

Empirically, in England there is an overall rise in the social housing waiting list until 2013, where numbers fall until the onset of the pandemic. On the one hand, this fall in waiting list numbers could be attributable to households accessing private accommodation upon economic recovery. However, as a result of the Localism Act 2011, local authorities are able set criteria to be placed on a waiting list and may even be able to refuse housing to potential applicants.²⁷⁵ The latter is further confirmed through the overall reduction in social housing lettings available from 2008 until 2022 of which lettings were mainly given to persons in living in overcrowded conditions and persons with medical issues and disabilities.²⁷⁶

In relation to total social housing stock, In England, where waiting list numbers were on the increase until 2012, total local authority stock was decreasing in comparison to housing authority stock which was gradually increasing. As can be seen there is a direct relation between dwindling local authority lettings and stock regardless of the waiting list. In Wales, there is an incremental relationship between the number of letting provided and total housing stock, given that the number of lettings available increases alongside increments in social housing stock. In Scotland, as the number of applicants on the housing register list decreases until 2019, so does total stock. Additionally when the number of applicants increases from 2020, so does stock, indicating that stock is more responsive to the demand of the waiting lists. In Northern Ireland, where the numbers on the housing waiting lists increases from 2017-2021, the number of social housing units also increase, however, the amount of housing units in comparison to waiting lists is small in number, insufficient to meet demand.

²⁷⁵ Suzanne Fitzpatrick and Beth Watts (n 153) 1025-1026.

²⁷⁶ Department for Communities 'Housing Statistics Bulletins' (n 200).

In relation to homelessness, cases of homelessness prevention and relief are relatively volatile over the 2008-2021 period while rough sleeping has a gradual increase over the same period. Though, it can be argued is that the homelessness cycle rises and falls in accordance with the economic cycle, the numbers of rough sleeping match accounts relayed by Phillip Alston in 2018 which highlight the growing numbers of persons who are homelessness and rough sleeping as a result of policies such as Universal Credit.²⁷⁷

With regard to the pandemic, there is a fall in homelessness and rough sleeping, in accordance to Government policies which aimed to house the homeless in temporary accommodation regardless of the ability to socially distance in addition to an emergency re-housing plan allocated £265 million exiting lockdown.²⁷⁸

In relation to Wales, while the total lettings are approximately halved by 2009 and gradually decreases over the remainder of the period, roughly 20 percent of housing is allocated to homeless persons. Though the percentage of BME groups which are housed is unclear, what can be drawn is that alongside the rises in rough sleeping and homelessness, the numbers of BME persons who are homeless are also rising.²⁷⁹ In terms of Wales's pandemic response, £10m was allocated towards contained accommodation for anyone who required it regardless of immigration status alongside a further £40m to increase allocation of permanent and temporary accommodation.²⁸⁰ Similar to Wales, the NIHE put in place emergency measures to source extra temporary accommodation to provide self-contained accommodation and £7m to homelessness provision.²⁸¹ The lack of disaggregated statistics as to race and gender prevents a holistic empirical analysis.

²⁷⁷ UNHRC Special Rapporteur Phillip Alston, 'Visit to the United Kingdom of Great Britain and Northern Ireland; Report of the Special Rapporteur on Extreme Poverty and Human Rights' (23 April 2018) UN Doc A/HRC/41/39/Add.1, 2.

²⁷⁸ Centre for Homelessness Impact, 'Homelessness and COVID-19: A comparison of Responses in Scotland, Wales, Northern Ireland and England.'
<<https://www.homelessnessimpact.org/post/homelessness-and-covid-19-a-comparison-of-responses-in-scotland-wales-northern-ireland-and-england>>Accessed 20 March 2023.

²⁷⁹ David Robinson, Jenny Preece and Glyn Robbins, 'Race Equality in Housing: A Review of Policy Approach in England, Scotland and Wales' (2022) UK Collaborative Centre for Housing Evidence, 7.

²⁸⁰ Ibid.

²⁸¹ Ibid.

Comparatively, Scotland has falls in both social housing waiting lists and lettings made to homeless persons. Where data is provided on both the letting to the homeless and the rate of homelessness, the rate of homelessness is volatile both rising and falling in comparison to the gradual decline of social lettings. During the pandemic, Scotland has a default re-housing policy as a result of abolishing priority need as part of its national homelessness strategy.²⁸²

Despite the variation in Scottish legislation removing priority need, its effectiveness does come into question empirically given the overall fall in letting provided to the homeless, which speaks to wider policy issues of a chronic lack of good quality social housing stock.²⁸³ The limited data provided on Northern Ireland highlights a decline in homelessness applications and rough sleeping against a backdrop of rising household waiting lists and dwindling social housing allocation. These decreases are attributable to the increases in temporary accommodation and its allocations.²⁸⁴

²⁸² Ibid.

²⁸³ Shelter Scotland, 'What is the Housing Emergency?' <https://scotland.shelter.org.uk/campaigning/what_is_the_housing_emergency> Accessed 20 March 2023.

²⁸⁴ Centre for Homelessness Impact 'Homelessness and Covid-19' (n 278).

4.3.4 Habitability

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Habitability	<ul style="list-style-type: none"> • Are housing measures providing habitable accommodations with adequate space and protection from cold, damp, heat, rain etc? 	<ul style="list-style-type: none"> • Proportion of population with sufficient living space (persons per room or rooms per household) or average number of persons per room among target households. • Proportion of households living in permanent structure in compliance with building codes and by-laws. • Proportion of households living in or near hazardous conditions.

According to General Comment 4, habitability largely focuses on whether social housing is free from damp, cold and various hazards.²⁸⁵ In the context of social housing, in addition to these requirements, adequate space, protection to tenants and the importance of the tenant’s voice in these processes is integral. In light of the Grenfell Tower Fire,²⁸⁶ the role of Governments to ensure that tenants concerns are listened with regards to their living conditions holds an important role in examining the habitability of social housing.

²⁸⁵ UNCESCR General Comment 4 (n 163) 5-6.

²⁸⁶ Peter Apps, *Show Me the Bodies: How We Let Grenfell Happen* (One World Publications 2022) 1.

4.3.4.1 England: Normative and Empirical Assessment

The Housing Act 2004 creates a system for assessing housing conditions. Through setting a new system involving category 1 or 2 hazards in relation to residential properties.²⁸⁷ The duties of local authorities are extended to keep housing conditions in their area under review 'with a view of identifying any action that may need to be taken by them such as repairs improvements etc.'²⁸⁸ However, this piece of legislation is largely applicable to residential premises arising in the private sector, but may cover private sector providers of social housing.

In relation to social housing, the Regulator of Social Housing (RSH) keeps tracks of complaints as to the quality of social housing.²⁸⁹ The RSH, which was established through the Housing and Urban Regulation Act 2008, regulates registered social housing providers through its consumer and economic objectives such as ensuring that social housing meet reasonable housing needs, is well managed and is financially viable.²⁹⁰ The co-regulatory approach of the RSH utilises a sector risk analysis to ensure that objective are met.²⁹¹ Usually, a notice is served first and the RSH engages in dialogue with providers, however, the RSH intervenes and enforces regulations where there is a serious detriment to consumer standards as set out by the 2008 Act.²⁹²

Though the Social Housing (Regulation) Bill 2022-23 falls outside of the scope of the thesis, the Bill aims to provide a transformational change for social housing residents through improved redress, better regulation and improve the quality of social housing.²⁹³ However, the final bill is set to pass in 2023 and its effects are yet to be seen.

²⁸⁷ Housing (Scotland) Act 2004, s 2(a) (HSA 2004).

²⁸⁸ Ibid, s 3(a).

²⁸⁹ Regulator of Social Housing, 'A Guide to Regulation of Registered Providers' <<https://www.gov.uk/Government/publications/brief-guide-to-regulation-of-registered-providers/a-guide-to-regulation-of-registered-providers>> Accessed 07 March 2023.

²⁹⁰ Ibid, 'About Us' <<https://www.gov.uk/Government/organisations/regulator-of-social-housing/about>> Accessed 07 March 2023.

²⁹¹ Ibid, 'Regulatory Standards' <<https://www.gov.uk/guidance/regulatory-standards>>

²⁹² Ibid, 'Approach to Intervention and Enforcement' <<https://www.gov.uk/Government/publications/guidance-on-the-regulators-approach-to-intervention-enforcement-and-use-of-powers/approach-to-intervention-and-enforcement.>> para 7.

²⁹³ Hannah Cromarty, House of Commons Library, *Social Housing (Regulation) [HL] 2022-23: Progress Of The Bill(2023)* <<https://commonslibrary.parliament.uk/research-briefings/cbp-9659/>> 6.

Table 13: Number of Non-Decent Local Authority Dwellings 2008-2022

Number of Non-Decent Local Authority Dwellings 2008-2022²⁹⁴		
Year	Total Non-Decent Dwellings	Total Expenditure to make Dwellings Decent (£mns)
2008/9	396,898	1,300,656
2009/10	287,304	1,570,349
2010/11	215,688	1,126,232
2011/12	214,381	533,226
2012/13	184,108	563,314
2013/14	145,781	652,762
2014/15	105,581	640,216
2015/16	85,019	450,413
2016/17	79,146	566,044
2017/18	70,660	350,086
2018/19	71,464	239,111
2019/20	81,634	242,628
2020/21	81,761	357,385
2021/22	176,249	567,067

²⁹⁴ Gov.UK 'Local Authority Housing Data' (n 120).

4.3.4.2 Wales: Normative and Empirical Assessment

The Housing (Wales) Act 2014 sets out the standards for housing provided by local housing authorities. Welsh Ministers after consultation,²⁹⁵ may set standards to be met by local authorities over the quality of accommodation provided by local housing authorities for housing, rent and service charges.²⁹⁶ Also, Welsh Ministers have the power to revise and withdraw standards via notice.²⁹⁷ Ministers also have intervention powers where a local authority is failing to meet standards set by Ministers.²⁹⁸

A Minister serves a warning notice to local authorities, setting out the grounds for the notice, action to be taken by the authority and consequences of action should the local authority not act.²⁹⁹ For local authority housing which appears to be failing to maintain or repair in relation to standards have a minimum of twenty-eight days to enter survey, inspect and examine the property.³⁰⁰

Additionally, Welsh Ministers may require the local authority to obtain advisory services,³⁰¹ or perform certain functions,³⁰² of which the local authority has a duty to co-operate.³⁰³ In relation to housing associations, Wales utilised a regulatory framework similar to England: the Housing Regulation Team, Regulatory Board for Wales and Tenant Participation Advisory Service Cymru. In tandem, a collaborative, co-regulatory approach is utilised to regulate social housing in a manner which provides an active role for tenants to influence the decision-making process.³⁰⁴

²⁹⁵ HWA 2014 (n 184) s 113.

²⁹⁶ *Ibid*, s 11(1) sub-ss (a)-(c).

²⁹⁷ *Ibid*, s 111(4) sub-ss (a)-(b).

²⁹⁸ *Ibid*.

²⁹⁹ *Ibid*, s 118(2) sub-ss (a)-(d).

³⁰⁰ *Ibid*, s 115(2).

³⁰¹ *Ibid*, s 120.

³⁰² *Ibid*, ss 121(1), 127(1).

³⁰³ *Ibid*, s 126(1).

³⁰⁴ Welsh Government, 'The Regulatory Framework for Housing Associations Registered in Wales (2022) <<https://www.gov.wales/sites/default/files/publications/2022-01/regulatory-framework-for-housing-associations-registered-in-wales.pdf>> 4.

The Housing Act 1996 establishes a social housing Ombudsman for Wales.³⁰⁵ Since then, the section regarding the Ombudsman has been repealed and replaced with the Public Services Ombudsman (Wales) Act 2005. The Ombudsman may investigate a complaint duly made or referred to them,³⁰⁶ regarding maladministration or alleged failure of service by a local authority.³⁰⁷ In terms of social landlords, the scope of these investigations fall under maladministration in the discharge of any of its functions.³⁰⁸

³⁰⁵ HA 1996 (n 107) s 51A.

³⁰⁶ Public Service Ombudsman Wales Act 2005, Part 2, ss 2, 3.

³⁰⁷ *Ibid*, s 7(1) sub-ss (a)-(c).

³⁰⁸ *Ibid*, s 3(a).

Table 14: Compliance with the Overall Welsh Housing Quality Standards by Provider and Measure 2011-2021

Compliance with the Overall Welsh Housing Quality Standard by Provider and Measure 2011-2021³⁰⁹	
Year	Non-Compliant Stock
2011/12	129,761
2012/13	87,984
2013/14	72,494
2014/15	63,331
2015/16	45,759
2016/17	32,011
2017/18	21,794
2018/19	15,590
2019/20	2,697
2020/21	-
2021/22	0

³⁰⁹ Gov.Wales, 'Compliance with the Overall Welsh Housing Quality Standard by Provider and Measure' <<https://statswales.gov.wales/Catalogue/Housing/Social-Housing-Quality/compliancewiththeoverallwelshhousingqualitystandard-by-provider-measure>> Accessed 08 March 2023.

4.3.4.3 Scotland: Normative and Empirical Assessment

The Housing (Scotland) Act 1987 sets out the duty of local authorities to secure that ‘all houses in their district which do not meet the tolerable standard are closed, demolished or brought to a tolerable standard in a reasonable time period.’³¹⁰ The tolerable standard of housing is defined as, *inter alia*, as structurally stable, free from penetrating or rising damp, provision of satisfactory lighting, ventilation and heating and water, drainage etc.³¹¹ The Housing (Scotland) Act 2010 also established the Scottish Housing Regulator, which has statutory roles in the monitoring, assessing and reporting of social landlords’ activities in order to safeguard social housing tenants, the homeless and marginalised groups such as Romany Gypsies and Travellers.³¹²

Furthermore, the Scottish Housing Quality Standards introduced in 2004 make sure that tenants’ homes are: energy efficient, safe and secure; not seriously damaged; have kitchens and bathrooms that are in good condition.³¹³ The Scottish Social Housing Charter imposes the standard on social landlords that homes meet the minimum Scottish housing quality standard by and after 2015, to ensure housing is always clean, tidy and in a good state of repair.³¹⁴ Standard 5 maintains that social landlords should ensure that homes are well maintained, with repairs and improvements carried out when required providing tenants with reasonable choices as to how repairs are carried out.³¹⁵ Furthermore, the Tenant Participatory Advisory service is a national participatory and advisory service for Scotland which works with tenants and landlords to improve housing conditions at a local level.³¹⁶

³¹⁰ HSA 1987 (n 186) s 85(1).

³¹¹ *Ibid*, s 86(1).

³¹² Scottish Housing Regulator, ‘For Landlords: Regulatory Framework’ <<https://www.housingregulator.gov.scot/for-landlords/regulatory-framework>> Accessed 07 March 2023.

³¹³ Scottish Government, ‘Social Housing: Improving Housing Standards’ <<https://www.gov.scot/policies/social-housing/improving-standards/>> Accessed 07 March 2023

³¹⁴ Scottish Government, *The Scottish Social Housing Charter* (Edinburgh 2012) <<https://www.gov.scot/publications/scottish-social-housing-charter>>

³¹⁵ *Ibid*.

³¹⁶ Scottish Government, ‘Social Housing: Tenant Participation’ <<https://www.gov.scot/policies/social->

housing/tenant-participation/> Accessed 09 March 2023.

While Coronavirus legislation does not set out any amendments to how local authorities should carry out their statutory duties of inspection and repair, a letter has been sent to social landlords by Scottish Ministers reminding them of their obligations to meet: the fire and carbon monoxide detector standard, energy efficient standard and electrical safety standard.³¹⁷

Table 15: Percentage of Social Housing Below the Tolerable Standard (BTS) 2010-2018

Percentage of Social Housing Below the Tolerable Standard (BTS) 2010-2018³¹⁸	
Year	Percentage (%)
2010-12	2%
2013-14	2%
2014-16	1%
2016-18	1%

4.3.4.4 Northern Ireland: Normative and Empirical Assessment

The Housing (NI) Order 1981 sets out powers for the NIHE for slum clearance and demolition orders.³¹⁹ Where at least one third of houses in an area are unfit for human habitation or is dangerous to inhabitants as a result of bad arrangement will declare the area as a re-development area.³²⁰ The NIHE shall submit to the department the a re-development scheme indicating houses considered to be unfit for human habitation and the manner in which the area should be laid out and used.³²¹

³¹⁷ Scottish Government, 'Meeting Statutory and Regulatory Targets For Social Housing During The Pandemic' (02 July 2020).

³¹⁸ Gov. Scot, 'Publication Statistics: Scottish House Condition Survey: Local Authority Analyses 2010-2012 to 2016-2018 <<https://www.gov.scot/publications/scottish-house-condition-survey-local-authority-analyses/>> Accessed 09 March 2023.

³¹⁹ HNIO 1981 (n 194) Ch.2.

³²⁰ Ibid, Part III, s 47(1)(b).

³²¹ Ibid s 48(1) sub-ss (a)-(b).

Similarly, the NIHE may declare an area a housing action area with the consent of the department after considering the physical state of the accommodation and social conditions in the area.³²² Declaring a housing action area signifies that within five year period improvements can be made to the area as a whole, the well-being of residents and proper and effective management of accommodation.³²³

4.3.4.5 Assessing Habitability in the United Kingdom: A Discussion

An assessment of habitability of social housing allows for a determination of whether the quality of living of social housing recipients is at an adequate standard. As social housing is often the only option that can be accessed by vulnerable and marginalised individuals and families, social housing should not be to the detriment of their quality of life. A similar approach is taken by all jurisdictions with regards to standards which need to be maintained in respect to social housing.

As a whole, there is legislation which addresses whether housing is categorised as a hazard, non-decent or an intolerable standard. In the case of Wales, Scotland and England, there is an emphasis on a co-regulatory approach or collaborative approach in relation to the regulation of social housing. A co-regulatory approach provides a hybrid system to match the ever-complex system of social housing, comprising both of public and private bodies.³²⁴ However from a human rights-based approach, the utilisation of risk-based analysis and economic, consumer objectives is questionable in meeting adequacy requirements which focus on the lived in experience of the individual. Despite this, the approach utilised by Wales and Scotland highlights a greater focus on the housing needs of social tenants and marginalised, vulnerable groups.

³²² Ibid, Part V, s 51(1) sub-ss (a)-(b).

³²³ Ibid, s 52(2) sub-ss (a)-(c).

³²⁴ Regulator of Social Housing, 'About Us' (n 290); Ibid, 'Regulatory Standards' (n 291).

For example, in the English context social housing providers are subject to different regulations and economic standards dependant to their size and whether they are a local authority.³²⁵ The difference in rent, financial viability and value for money for different providers while on the one hand permits tailoring for providers depending on their exposure size and role, emphasises that social housing should be profitable both to Government and consumers. A profitable, value for money approach conceptualises the social housing tenant as economic consumer, rather than a right holder. However, there are a variety of consumer-based objectives in all jurisdictions such as whether the tenant has choice, receive high quality services.³²⁶

Empirically, Wales and Scotland report an overall fall in non-compliant and 'Below the Tolerable Standard' social housing, which can be attributed to the greater role tenant participation has in the social housing systems and standards set by the regulators. However, in England the number of non-decent dwellings has risen post pandemic with expenditure in making dwellings decent falling, highlighting a lack of lessons learned as a result of Grenfell Tower.

While there is no data on non-decent dwellings in relation to social housing provided by the NIHE, what could be discerned is that while normatively the provision for habitable housing is provided for, through reduced expenditure and a lack of tenant participation processes - as can be seen through the English context - the habitability of social housing has become inadequate. In the English context, the number of non-decent units falls rather significantly from 2008 until 2017.

³²⁵ Regulator of Social Housing, 'Regulating the Standards' <<https://www.gov.uk/Government/publications/regulating-the-standards/regulating-the-standards-march-2022#the-statutory-basis-for-regulation>> 1.18-1.20.

³²⁶ Welsh Government (n 306) 4; Regulator of Social Housing, 'About Us' (n 291).

What is of interest to note is how the money spent on making dwellings decent is drastically cut. In 2011, the money spent on making dwellings decent nearly halves in amount and is gradually reduced to under £500m by 2020. From this, it can be argued that there is a direct correlation between the number of non-decent units and the expenditure to make them decent. The reduced expenditure on making dwellings decent may be attributable to reduced local authority funding as a result of the use of budget cuts carried out from 2009 onwards. However, in the case of the pandemic period, it can be thought that the reduced spending on making dwellings decent is as a result of local authorities being unable to access properties to carry out repairs on dwellings. By 2021, the number of non-decent dwellings dramatically increased with a small increment in spending by local authorities to make dwellings decent. This dramatic increase either highlights the vast number of uninhabitable social housing that has been overlooked, or the number of social housing units awaiting repair since the pandemic lockdown.

Though some of the figures highlight that the number of non-decent dwellings has decreased over time, this comes across as doubtful. In 2020, a parliamentary inquiry on social housing quality found that social housing has deteriorated to the point of being unfit for human habitation suffering from conditions such as mould and damp.³²⁷ From this, it becomes more difficult to trust statistics in relation to habitability when reports have highlighted otherwise. Furthermore, in light of Grenfell Tower, it can be deemed that overall effectiveness of these mechanisms and legislation are ineffective and have failed hearing social tenants' concerns.³²⁸

³²⁷ House of Commons, 'The Regulation of Social Housing', First report of Session 2022-2023, Levelling Up, Housing and Communities Committee, 9.

³²⁸ Helen Carr, Dave Cowan and Ed Kirton-Darling (n 61) 10; Gideon Macleod (n 64) 465.

4.3.5 Affordability and Social Housing Welfare

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing and Social Security: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Affordability	<ul style="list-style-type: none"> • Is housing affordable, in the sense that housing costs do not compromise other basic needs? 	<ul style="list-style-type: none"> • Proportion of households that receive public housing assistance, including those living in subsidised rental and subsidised owner-occupied housing.
Retrogressive criteria under General Comment 19	<ul style="list-style-type: none"> • There was reasonable justification for the action. • Alternatives were comprehensively examined. • There was genuine participation of affected groups in examining the proposed measures and alternatives. • The measures were directly or indirectly discriminatory. • The measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights 	<ul style="list-style-type: none"> • Public expenditures for targeted social assistance schemes in relation to access housing. • Proportion of requests for social assistance i.e., income transfer, subsidised housing reviewed and met. • Averages of weekly social rents. • Proportion of population at risk of poverty. (SILC data and ONS data on median income line) (if possible

	<p>or whether an individual or group is deprived of access to the minimum essential level of social security; and</p> <ul style="list-style-type: none"> • Whether there was an independent review of the measures at the national level. 	<p>disaggregated data on gender, family type, race, disability).</p>
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In terms of assessing the affordability of social housing in the United Kingdom, it is pertinent to know that there is a dissonance in the meaning of affordability. As highlighted in General Comment 4, affordability of housing refers to where housing costs do not compromise other income of persons to afford other household costs such as food.³²⁹ The OECD further defines affordability as where households do not spend more than 30% of their gross income on housing costs.³³⁰ From a policy standpoint, affordability in relation to social housing refers to ‘a diversity of housing tenures... provided for those on low or moderate incomes offered at sub-market rents or prices.’³³¹ Therefore, affordable housing in a social housing context focuses on the developmental and construction costs of social housing.

Against this backdrop, in undertaking an assessment of social housing, the impact on the income of social housing tenants takes the fore. While on the one hand, it may be argued that social benefits may not have a significant impact on housing affordability, the thesis contends that due to the redistributive nature of social welfare, benefits increase household income to enable households to access housing they may have otherwise been unable. Affordability in this regard includes private housing, accessed with individual targeted subsidies such as the housing benefit or rental allowance, or a rental rebate

³²⁹ UNCESCR General Comment 4 (n 163) 5-6.

³³⁰ OECD, ‘Affordable Housing Database:HC1.5 Overview of Affordable Housing Indicators’ <<http://oe.cd/ahd>> Accessed 05 February 2024, 5.

³³¹ Nicole Gurrán and Christine Whitehead, ‘Planning and Affordable Housing in Australia and the UK: A Comparative Perspective’ (2011) 26(7-8) *Housing Studies* 1193, 1196.

which is deducted from social rents thereby making social housing rent more affordable.

Furthermore, as stated by the Committee, the affordability element of housing includes that the State Party shall 'establish housing subsidies for those unable to afford housing, as well as forms and levels of housing finance which adequately reflect housing needs.'³³²

For these reasons, there is also scope to examine whether social housing welfare aids housing affordability for social housing tenants. Additionally, the lack of expansion on the requirements of housing subsidies requires incorporation of the retrogressive requirements as found in General Comment 19. Doing so provides a greater analysis of affordable social housing and related welfare policies available to social housing tenants.

4.3.5.1 England: Normative and Empirical Assessment

The right to buy scheme is provided for in the Housing Act 1985, whereby a secure tenant of three years or more can purchase a dwelling house or flat owned by the landlord at a discount.³³³ The Housing Act 1996 also provides for a right to acquire a dwelling property owned by the social landlord at a discount as prescribed by the Secretary of State.³³⁴ The Housing and Urban Regeneration Act 2008 extends the right to acquire to secure and assured tenants of property owned by private registered providers and Registered Social Landlords of publicly funded dwellings.³³⁵

³³² UNCESCR General Comment No. 4 (n 163) 5.

³³³ HA 1985 (n 164) Part V, ss 118(1) sub-ss(a)-(b), 119, 126(1)(b).

³³⁴ HA 1996 (n 107) ss 15(1) sub-ss(a)-(c), 17(1) sub-ss(a)-(2).

³³⁵ HURA 2008 (n 174) s 180 sub-ss (1)-(2).

Under the Social Security Administration Act 1992, the prior housing benefit shall be funded and administered by the appropriate housing or local authority.³³⁶ While the benefit encapsulates both social and private housing, where social housing is concerned the payment of the housing benefit takes the form of a rebate or rental allowance, consisting of multiple payments made to the local authority or reductions in the amount of payment to be made to the local authority.³³⁷ Rent officers may without prejudice, make orders as to the payment of a fee to landlords or redetermination of claim for the housing benefit or Universal Credit.³³⁸

The Welfare Reform Act 2012 provides a single payment of benefits - known as Universal Credit - such as the Job Seekers Allowance, Disability Payments, Childcare Allowance and Rent Rebate. The overall amount of benefits is re-calculated in relation to the following criterion: a standard allowance, amount for children or young persons, housing or particular needs.³³⁹ Therefore, the recipient is assessed for a range of benefits in accordance to one set of criteria rather than several different ones. As a result, the welfare recipient receives one lump sum payment per month for all the welfare they are entitled to, rather than separate payments. The rationale behind the introduction of the Welfare Reform Act 2012 is to streamline the benefits system through providing one overall benefit which encompasses disability, housing, childcare and standard allowances.³⁴⁰ The use of one benefit and one criterion standardises the needs of recipients and tapers the amount they receive when under the old welfare system they were entitled to greater financial assistance.

Claimants must be at least 18 years old living in Great Britain having accepted a claimant commitment and not receiving education or a pension.³⁴¹ In relation to the housing benefit, calculations of housing costs are made in respect of any liability of a claimant to make payments for accommodation they occupy as their home.³⁴²

³³⁶ Social Security Administration Act 1992, Part VIII, s 134(1).

³³⁷ Ibid ss 134 sub-ss (1)(a), (2)(a)-(c).

³³⁸ HA 1996 (n 107) Part IV, s 122(2), sub-ss (a)-(d).

³³⁹ Welfare Reform Act 2012, s 3 sub-ss (a)-(d) (WRA 2012).

³⁴⁰ Jane Millar and Fran Bennett, 'Universal Credit: Assumptions, Contradictions and Virtual Reality' (2016) 16(2) Social Policy and Society 169, 170-171.

³⁴¹ Ibid, s 4(1) sub-ss (a)-(e).

³⁴² Ibid, s 11(1).

In relation to social housing, housing contributions are deducted from the overall rent.³⁴³ The benefit applies to the one room the renter occupies, or is extended to persons included in their extended benefit such as joint renters, children and young persons the renter is responsible for.³⁴⁴ However, persons who are exempt are persons who are blind, or receive disability living allowances at a middle or higher rate.³⁴⁵

In extension to this, with the introduction of the Bedroom Tax in 2017 households with an extra room were subject to reduced welfare payments. The controversy of this tax on benefit payments for households who had rooms for overnight carers, persons with disabilities and households with members part of the armed forces, has led to a Supreme Court case in favour of social welfare recipients, enabling amendments in these areas to provide exceptions to the existing legislation.³⁴⁶

Table 16: Social Housing Weekly Rents in England 2008-2022

Social Housing Weekly Rents in England 2008-2022³⁴⁷		
Year:	Local Authority (£)	Registered Private Providers (£)
2008/09	64.21	69.96
2009/10	66.05	73.51
2010/11	67.83	78.28
2011/12	73.58	83.20
2012/13	78.61	88.40
2013/14	82.64	92.30
2014/15	86.29	95.88
2015/16	88.16	97.84
2016/17	87.37	96.61
2017/18	86.71	96.33

³⁴³ Universal Credit Regulations 2013, Sch.4, Part 5, s 33.

³⁴⁴ Ibid, Sch.4, ss 10(1) sub-ss (a)-(f), 12 sub-ss (1)-(3)

³⁴⁵ Ibid, s 15 sub-ss (1)-(2).

³⁴⁶ The Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017. Ibid, Explanatory Note.

³⁴⁷ Gov. UK, 'Housing Benefit Caseload Statistics'

<<https://www.gov.uk/Government/statistics/housing-benefit-caseload-statistics>> Accessed 20 March 2023.

2018/19	85.85	95.12
2019/20	85.56	94.25
2020/21	88.17	96.60
2021/22	89.69	98.05

Table 17: Housing Benefit Expenditure 2008-2021

Housing Benefit Expenditure 2008-2021³⁴⁸			
Year	Amount (£mns)	Total Welfare inside welfare cap (£bns)	Total Expenditure (£bns)
2008	15,000,000	-	169.6
2009	17,600,000	-	186.6
2010	18,874,000	113.1	197.6
2011	20,137,000	114.9	205.3
2012	21,119,000	116.5	213.0
2013³⁴⁹	21,396,000	116.2	209.3
2014	21,529,000	119.2	213.9
2015	21,447,000	120.1	216.3
2016	20,699,000	119.0	216.7
2017	19,638,000	118.7	218.8
2018	18,197,000	119.5	222.5
2019	16,094,000	126.1	227.0
2020	15,164,000	123.4	245.4
2021	14,102,000	123.1	244.3

³⁴⁸ Ibid; Office for Budget Responsibility. 'Historical Official Forecast Database 2023' <https://obr.uk/data/> > Accessed 16 January 2024; Office for Budget Responsibility, 'EFO-PSF Aggregate Data Bank Nov 2022' <https://obr.uk/public-finances-databank-2022-23/> > Accessed 16 January 2024.

³⁴⁹ Note: The statistics for the Housing Benefit from 2013 onwards are isolated from overall Universal Credit expenditure which encapsulates a range of benefits as a result of welfare reform.

Table 18: Housing Benefit Claimant by Tenure 2008-2018

Housing Benefit Claimants by Tenure 2008-2018³⁵⁰		
Year	Local Authority	Registered Social Landlords
2008	1,493,080	1,616,296
2009	1,504,172	1,729,890
2010	1,500,059	1,800,547
2011	1,463,172	1,882,087
2012	1,451,632	1,939,783
2013	1,417,564	1,920,130
2014	1,389,149	1,904,399
2015	1,336,876	1,901,981
2016	1,289,688	1,855,778
2017	1,234,583	1,796,066
2018	1,190,518	1,751,974

4.3.5.2 Wales: Normative and Empirical Assessment

The Abolition of the Right to Buy and Associated rights (Wales) Act 2018 abolishes the right to buy and right to acquire schemes in relation to dwellings in Wales.³⁵¹ The Renting Home (Wales) Act 2016 sets out a fundamental provision in secure contracts in relation to the variation of rent. In order to be able to vary the rent payable under a secure contract, a notice of two months or more must be provided to the contract holder which sets out when new rent will take effect.³⁵² Subsequent notices must specify a date that is at least a year from which the new rent was set.³⁵³

³⁵⁰ Housing Benefit Caseload Statistics' (n 347).

³⁵¹ The Abolition of the Right to Buy and Associated Rights (Wales) Act 2018, s 6(1)sub-ss (a)-(b).

³⁵² RHW 2016 (n 122) s 104 sub-ss (1), (2).

³⁵³ Ibid, s 3 (a)-(b).

Social welfare is a reserved policy competence which falls under the sovereign to enact. As a result, in Wales, the existing social welfare for the housing benefit on a State level is carried out through Universal Credit which has been examined in the England section. On a local level, local authorities may also provide a housing benefit allowance for tenants to afford rent in the private sector.

Table 19: Average Weekly Social Housing Rents in Wales 2008-2023

Average Weekly Rents in Wales 2008-2023³⁵⁴		
Year	Local Authority Rent Rates (£ per month)	Registered Social Landlords (Community Landlords) Rental Rates (£mns)
2008/9	58.09	62.06
2009/10	60.78	64.90
2010/11	62.46	66.97
2011/12	66.61	69.62
2012/13	69.60	73.69
2013/14	72.58	76.18
2014/15	75.19	79.16
2015/16	78.44	82.05
2016/17	81.15	83.93
2017/18	84.65	87.10
2018/19	89.35	91.15
2019/20	92.26	93.81
2020/21	95.06	-
2021/22	96.45	98.12
2022/23	99.20	101.04

³⁵⁴ Gov.Wales, 'Average weekly rents in self-contained stock at social rent by provider type and year' <<https://statswales.gov.wales/Catalogue/Housing/Social-Housing-Stock-and-Rents/averageweeklyrentsinselfcontainedstockatsocialrent-by-providertype-year>> Accessed 20 March 2023.

Table 20: Housing Benefit Expenditure in Wales 2008-2022

Housing Benefit Expenditure in Wales 2008-2022³⁵⁵			
Year	Amount (£mns)	Total from Council Housing Fund and Housing Benefit (£k)	Total Expenditure Receipts (£mns)
2008/9	712	878,178	1,128,396
2009/10	1,424	985,254	9,34,126
2010/11	893	999,461	997,663
2011/12	956	1,058,643	1,035,262
2012/13	992	1,109,978	1,088,056
2013/14	1,004	1,149,553	1,040,587
2014/15	1,011	1,151,088	1,015,213
2015/16	1,024	1,151,909	2,004,567
2016/17	1,009	1,138,550	1,113,214
2017/18	992	1,125,445	1,174,158
2018/19	945	1,080,952	1,230.712
2019/20	849	991,251	1,245,556
2020/21	1,116	970,149	1,323,925

³⁵⁵ Gov.UK 'Housing Benefit Caseload Statistics' (n 347); StatsWales, 'Capital Outturn Expenditure by Service (£ thousand)' <<https://statswales.gov.wales/Catalogue/Local-Government/Finance/Capital/Outturn/capitaloutturnexpenditure-by-service>> 16 January 2024; StatsWales, 'Revenue Outturn Expenditure, by Service' <<https://statswales.gov.wales/Catalogue/Local-Government/Finance/Revenue/Outturn/chart-revenueoutturnexpenditure-by-service>> Accessed 16 January 2024

Table 21: Finance and provision of Affordable Housing Through Local Authorities and Registered Social Landlords in Wales 2008-2022

Finance and Provision of Affordable Housing Through Local Authorities and Registered Social Landlords in Wales 2008-2022³⁵⁶			
Year	Delivered Affordable Local Authority Housing	Delivered Affordable Registered Social Landlord Stock	Total Financial Contributions Towards Provision of Affordable Housing (£)
2008/9	38	2,050	5,012,453
2009/10	1	2,172	4,258,853
2010/11	89	2,261	5,184,187
2011/12	50	1,954	4,219,805
2012/13	68	1,704	5,004,268
2013/14	34	1,799	6,756,320
2014/15	53	1,971	7,890,994
2015/16	69	2,250	8,265,669
2016/17	121	2,377	12,000,732
2017/18	266	1,946	9,367,920
2018/19	205	2,338	14,986,524
2019/20	393	2,470	16,168,308
2020/21	497	3,018	19,612,925
2021/22	486	2,130	20,486,210

³⁵⁶ Gov.Wales, 'Financial contributions towards affordable housing via planning obligations by local authority and amount' < <https://statswales.gov.wales/Catalogue/Housing/Affordable-Housing/Financial-Contributions/financialcontributionstowardsaffordablehousingviaplanningobligations-by-authority-amount>> Accessed 21 March 2023; Gov.Wales, 'Additional affordable housing provision by location and provider' < <https://statswales.gov.wales/Catalogue/Housing/Affordable-Housing/Provision/additionalaffordablehousingprovision-by-location-provider>> Accessed 20 March 2023.

4.3.5.3 Scotland: Normative and Empirical Assessment

The Housing (Scotland) Act 2014 abolished right to buy schemes,³⁵⁷ in an effort to preserve existing social housing supply.³⁵⁸ In regards to the affordability of social housing, the Scottish Social Housing Charter came into force in April 2012 set the standards that social landlords should seek to achieve with their tenants.³⁵⁹ In particular Charter point 13 provides that social landlords must ensure that they are continuously improving the value for rent and other charges paid by tenants.³⁶⁰ Points 14 and 15 provide that social landlords must consult tenants before setting rents and service charges to reflect the legal duty of the landlord in consulting tenants about rents as well as gauging what prospective and current tenants are able to afford.³⁶¹

The Housing Benefit Regulations 2006 sets out that for social housing tenants, the housing benefit is payable in the form of a rent rebate or a periodic allowance for which a person is liable to make in respect of a dwelling they occupy.³⁶² The rebate is not payable in respect to periodic payments under a long tenancy, co-ownership scheme, hire purchase or payments made by a crown tenant.³⁶³ Most cannot apply for a new claim under the housing benefit unless they are of state pension age, live in a charity housing association providing care or support or have been in receipt of pension credits since May 2019.³⁶⁴

³⁵⁷ HSA 2014 (n 137) Part I, s 1.

³⁵⁸ Scottish Government, 'Social Housing: Council Housing' <<https://www.gov.scot/policies/social-housing/council-housing/>> Accessed 07 March 2023.

³⁵⁹ Scottish Government Improving Housing Standards (n 313).

³⁶⁰ Scottish Social Housing Charter (n 314).

³⁶¹ Ibid.

³⁶² Housing Benefits Regulations 2006, s 12(a).

³⁶³ Ibid, s 12(2).

³⁶⁴ Shelter Scotland, 'Housing Benefit: Eligible Claimants' <https://scotland.shelter.org.uk/professional_resources/legal/benefits/housing_benefit/eligible_claimants#reference-3> Accessed 07 March 2023.

As a result, a majority of new claims for housing benefit have to be made to Universal Credit, which is governed by the Welfare Reform Act 2012, as has been explored in the England section. As a result, many groups are ineligible for the housing benefit, such as full-time students, residents of care homes, persons staying in a night shelter etc.³⁶⁵

Table 22: Affordable Accommodation Provision in Scotland 2008-2021

Affordable Accommodation Provision in Scotland: 2008-2021³⁶⁶	
Year	No. of Completions
2008/9	6,221
2009/10	8,092
2010/11	7,231
2011/12	6,882
2012/13	6,009
2013/14	7,016
2014/15	7,065
2015/16	6,445
2016/17	7,493
2017/18	8,527
2018/19	9,566
2019/20	9,290
2020/21	6,479
2021/22	9,757

³⁶⁵ Shelter Scotland, 'Housing Benefit: Ineligible Claimants' <https://scotland.shelter.org.uk/professional_resources/legal/benefits/housing_benefit/ineligible_claimants> Accessed 07 March 2023.

³⁶⁶ Gov.Scot, 'Publication – Statistics: Housing statistics quarterly update: new housebuilding and affordable housing supply' <<https://www.gov.scot/publications/housing-statistics-for-scotland-new-house-building/>> Accessed 20 March 2023.

Table 23: Average Weekly Social Rents in Scotland 2018-2018

Average Weekly Social Rents in Scotland: 2014-2018³⁶⁷		
Year	Local Authority Rent (£)	Housing Authority Rent (£)
2013/14	67.96	-
2014/15	76.92	65.78
2015/16	78.86	67.60
2016/17	80.24	69.22
2017/18	82.28	70.73

Table 24: Housing Benefit Expenditure in Scotland 2008-2021

Housing Benefit Expenditure in Scotland 2008-2021³⁶⁸			
Year	Amount (£mns)	Total Social Protection Expenditure (£mns)	Overall Budget Expenditure (£bns)
2008/9	1,392	18,613	56,507
2009/10	1,556	20,203	54,427
2010/11	1,661	21,047	61,625
2011/12	1,728	-	-
2012/13	1,789	22,458	65,205
2013/14	1,770	22,323	66,388
2014/15	1,776	22,840	68,377
2015/16	1,772	-	-
2016/17	1,733	23,782	71,209
2017/18	1,671	23,556	73,398
2018/19	1,588	24,126	75,338
2019/20	1,441	24,275	81,015
2020/21	791	26,017	99,176
2021/22	1,286	26,076	97,502

³⁶⁷ Gov.Scot, 'Rent affordability in the affordable housing sector: literature Review' <<https://www.gov.scot/publications/rent-affordability-affordable-housing-sector-literature-review/pages/7/>> See graph. Accessed 20 March 2023.

³⁶⁸ Gov. UK 'Housing Benefit Caseload Statistics'(n 347); Scottish Government. 'Government Expenditure & Revenue Scotland Reports 2021-22 to 2010-2011.

Table 25: Housing Benefit Case Load in Scotland 2008-2021

Housing Benefit Case Load in Scotland 2008-2021³⁶⁹	
Year	No. (mil)
2008/9	199
2009/10	202
2010/11	206
2011/12	205
2012/13	206
2013/14	201
2014/15	147
2015/16	142
2016/17	185
2017/18	178
2018/19	162
2019/20	142
2020/21	131
2021/22	120

³⁶⁹ Ibid.

4.3.5.4 Northern Ireland: Normative and Empirical Assessment

Though still operational until 2022, the right to buy scheme was replaced by the House Sales Scheme, where eligible social housing tenants of five years or more have the right to buy their homes at a discount.³⁷⁰ However, this scheme ended in 2022.³⁷¹ In order to access rent rebates, recipients must apply to Universal Credit which has been explored in the England context.

Table 26: Housing Benefit Expenditure in Northern Ireland 2008-2021

Housing Benefit Expenditure in Northern Ireland 2008-2021³⁷²		
Year	Amount (£mns)	Total Social Welfare Expenditure (£mlns)
2008/9	1,858,000	228.9
2009/10	2,050,000	243
2010/11	2,152,000	242
2011/12	2,200,000	244
2012/13	2,239,000	259
2013/14	2,171,000	273
2014/15	2,154,000	286
2015/16	2,132,000	302
2016/17	2,043,000	379
2017/18	1,938,000	504
2018/19	1,809,000	615
2019/20	1,600,000	900*68
2020/21	1,440,000	361

*This total includes the whole Communities department amount.

³⁷⁰ NI Direct, 'House Sales Scheme' <[³⁷¹ Ibid.](https://www.nidirect.gov.uk/articles/house-sales-scheme#:~:text=House%20sales%20scheme-,Under%20the%20House%20Sales%20Scheme%2C%20eligible%20tenants%20of%20social%20housing,Ireland%20on%2028%20August%202022.> Accessed 08 March 2023</p>
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³⁷² Gov. UK 'Housing Benefit Caseload Statistics' (n 347); Department for Communities, 'Universal Credit Statistics' <<https://www.communities-ni.gov.uk/articles/universal-credit-statistics>> Accessed 08 March 2023.

Table 27: NIHE Average Weekly Rents 2008-2022

NIHE Average Weekly Rents: 2008-2022³⁷³	
Year	Rent (£)
2008/9	50.81
2009/10	51.84
2010/11	52.76
2011/12	54.73
2012/13	58.76
2013/14	60.88
2014/15	63.46
2015/16	66.60
2016/17	66.61
2017/18	66.60
2018/19	66.59
2019/20	66.59
2020/21	68.39

4.3.5.5 Assessing Affordability and Social Housing Welfare in the United Kingdom

Assessing the affordability of social housing aids in determining whether social housing recipients are able to afford rent and meet basic living costs. If social housing is expensive to access, vulnerable and marginalised groups may be unable to access social housing at first instance or may be at risk of termination of their tenancies if they are unable to meet social housing rents.

³⁷³ Statista.com, 'NIHE Average Weekly Rent' <<https://www.statista.com/statistics/525628/nihe-average-weekly-rent-in-northern-ireland>> Accessed 08 March 2023.

In relation to the affordability aspect of social housing, what primarily can be noted is that the decision of Scotland and Wales to abolish right to buy schemes. While the action to abolish the right to buy scheme preserves existing social housing stock, it does impact the affordability element for social housing tenants. Though controversial, the removal of right to buy schemes circumvents the ability to access discounted homeownership options and places a greater necessity of social housing to be affordable in accordance with income of social housing tenants. Therefore, the provision of affordable housing that is below market rents becomes a matter of political will.

As can be seen in the Welsh context, during the global financial crisis, the number of affordable housing units provided by local authorities dwindled significantly. However, after 2009, the number of affordable housing units grows at a steady rate, even through the financial impacts of Brexit and the Pandemic. In comparison, where the local authority provision of affordable accommodation was heavily impacted by the global financial crisis, the opposite can be said for Registered Social Landlords who benefitted from voluntary transfers. Despite this benefit, the provision of affordable housing has little stability, as supply of affordable units decrease through the recession only to face volatility through recovery and the impacts of Brexit and the Pandemic heavily impacting their financial viability to access private funding. In terms of funding contributions, though impacted by the recession, funding for affordable housing units have increased both through recovery, Brexit and the Pandemic.

Comparatively, Scotland's provision of affordable accommodation may start low, however is an increment from 2007-8 of 5,670 total affordable housing units.³⁷⁴ Although the provision of affordable units follows a cycle of incrementing and then gradually decreasing, there are strong increments in the provision of affordable housing units both during Brexit and the Pandemic. While there is no equivalent data available in the English and Northern Irish context, overall, what can be discerned is that where there is political will to provide affordable social housing its provision and availability is built upon.

³⁷⁴ Gov.Scot 'Quarterly Statistics Update: New House Building And Affordable Supply'(n 366).

Though England still provides right to buy schemes for social housing tenants, its impact on the affordability of social housing is detrimental. Right to buy schemes have facilitated 'better off' social housing tenants to exit the social housing system through purchasing their unit. Reducing the supply of social housing in this manner, drives up the price of existing social housing in tandem with any development costs from constructing new social housing units which may be passed onto the tenant.³⁷⁵ These results can be seen through the rising costs of social rents in England from 2008-2021. The impacts of Brexit further impact the affordability of social housing. Brexit increased production costs associated with social housing and risks of financial liquidity which contributed to the driving up of the price of social housing.³⁷⁶ Furthermore, Brexit and the pandemic brings increases in rent arrears due to sudden changes in social housing tenants financial circumstances.³⁷⁷

While England, Wales and Scotland all contain a requirement of affordability of rents and financial viability in standards held by each respective regulator of housing, average social housing rents have increased from 2008 until 2021. The highest increases can be seen in England and Wales post lockdown has risen from £60-£100 dependent on whether the tenant holds a tenancy with the local authority or housing association. Scotland and Northern Ireland have retained some form of affordability ranging from £60-£80 respectively. What is of particular concern, is the higher rents afforded to housing association tenants given the predominance of housing association in the supply of social housing. Additionally, as noted by the Joseph Rowntree Foundations, affordable rents are 30 percent higher than social rents averaging at £1,400 per year.³⁷⁸

³⁷⁵ Nicole Gurran and Christine Whitehead (n 330) 1196.

³⁷⁶ Penningtons Law, 'How Is Brexit Affecting Housing Providers?' (2021) <<https://www.penningtonslaw.com/news-publications/latest-news/2021/how-is-brexit-affecting-housing-providers>> Accessed 19 March 2023.

³⁷⁷ Ibid.

³⁷⁸ Joseph Rowntree Foundation, 'JRF Analysis Unit Briefing Paper: Affordable Rents Compared to Traditional Social Rents' (July 2018).

Against this backdrop, the role of social housing welfare policies become important in ensuring affordability of social housing for tenants. As prior mentioned, the prior housing benefit was adapted through the Thatcher administration to provide a minimal amount of benefit covering the cost of the bricks and mortar of social housing.³⁷⁹ The replacement to Universal Credit though as a means to simplify the welfare payments for recipients, as noted by the Committee on Economic, Social and Cultural rights has become a cause for concern given the cuts to welfare payments.³⁸⁰

Given this concern, it is important to examine the switch to Universal Credit. From a normative perspective, under the White paper '21 Century Welfare', the Government set out that the social welfare system was overly complex, thereby requiring reform to simplify the welfare system and increase work-based incentives to poor groups.³⁸¹ Therefore, the rationale has a neoliberal background in ensuring that the poor are employable as well as making the welfare system cost-efficient.

Alternatives to Universal Credit are proposed, such as a single unified taper, single working age benefit, the Mirrlees Model and the Single Benefit/Negative income tax model.³⁸² Though these alternatives were presented, all options present as a radical overhaul of existing systems which involved unification or tapering off of benefits in accordance with the employability of the recipient.³⁸³ Public consultations and impact assessments have been carried out at various periods, which consider different elements of Universal Credit.³⁸⁴

³⁷⁹ Mark Stephens (n 58) 114.

³⁸⁰ UNCESCR United Kingdom Sixth State Party Report (n 18) para 96.

³⁸¹ Department for Work and Pensions, '21st Century Welfare' (2010) Cm 7913, 7.

³⁸² Ibid, 20-30.

³⁸³ Department for Work and Pensions, 'Universal Credit: Impact Assessment' (December 2012).

³⁸⁴ Revenue Benefits, 'Policy Background to Universal Credit' < <https://revenuebenefits.org.uk/universal-credit/policy/background-to-universal-credit/>> Accessed 19 March 2023.

In relation to impact assessments, a general focus has been on the loss of welfare through the intricacies of the welfare system prior to reform.³⁸⁵ A problem under consideration has been that recipients live in social housing ‘too large for their needs’ and largely focuses on costs to social landlords and local authorities.³⁸⁶ These impact assessments though carried out, predominantly focus on a financial incentive, rather than a human rights-based assessment which would determine the impact of welfare reform on welfare recipients, especially from marginalised and vulnerable groups.

The dissonance in assessment can be seen through the inquiry carried out by the Committee on the Rights of Persons with Disabilities. Concern has been expressed at the discriminatory effect of Universal Credit towards persons with disabilities in regards to the independent living payment, strict eligibility criteria and work conditionality requirements, despite being warned by various bodies of the potential retrogressive effects of the measures.³⁸⁷ As noted by the Joseph Rowntree Foundation, the tighter and stricter benefit reforms have hit the most vulnerable the hardest causing tenants to cut back on food and energy in order to survive.³⁸⁸

Given that Universal Credit is an umbrella payment of multiple benefits, the data focuses on caseloads of Universal Credit and average expenditure on housing benefit expenditure against total expenditure. In England, Scotland and Northern Ireland, housing benefit expenditure increased until 2013-14 before gradually decreasing in amount, even through part of the pandemic period. In contrast, Welsh housing benefit expenditure has decreased since 2008 until the pandemic period. Aside from Wales, the overall increase in housing benefit expenditure can be attributed to the impact of the financial crisis and austerity causing greater reliance on social welfare in order for households to meet housing and living costs.

³⁸⁵ Department for Work and Pensions ‘Universal Credit’ (n 383).

³⁸⁶ Department for Work and Pensions, ‘Housing Benefit: Under Occupation for Social Housing’ (June 2012).

³⁸⁷ UNCRPD, ‘Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention, (24 October 2017) UN Doc CRPD/C/5/4, para 76.

³⁸⁸ Anne Power, Bert Provan, Eileen Herden and Nicola Serle, ‘The Impact of Welfare Reform on Social Landlords and Tenants’ (June 2014) Joseph Rowntree Foundation, 5.

In the English context, while there is no data on expenditure inside the welfare cap, it can be seen that from 2010 onwards there is a gradual increase in expenditure until 2015, after which expenditure decreases until 2018. From 2018 onwards, expenditure does increase over the pandemic lockdown period, however the amount gradually decreases by 2021. In the context of total expenditure, spending inside the welfare cap makes up a significant proportion of total expenditure which has largely been incremental throughout 2008-2021.

In Wales, the total council housing fund includes funding for the housing benefit increases until 2015, and then decreases throughout the remainder of 2016-2021, Against the overall expenditure receipts there is some volatility as expenditure receipts fall and rise until 2017, after which there is a gradual increase in expenditure receipts. In the context of the housing benefit, its expenditure far outranks the expenditure in relation to the council housing fund which covers a range of services provided by the council. In this context, housing benefit expenditure also forms a small proportion of expenditure receipts.

In comparing the housing benefit expenditure in Scotland to overall social protection expenditure, the housing benefit forms a smaller proportion of social protection expenditure. Through 2008 until 2021 there is an overall increase in social protection expenditure. When placed against overall budget expenditure, social protection also makes up a small proportion of overall budget expenditure.

In comparison, the housing benefit expenditure in Northern Ireland the against overall social welfare expenditure highlights that housing benefit at the beginning of 2008 makes up a large proportion. However, when overall social welfare expenditure begins to increase from 2015 onwards, the proportion of the housing benefit makes up gradually reduces until 2021.

The overall falls in housing benefit expenditure since 2013 can be attributed to the Welfare Reform Act 2012, introducing Universal Credit which combines multiple benefits. The housing benefit forms one component in calculating the overall amount received by claimants. Therefore, the amount of housing benefit received by claimants is smaller when calculated alongside further benefits. It is unclear why housing benefit expenditure fell even through the pandemic, given the increase in the number of

claimants as a result of mass unemployment.³⁸⁹ However, it is likely that a combination of frequent expenditure cuts as a result of past austerity packages as well as the temporary suspension of benefit caps, limits and conditions during the pandemic facilitated further falls in housing benefit expenditure.³⁹⁰

The mixed result empirically can be attributed to a range of changes in the amounts of welfare, benefit caps and eligibility criteria and delays in Universal Credit payments, as has been noted by Phillip Alston.³⁹¹ There have been increments in allowances over the pandemic period and cost of living crisis, such a £900 cost of living allowance. However, the rate of take up is low as a result of strict eligibility criteria, confirming the non-take up of benefits as outlined by the Special Rapporteur on Extreme Poverty and Human Rights.³⁹² As reported by the Joseph Rowntree Foundation, overall poverty rates have stayed at a similar 20 percent level, for different groups such as children, the poverty rate has been at higher rates of 27-35 percent from 2008-21.³⁹³

Though the provision of affordable housing units provides an incomplete analysis, it can be concluded that Universal Credit as a whole, if not fully reformed is in danger of becoming deliberately retrogressive. Alongside the rising costs of social housing rents, it is questionable whether Universal Credit provides enough financial support to be able to support households in the rising costs of housing.

³⁸⁹ Andrew Mackley, 'Coronavirus: Universal Credit During the Crisis' (2021) House of Commons Briefing Paper No.8999, 4.

³⁹⁰ Ibid.

³⁹¹ Phillip Alston (n 276) 12.

³⁹² Joseph Rowntree Foundation, 'On a Low Income, But Not Claiming Means- Tested Benefits' <<https://www.jrf.org.uk/report/low-income-not-claiming-means-tested-benefits>> Accessed 08 March 2023; UNHRC Special Rapporteur Olivier De Schutter, 'Non-Take up of Rights in the Context of Social Protection: Report of the Special Rapporteur of Extreme Poverty and Human Rights' (19 April 2022) UN Doc A/HRC/50/38, para 1.

³⁹³ Joseph Rowntree Foundation, 'UK Poverty Statistics' <<https://www.jrf.org.uk/data>> Accessed 07 March 2023.

4.4 Conclusion

In discerning whether the United Kingdom has adopted retrogressive measures regarding social housing and welfare, there is not a clear answer. From the third chapter, through qualitative analysis, it was established that the Conservative Government has engaged in a systematic use of austerity measures which emphasise cost-efficiency, welfare residualisation and neoliberal doctrine. During the recession these justifications may be considered to be necessary and proportional given the exigencies of high unemployment, budget deficit and sovereign debt. However, upon entering economic recovery these reasons hold less weight. While there is divergence from this rhetoric entering the pandemic, it lingers and has returned since the ceasing of imposed lockdowns.

There have been great variations in England, Wales, Scotland and Northern Ireland in their approach to social housing. The removal of right to buy schemes in Scotland and Wales has preserved existing social housing stock to be further built upon and improved, whereas England has systematically reduced social housing supply and Northern Ireland social housing supply remains stagnantly low. Bar Northern Ireland, England, Wales and Scotland have embraced modernised and flexible social housing tenancies which as mentioned provide greater flexibility to social landlords.

Normatively, all jurisdictions have the frameworks in place to provide some means of protection in relation to all adequacy requirements. Empirically, particularly in the case of England, statistics have highlighted a growth in homelessness and rough sleeping and increase in social housing rents. What is of particular interest to note in relation to the availability of services and the affordability of housing is that the expenditure is that there is an overall increase in expenditure in both contexts in each devolved jurisdiction. However, when placed in the wider context of overall budget expenditure the proportion allocated to housing capital and current expenditure forms a small portion of the budget. These smaller proportions highlight a process whereby the local authority has been sidelined from state funding provisions and encouraged to self-finance their capital finance expenditure, often requiring joint enterprise with housing associations which have greater access to finance avenues. While on the one hand, it can be argued that the

impacts of austerity measures are not as significant given the overall increases in capital and current expenditure of housing over the 2008-2021 period, the main focus in this part of the assessment is on the quantity of housing stock available in England, Wales, Scotland and Northern Ireland. With this in mind, regardless of the increases in capital and current expenditure of housing, the quantity of social housing units have been heavily impacted.

Though the pandemic predominantly protected security of tenure of all tenants, the response by all jurisdictions significantly protected the homeless and tenants both in the private and social sector. However, since recovery the approach utilised by all jurisdictions is altogether different. Compared to Scotland, Wales and Northern Ireland, England returns to the use of austerity practices which makes doubtful its promises on increasing social housing supply. However, the full extent of the current austerity budget and its impact on social housing is yet to be seen.

In terms of the affordability of social housing, the housing benefit and Universal Credit expenditure have increased over the 2008-2021 period to support persons facing economic instability as a result of austerity measures, Brexit and the Pandemic. Furthermore, the overall expenditure of Universal Credit forms a larger proportion of social welfare expenditure. Historically, the proportion of welfare spending – including housing – has increased in numbers significantly since the 1970s.³⁹⁴ On the surface, the statistics provided on housing affordability demonstrate that there is no potential of retrogression empirically as a result of increased welfare expenditure. However, what is important to note here is that the increase expenditure on social welfare is to support a growing number of citizens who are unable to afford housing costs and living costs. Since 2008, there have been various occurrences where tenants in the social sector face poverty and material deprivation after meeting housing costs.³⁹⁵

Having noted rising social rents in all jurisdictions in the United Kingdom, it is questionable whether the housing benefit and Universal Credit sufficiently address housing costs despite increases in expenditure. Furthermore, Universal Credit has been held by various UN bodies – such as the UNCRPD as mentioned- to infringe on the rights of persons with disabilities and living standards of children and vulnerable groups.

³⁹⁴ UKpublicspending.co.uk, 'UK Spending Since 1900' <ukpublicspending.co.uk/past_spending> Accessed 20 January 2024

³⁹⁵ Joseph Rowntree Foundation, 'The Links Between Housing and Poverty: An Evidence Review' (April 2013) 5.

Therefore, the empirical statistics fail to demonstrate the qualitative impact of housing benefit expenditure on the population as has been noted by the Committee and UNCRPD.

Overall, it becomes clearer as to why the Committee on Economic, Social and Cultural Rights has not mentioned outright retrogressive practices in relation to social housing. The efforts of Wales, Scotland and Northern Ireland in improving the supply and sustainability of social housing in comparison to England may have persuaded the Committee from using an explicit label of retrogressive practices being adopted in relation to social housing practices. However, it is uncertain whether empirical retrogression alone would be sufficient in definitively claiming that deliberately retrogressive practices have been adopted in relation to social housing policies and legislation.

5. Assessing the Doctrine of Non-Retrogression in relation to Social Housing and Welfare Legislation and Policies in Ireland: From the Global Financial Crisis to Covid-19 Pandemic

The Irish social housing system has transformed in recent decades. The growth of financialisation of the housing market arose due to the globalisation of the international banking sector which contributed to the global financial crash.¹ Post financial crisis and economic recovery, there has been reduced public spending on housing as part of a wider neoliberal ideology.² As Michelle Norris notes, social housing provision in Ireland operated independently – counter cyclically - of the economic cycle as supply was met by local authorities. However, through a series of reforms, social housing provision has become reliant on private sector supply, which is susceptible to the economic cycle and financial and market crises, impacting the supply of social housing.³

Against this backdrop, the chapter focuses on assessing the doctrine of non- retrogression in relation to the rights to adequate housing and social security regarding legislation and policy measures adopted by the Irish State in relation to social housing and welfare since the global financial crisis until 2020/2021. Following suit of the prior chapter, a brief overview of the history of social housing in the Irish context is provided to trace the development of the social housing until its current position. The thesis acknowledges that in relation to the empirical assessment, the ESRI has produced its own indicators which measure the adequacy of housing which also take from a range of sources such as the Covenant, OECD and UN Habitat.⁴ Similar to the approach of the report, the thesis relies on local authority housing data, SILC data, however uses UN process indicators to ensure a general application of the assessment in both the United Kingdom and Irish contexts.⁵

¹ Padraic Kenna, *Contemporary Housing Issues in a Globalized World* (Routledge 2014) 8.

² Michael Byrne and Michelle Norris, 'Pro-cyclical Social Housing and the Crisis of Irish Housing Policy: Marketization, Social Housing, and the Property Boom and Bust' (2018) 28 *Housing Policy Debate* 50, 60-61.

³ *Ibid*, 60

⁴ Helen Russell, Ivan Privalko, Frances McGinnity and Shannen Enright, 'Monitoring Adequate Housing In Ireland' (ESRI 2021) 1-12.

⁵ *Ibid*, 27.

Subsequently, the Concluding Observations of the Committee on Economic, Social and Cultural Rights and State Party reports of Ireland are examined to provide insights as to the position of the State Party in relation to its obligations under the International Covenant of Economic, Social and Cultural Rights. Finally, legislation and policies adopted in relation to social housing and related welfare policies since 2008 until 2020/21 are examined with the assessment criteria for the doctrine of non- retrogression. The criterion are as follows: security of tenure, availability of services, accessibility, habitability and affordability and social housing welfare.

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5.1 The View of the Committee on Social Housing and Welfare in Ireland

Undertaking an examination of the Committee on Economic, Social and Cultural Rights' Concluding Observations and State Party Reports of Ireland promotes a greater understanding of the current status of the enjoyment of the rights under the Covenant. Furthermore, it is of interest to examine how the Committee approaches Ireland's adoption of austerity measures arising from the intervention of the 'Troika', consisting of the European Commission, European Central Bank and International Monetary Fund.

Ireland signed the Covenant on the 1 October 1973 and ratified on 8 December 1989.⁶ The State Party also signed the Optional Protocol to the Covenant in March 2012.⁷ However, the Optional Protocol is yet to be ratified to allow for inquiry and individual complaint mechanisms to be operable.⁸ Despite ratification, the Committee has noted concern in the 1999 and 2002 Concluding Observations regarding the continued intentional absence of domestically justiciable Covenant rights in Ireland.⁹ In response, the State Party has responded by emphasising that:

The Government is fully committed to ensuring the progressive implementation of economic, social and cultural rights both in Ireland and in the context of international co-operation. The Government ensures that the State's obligations to implement the Covenant in Ireland are met through policies aimed at improving the enjoyment of economic, social and cultural rights, including by fighting persistent poverty and social exclusion.¹⁰

⁶ UNCESCR, 'Second Periodic Report Submitted by State Parties under Articles 16 and 17 of the Covenant: Ireland' (06 November 2000) UN Doc E/1990/6/Add.29, para 1

⁷ UNCESCR, 'Concluding Observations on the Third Periodic Report of Ireland' (08 July 2015) UN Doc E/C.12/IRL/CO/3, para 3

⁸ UNOHCHR, 'Ratification Status for CESCR-Committee on Economic, Social and Cultural Rights' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CommitteeID=9> Accessed 13 April 2023

⁹ UNCESCR Concluding Observations 2015 (n 7), para 7; UNCESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland' (05 June 2002) UN Doc E/C.12/1/Add.77, para 12; UNCESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland' (14 May 1999) UN Doc E/C.12/1/Add.35, para 9.

¹⁰ Ibid; UNCESCR, 'Consideration of Reports Submitted by the State Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Third Periodic Reports of State Parties due in 2007: Ireland' (07 May 2012) UN Doc E/C.12/IRL/3, para 491.

Similar to the United Kingdom, Ireland has posited that utilising a differentiated approach – where Covenant rights are addressed through the Constitution, relevant legislation or administrative measures in accordance to what is seen as best choice for Ireland – is the ‘best means of implementing Ireland’s obligations under the Covenant.’¹¹ A differentiated approach to addressing economic, social and cultural rights is in accordance with Article 2.1 of the Covenant, which indicates that the State Party can realise Covenant rights ‘by all appropriate means.’¹² Furthermore, Covenant rights such as the rights to social security and an adequate living standard are textually vague, requiring greater interpretation by Irish courts which - as set out in *obiter* in *Sinnott v Minister for Education* - usurps the function of the Oireachtas and the executive in the proper distribution of the resources available to the State.¹³

On the other hand, such an approach creates a hierarchy in which the individual is able to seek redress for specific Covenant rights addressed in the Constitution or legislation such as the rights to education, work and family but not others.¹⁴ Although, even at constitutional level, Covenant rights face limited protection. Taking the rights to housing and social security as examples, both rights are addressed to an extent through the Constitution, legislation and administrative measures. Article 43 of the Irish Constitution guarantees the right of private ownership of goods and property,¹⁵ however there is no outright right of the individual to housing.¹⁶

Similarly, there is no right to social security or to an adequate living standard in the Irish Constitution, though Article 45 sets out the directive principles of social policy, of which the State shall direct its policy so that men and women equally have the right to an adequate means of livelihood; the welfare of the people as a whole; and on the land in economic security of as many families as practicable.¹⁷ However, Article 45 of the Constitution excludes the courts from being able to comment on the principles

¹¹ Ibid.

¹² International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1976) UNGA Resolution 2200A (XXI) Art. 2.1.

¹³ *Sinnott v Minister for Education* [2001] IESC 63; [2001] 2 IR 505.

¹⁴ UNCESCR Ireland Second State Part Report (n 6) para 8.

¹⁵ The Irish Constitution (Bunreacht na hÉireann) Article 45.

¹⁶ For the right to housing see: Rory Hearne and Mary Murphy, ‘Investing in the Right to a Home: Housing, HAPs, and Hubs’ (2017) Maynooth University. ¹⁷ The Irish Constitution (n 15) Article 45.2

aforementioned.¹⁸ The right to social security is further addressed through administrative measures such as national poverty alleviation programmes.¹⁹ Therefore, only certain aspects of Covenant rights are addressed via the Constitution or through other measures, which does not provide an avenue for the individual to seek legal redress for Covenant rights such as the rights to an adequate living standard and social security. With this point in mind, the Committee has referred to General Comment 9 emphasising that in the domestic legal order an appropriate means of legal redress and remedies must be available to aggrieved individuals or groups.²⁰

In relation to the right to adequate housing in Ireland, though there is no statutory right to housing, various Housing Acts demonstrate the 'Government's long-standing commitment to ensuring that housing needs, especially social housing needs are adequately addressed.'²¹ Furthermore, the aim of Irish housing policy is to provide all households with access to affordable, good quality housing suited to their needs.²² From the State Party report, there is an understanding of the adequacy requirements of the right to adequate housing as presented in General Comment 4. For example, In meeting the availability of services component - which sets out essential services which must be present in an adequate home such as energy for cooking, washing facilities and lighting²³ - the State Party carried out programmes to provide water and sanitation services for domestic dwellings.²⁴ Furthermore, in meeting adequate accessibility of housing, the State Party has introduced financial, administrative and legislative measures such as providing funding for Traveller accommodation programmes; enacting statutory measures recognising Traveller accommodation; and establishing a Consultative Committee in regards to Traveller accommodation needs.²⁵

¹⁸ Ibid.

¹⁹ UNCESCR Ireland Second State Party Report (n 6) para 492.

²⁰ UNCESCR, 'General Comment No.9: The Domestic Application of the Covenant (03 December 1998) UN Doc E/C.12/1998/24, para 2.

²¹ UNCESCR, 'Initial Reports Submitted by State Parties under Articles 16 and 17 of the Covenant: Ireland.' (26 September 1997) UN Doc E/1990/5/Add.34, para 497.

²² Ibid, para 494; UNCESCR Concluding Observation 2015 (n 7) para 280.

²³ UNCESCR, 'General Comment No.4: The Right to Adequate Housing (Art.11 (1) of the Covenant)' (13 December 1991) UN Doc E/1992/23, 5.

²⁴ UNCESCR Ireland Initial State Party Report (n 21) para 535.

²⁵ UNCESCR, 'Fourth Periodic Report Submitted by State Parties under Articles 16 and 17 of the Covenant due in 2020' (25 August 2021) UN Doc E/C.12/IRL/4, paras 236, 237.

In the 1999 and 2002 Concluding Observations, the Committee has noted concern that marginalised and vulnerable groups such as Travellers and disabled persons have faced discrimination in relation to accessing housing.²⁶ In particular, the Committee has noted that there is a lack of culturally appropriate housing provision for the Traveller and Roma communities.²⁷ As a result, groups such as Travellers have remained on insecure roadside encampments without access to water and sanitary facilities.²⁸ In terms of social housing, the Committee has noted a lack of complaint mechanisms for local authority tenants; a continuing gap between availability and demand for social housing resulting in longer waiting lists as well as an inaccessibility of affordable housing by households.²⁹ Additionally, rising homelessness as a result of lack of social housing has also been noted with concern by the Committee.³⁰

In comparing Ireland's State Party reports to the relevant Committee Concluding Observations, a dissonance can be seen between the theory and application of housing policy. Ireland's State Party reports present an understanding of the right to adequate housing, in practice, social housing, has failed to meet national demand and Covenant obligations. Aside from referring General Comment 4 to the State Party for further guidance, the Committee has recommended that the State Party: 'step up its efforts to increase the number of social housing units so as to satisfy the high demand and to reduce the long waiting list'³¹; and review their policies to become more effective in 'responding to the real needs of the population, especially disadvantaged and marginalised individuals and groups.'³²

The same can be said for the right to social security. Since 1999, the Committee has noted a consistent lack of a human rights-based approach adopted by the State Party in relation to anti-poverty strategies.³³ Furthermore, marginalised groups such as Travellers and disabled persons have faced barriers in the enjoyment of the right to

²⁶ UNCESCR Concluding Observations 2002 (n 9) para 20.

²⁷ UNCESCR Concluding Observation 2015 (n 7) para 27.

²⁸ UNCESCR Concluding Observations 2002 (n 9) para 20.

²⁹ *Ibid*; UNCESCR Concluding Observation 2015 (n 7) para 26.

³⁰ *Ibid*.

³¹ *Ibid*, para 27 sub-ss (a), (b).

³² *Ibid*.

³³ UNCESCR Concluding Observations 1999 (n 21) para 13.

social security as a result of discrimination and inconsistent application of eligibility criteria and the habitual residence condition in accessing benefits.³⁴

In 2015, the Committee have highlighted the disproportionate and adverse impact of austerity measures on the enjoyment of Covenant rights by the entire population of Ireland, especially marginalised and disadvantaged groups.³⁵ In particular, through public expenditure cuts and policies regarding eligibility criteria to access to social security have deteriorated the enjoyment of the rights to housing and social security.³⁶ In response, the State Party has defended its use of austerity measures by stating it was in compliance with the fiscal rules under the EU Stability and Growth Pact.³⁷ Such a justification demonstrates how the State Party utilises European Union Law which has facilitated an austerity agenda,³⁸ as a means to shield itself from accountability of its Covenant obligations.

Overall, though the State Party has highlighted its commitment to ensuring the progress of economic, social and cultural rights.³⁹ With this commitment in mind, the Irish State has adopted a breadth of budgetary, administrative and financial measures to address the right to housing and social security, for example in increasing funding in relation to the Traveller community and targeted individual subsidies provided to the individual to access housing such as the Housing Assistance Payment, which is explored later on within this chapter. However, given the disproportionate adverse impact of austerity measures on the population and vulnerable groups and the efforts by the Irish State to ensure enjoyment of the right to housing and social security has been negatively impacted. The Concluding Observations highlight a lack of compliance by the State Party as to the normative requirements imposed by the Committee 2012 letter and the requirement of maximum available resources under Article 2.1 of the Covenant.⁴⁰

³⁴ UNCESCR Concluding Observations 2015 (n 7) paras 20, 21.

³⁵ *Ibid*, para 11.

³⁶ *Ibid*.

³⁷ UNCESCR Ireland Fourth State Party Report (n 25) para 11.

³⁸ Marija Bartl and Markos Karavias, 'Austerity and Law in Europe: An Introduction' (2017) 44 (1) *Journal of Law and Society* 1-9, 5.

³⁹ UNCESCR Ireland Third State Party Report (n 10) para 491.

⁴⁰ *Ibid*.

While the 'Rebuilding Ireland' housing programme aims to increase the supply and affordability of housing and alleviate homelessness,⁴¹ its effects are yet to be seen in the long-term. The Committee does not outrightly label the State Party's efforts to protect and implement the right to housing as inadequate. However, it can be inferred that since the global financial crash there has been a continuing growth in the scarcity, price and inhabitability of housing for various groups, emphasising the growing inadequacy of housing conditions in Ireland.

⁴¹ UNCESCR Ireland Fourth State Party Report (n 25) para 199.

5.2 A Brief History of the Social Housing Systems in Ireland

Setting out the development of social housing in Ireland provides insight into the integration of the private sector with social housing, and how social housing policy objectives were carried out. Norris and Redmond note that in the mid-1800s housing was largely addressed by a mixture of philanthropic, semi-philanthropic and industrial entities.⁴² The role of the Irish local authorities developed through British policy and legislation such as the United Kingdom Common Lodging Houses Act 1851, which established the principle of State involvement in enforcing minimum housing standards.⁴³

The jurisdiction of local authorities gradually expanded to slum clearances and constructing on greenfield sites, including the ability to provide housing for labourers in rural areas.⁴⁴ The 1908 Housing Act and establishment of the Irish Housing Fund introduced attractive central Government loans and provided a direct exchequer subsidy for urban housing.⁴⁵ Post World War One, local authorities had accrued a large housing stock which established that their position in providing housing rather than non-statutory bodies such as philanthropic organisations.⁴⁶

Through the 1920s onwards the 'Million Pound Scheme' helped local authorities to access central funds and bank loans at a lower rate of interest which resulted in the construction of 959 new dwellings.⁴⁷ However, through the Cumann na nGaedheal Government there is a gradual shift in enabling the private sector to participate in housing construction. The Housing (Building Facilities) Act 1924 introduced substantial subsidies for private house building, which covered a sixth of building costs at the time.⁴⁸

⁴² Michelle Norris and Declan Redmond, *Housing Contemporary Ireland: Policy, Society and Shelter* (IPA 2005) 160.

⁴³ *Ibid*, 161.

⁴⁴ *Ibid*, 164.

⁴⁵ *Ibid*, 162.

⁴⁶ *Ibid*.

⁴⁷ *Ibid*, 164.

⁴⁸ *Ibid*, 165.

While the Housing Act 1925 tilted the balance to favour of local authorities in accessing cheaper loans, the Housing (Miscellaneous Provisions) Acts 1929 and 1932 provided greater Government subsidies for slum clearance to both local authorities and private companies.⁴⁹

What can be observed through these acts is the growing battle between local authorities and private companies for Government preference in providing housing supply on a national level. Local authority housing stock constituted between 52 percent to 65.2 percent of total Irish housing output during the 1930s, 1940s and 1950s.⁵⁰ From the 1960s onwards, modernisation takes place in the Irish social housing system. The introduction of the Housing Act 1966 rationalised public housing legislation by providing a simple statement which gives local authorities a plethora of powers such as assessing and allocating housing in accordance to needs and deal with unfit dwellings.⁵¹ The Act further provided subsidies for local authorities to construct six storey flats for social housing tenants to modernise social housing.⁵² These high rise buildings were later heavily criticised for lack of quality and damaging the living standard of social housing tenants, further delegitimising social housing.⁵³

There was a shift in Government policies to encourage greater homeownership amongst social tenants. Schemes such as the '€5,000 Surrender Grant' were paid by local authorities out to tenants in the 1980s to surrender their dwelling for a privately owned home.⁵⁴ Such schemes facilitated local authorities to encourage low-income and middle-income tenants to buy a home of their own as an alternative to social housing. Doing so resulted in improved access of social housing to one parent households and the elderly, emphasising the policy front for social housing prioritised in accordance with categories of need.⁵⁵

From the 1980s onward, there was a development in housing welfare policies. In 1997, the introduction of the Rent Supplement provided 'a cash allowance which subsidised

⁴⁹ Ibid.

⁵⁰ Michael Byrne and Michelle Norris (n 2) 50.

⁵¹ Ibid.

⁵² Ibid, 170.

⁵³ Ibid, 170.

⁵⁴ Ibid, 175.

⁵⁵ UNCESCR Ireland Initial State Party Report (n 21) para 497.

the rent of private renting household's dependent on social security benefits or State education or training schemes intended to aid the long-term unemployed return to work.⁵⁶ Additionally, the Housing (Miscellaneous Provisions) Act 1992 required voluntary organisation and co-operatives to acquire 'approved' status from the Department of the Environment, Heritage and Local Government (DEHLG) to access a range subsidies and attractive funding such as the Capital Assistance Scheme.⁵⁷ Though little is known or researched on these voluntary organisations and co-operatives, otherwise known as 'Approved Housing Bodies', it has been noted by Brooke and Clayton that Approved Housing Bodies provide specialised small units of housing for the elderly, persons with disabilities etc.⁵⁸

The introduction of Approved Housing Bodies in the Irish social housing system emphasizes a point of change in nature of how social housing is supplied. Gradually, the role of the local authority in meeting housing need has been displaced by Approved Housing Bodies, and welfare policies encouraging the recipient to seek accommodation through the private sector.⁵⁹ It must be emphasised here that the Approved Housing Body does not become the main provider of housing, rather they form an additional actor. As highlighted, the main provider of housing both in the private and social context is the private sector. Tony Fahey, in collaboration with the Combat Poverty Agency posited that local authorities in the social housing system had contributed greatly to the Government's policies for greater homeownership (at the time 80 percent), though, as a result of privatisation, social housing sector stock and quality has reduced.⁶⁰ A primary recommendation by Fahey and the Combat Poverty Agency had been to increase social housing stock to 20 to 30 percent and reform local authority housing management.⁶¹ From this, it can be seen that prior to the global financial crisis, social housing stock and quality already began to recede.

⁵⁶ Michelle Norris and Dermot Coates, 'Private Sector Provision of Social Housing: An Assessment of Recent Irish Experiments' (2010) 30 *Public Money & Management* 19, 20.

⁵⁷ Michelle Norris and Declan Redmond (n 42) 177.

⁵⁸ *Ibid.* See Chapters 8 and 10.

⁵⁹ *Ibid.*, 177.

⁶⁰ Tony Fahey, Katharine Howard Foundation and Combat Poverty Agency, *Social Housing in Ireland: A Study of Success, Failure, and Lessons Learned* (Oak Tree Press 1999) xix.

⁶¹ *Ibid.*, xxi.

Stepping into the 21st Century, we can see a transformation in the social housing system. The 2004 National Economic and Social Council (NESC) Report 'Housing in Ireland: Performance and Policy' notes three main concerns regarding housing in Ireland: the stability of the housing market; inequality of access to housing and sustainability of the Irish housing market.⁶²

With reference to social housing, the report notes that social housing supply was marginally behind targets set by the National Development Plan 2000-2006.⁶³ Additionally, there has been a steady decline of social housing stock, particularly with regards to local authority housing stock.⁶⁴ Though this stock is further bolstered by the supply of housing from Approved Housing Bodies - providing more diverse accommodation to tenants - the supply of social housing stock is still in decline.⁶⁵

In relation to the global financial crisis, the combined result of the property bubble and banking sector collapse and bailout caused Government debt to increase by 320 percent to over 110 percent of GDP.⁶⁶ The involvement of the 'Troika' - the European Central Bank, European Parliament and IMF - initiated a programme of macroeconomic adjustment through cutting public expenditure.⁶⁷ The resulting National Recovery Plan 2011-14 envisaged a €15 billion adjustment in four years to encourage economic recovery.⁶⁸

⁶² National Economic and Social Council, 'Housing in Ireland: Performance and Policy' (RN/112 December 2004) 1.

⁶³ Ibid.

⁶⁴ Government of Ireland, 'National Development Plan 2000-2006' (Stationery Office, Ireland Government of Ireland 1999) 57.

⁶⁵ National Economic and Social Council (n 62) 59.

⁶⁶ Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP 2013) 66.

⁶⁷ Rod Hick, 'From Celtic Tiger to Crisis: Progress, Problems and Prospects for Social Security in Ireland' (2014) 48(4) *Social Policy & Administration* 391, 398.

⁶⁸ Ibid.

With regards to social housing, the DEHLG experienced the second highest rate of reductions of any Ministry between 2008 and 2012, in addition to falls in exchequer capital grants for the construction of new social housing falling from 88 percent between 2008 to 2014.⁶⁹ With regards to the social housing sector, waiting lists for social housing rose by 75 percent from 2008 to 2011.⁷⁰ Additionally, a large number of construction projects ceased, leading to one in five estates in Ireland becoming ghost estates in 2010.⁷¹ Despite recommendations from the NESC for further social housing stock of 73,000 to ensure the capacity of social housing sector to address social housing needs,⁷² Government spending for social housing stock remained stagnant.⁷³

As noted by Michelle Norris, the impact of the economic crisis pushed the Irish Government to reform the social housing sector from being counter cyclical to procyclical in nature.⁷⁴ The extensive public expenditure cuts to social housing led to falls in social housing output from 7,588 units in 2008 to 642 units in 2014.⁷⁵ Though the Planning and Development Act 2000 facilitated the acquisition of 4,518 social housing units, the fall in private construction as a result of the crisis led to only 67 acquisitions for social housing output in 2014.⁷⁶ Taking all these factors into consideration, the increased integration and dependence of the social housing sector on the private sector to provide housing units for welfare recipients can be observed. As seen, the private housing sector is heavily susceptible to financial instability. Therefore, the stability of the social housing market in tandem has become susceptible to financial shocks, providing little security in terms of rental price for vulnerable households at risk of homelessness or poverty in accessing housing whether in the social or private housing market.

⁶⁹ Michael Byrne and Michelle Norris (n 2) 54.

⁷⁰ Center for Economic, Social and Cultural Rights, 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (2012)19.

⁷¹ Ibid.

⁷² National Economic and Social Council (n 62) 6.

⁷³ Center for Economic, Social and Cultural Rights (n 70)19.

⁷⁴ Michael Byrne and Michelle Norris (n 2) 59.

⁷⁵ Ibid.

⁷⁶ Ibid.

In addition to the Rent Supplement and Rental Accommodation Scheme, the Housing Assistance Payment was introduced in 2014, which provides social welfare tenants with accommodation in the private sector through the local authority paying a percentage of rents to private landlords who can choose to register as social landlords.⁷⁷ As noted by Emma Heffernan *et al*, the effect of the Housing Assistance Payment and Rent Supplement pushed social welfare tenants into competition with private sector renters, placing a greater burden on the private sector to accommodate housing need.⁷⁸ In hindsight, the Irish Government's commitment to ending homelessness by the end of 2010, as envisaged in the 'Towards 2016' policy document,⁷⁹ only serves to highlight the gravity of the housing crisis which has carried on until present day.

The COVID-19 pandemic has further shed light on the inequalities present in our reality.⁸⁰ While homelessness, poverty and inequality have always existed, the pandemic has exacerbated these conditions, making clear the impact of austerity measures on the public sector capacity to meet demand and the lack of political will to address inequality and poverty.⁸¹ As is explored in the assessment, the Irish Government provided a variety of social welfare measures and legislation to prevent evictions to support a population facing job losses from national lockdowns.

⁷⁷ Paul Umfréville and Lorcan Sirr, 'Reform and Policymaking: Theory and Practice in the Irish Housing Context' (2020) 68 *Administration* 215, 219.

⁷⁸ Emma Heffernan, John McHale and Niamh Moore-Cherry, *Debating Austerity in Ireland: Crisis, Experience and Recovery* (Royal Irish Academy 2017) 137.

⁷⁹ *Ibid*; Umfréville and Sirr (n 77) 219.

⁸⁰ Ryan Nolan, "'We Are All in This Together!' Covid-19 and the Lie of Solidarity' (2021) 29 *Irish Journal of Sociology* 102, 102.

⁸¹ Focus, 'Homeless Figures and the Impact of COVID-19' <<https://www.focusireland.ie/focus-blog/homeless-figures-and-the-impact-of-covid-19/>> Accessed 25 November 2021.

Despite fears of a return to austerity measures, the Government plan 'Housing for All - A New Housing Plan For Ireland' proposed the construction of an average of 33,000 new homes to be provided each year from 2021 to 2030.⁸² The Government's overall objective from the plan is that 'every citizen in the State should have access to good quality homes: to purchase or rent at an affordable price; built to a high standard and in the right place; offering a high quality of life.'⁸³ In terms of low-income households, the objective is to deliver over 10,000 new social homes per year by 2030, including an average of 9,500 new build units and reforms in both income eligibility and leasing of social housing.⁸⁴ In relation to the homeless there is an increased 'Housing First' target of 1,200 occupancies over five years, the establishment of a new national Homeless Action Committee and personalised integrated healthcare.⁸⁵

While on the surface the objectives of the Irish Government are well intentioned, it becomes a concern as to whether these objectives are purely aspirational given the transformation of the social housing sector to be integrated to the private sector. Whether these measures further replicate past measures which emphasise a homeownership approach which diminishes existing housing stock is yet to be seen.

⁸² 'Gov.Ie - Housing for All - a New Housing Plan for Ireland' <<https://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/>> Accessed 25 November 2021.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

5.3 Assessing the Doctrine of Non-Retrogression in relation to Social Housing and Welfare Legislation and Policies

In Ireland, the Housing Act 1966, while providing a basis for a modern code of social housing law in Ireland, largely continues the legacy of housing policy of the pre-Independent State through the protecting and the extension of homeownership.⁸⁶ Therefore, there are similarities to be noted in Irish legislation as a result of the colonial influence of the United Kingdom.

The Housing (Miscellaneous Provisions) Act 2009 has modified and expanded many areas of social housing law, symbolising 'a significant shift in the way local authorities carry out their housing functions.'⁸⁷ Therefore, it is of interest to examine how the Housing (Miscellaneous Provisions) Act 2009 alongside further developments in legislation have altered the operation of social housing law in Ireland and whether these acts are deliberately retrogressive.

With this in mind, following the structure of the prior chapter, Irish social housing legislation and related welfare policies are examined in relation to the assessment criterion: security of tenure; availability of services; accessibility; habitability and affordability and social housing welfare.

⁸⁶ Padraic Kenna, *Housing Law, Policy and Practice* (Clarus Press 2006) 55, 104.

⁸⁷ Padraic Kenna, 'The Housing (Miscellaneous Provisions) Act 2009' (2010) 15(2) *Conveyancing and Property Law Journal* 26, 32.

5.3.1 Security of Tenure

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing: The Backwardness of the Measure.		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Security of Tenure	<ul style="list-style-type: none"> • Is the legal security of tenure guaranteed for all forms of public and private accommodation? • Do all persons have a guarantee against forced evictions? 	<ul style="list-style-type: none"> • Number and proportion of displaced or evicted persons rehabilitated or resettled in the reporting period. • Proportion of households with legally enforceable, contractual, statutory or other protection providing security of tenure or proportion of households with access to secure tenure.

Security of tenure focuses on whether social housing tenants have secure tenants which provide them with some form of protection from immediate evictions.⁸⁸ Assessing for the security of tenure in the assessment aids understanding whether social housing tenants in Ireland enjoy stable and secure tenancies, upon which they can self-actualise and enjoy further rights.

The Housing Act 1966 states that housing authorities may 'lease or otherwise provide dwellings... and such dwellings may be temporary or permanent.'⁸⁹ There is little elaboration as to whether these leases would be more or less secure than tenancies found in the private sector. Therefore, it can be inferred that *prima facie* social housing leases

⁸⁸Helen Russel et al (n 4) 3.

⁸⁹ Housing Act 1966 PIII, s 56 (HA 1996)

are similar in nature to that of the private sector.

In terms of protection from evictions, the 1996 Act sets out the procedure to be carried out by housing authorities for dwellings both leased and informally occupied. In the event of there being no tenancy in a housing authority owned dwelling and the occupier neglects or refuses to deliver possession despite there being a statement of recovery by the authority, the authority may apply to the District Court to issue a warrant for possession.⁹⁰ The Act also provides coverage to circumstances where the rent owed for a dwelling is in arrears for more than a month, abandonment and where the dwelling is not actually occupied by any person.⁹¹ In these circumstances the housing authority may give the lessee a notice stating their intention to quit and recover the dwelling where in rent arrears are unpaid.⁹²

Upon hearing the application, the housing authority must provide a document purported to be the tenancy agreement of which the signature need not be proved.⁹³ In cases of there being no tenancy agreement by an occupier, both the demand or notice for delivering possession and statement of the intention of the authority to make an application to the Court are required.⁹⁴ Should the justice of the District Court be satisfied with the application, a warrant is granted.⁹⁵ The Act facilitates a speedier process for recovering local authority dwellings,⁹⁶ through offering two different processes to recover possession from tenants and occupiers.

⁹⁰ Ibid, s 62(1).

⁹¹ Ibid, s 62(2).

⁹² Ibid.

⁹³ Ibid, s 62(5).

⁹⁴ Ibid, sub-ss (a),(b).

⁹⁵ Ibid, s 62(3).

⁹⁶ Padraic Kenna 'Housing Law, Policy and Practice' (n 86) 83.

The introduction of the Housing (Miscellaneous Provisions) Act 2009 introduces the Rental Accommodation Scheme through 'Rental Accommodation Availability Agreements' - otherwise known as part 4 tenancies - whereby the housing authority enters into an agreement with a rental accommodation provider to rent the dwelling to a qualifiable tenant.⁹⁷ These tenancies are not to be construed as a dwelling let by the local authority.⁹⁸ As a result, the local authority performs a facilitating role in securing accommodation for potential tenants of which the property is managed by a provider.⁹⁹ With this in mind, these tenancy agreements no longer follow the eviction procedures as governed in the 1966 Act, rather the Residential Tenancies Act 2004.

Tenancies may be terminated as a result of failure to pay the rent contribution in accordance with the terms set out in the tenancy agreement, contractual breach or allowing non-permitted persons in the dwelling.¹⁰⁰ The Act also introduces the requirement for housing authorities to develop anti-social behaviour strategies to prevent and reduce anti-social behaviour in co-operation with the Garda Síochána and Health Service Executive.¹⁰¹ Hence, anti-social behaviour forms a ground for termination of a tenancy agreement.¹⁰² The housing authority must notify the housing provider in writing of the tenant's failure to comply with the agreement.¹⁰³ The provider then serves a notice of termination to the tenant in accordance with Section 67 of the Residential Tenancies Act 2004 and provides a copy to the housing authority.¹⁰⁴ The impact of the legislation further integrates the social housing sector with the private sector and widens the number of grounds upon which social housing tenants may be evicted, for example anti-social behaviour.

⁹⁷ Housing (Miscellaneous Provisions) Act 2009, Chapter 4, s 24 subs (1) (HMPA 2009)

⁹⁸ *Ibid* s25(3).

⁹⁹ Padraic Kenna 'Housing (Miscellaneous Provisions Act 2009' (n 87) 38

¹⁰⁰ *Ibid* s 25(c).

¹⁰¹ *Ibid* s 35 sub-ss (1), (5).

¹⁰² *Ibid*, s 6(c).

¹⁰³ *Ibid*, s 6(b).

¹⁰⁴ *Ibid* ss 6(c), 7.

The Housing (Miscellaneous Provisions) Act 2014 further elaborates on the process of recovery of possession of the dwelling by local authorities. The housing authority may issue a warning to the tenant for breaches of the tenancy agreement the tenant or by family members, which may request a specified actions or to prevent a repetition of actions.¹⁰⁵ Grounds for warnings include anti-social behaviour, rent arrears, or other tenancy breaches.¹⁰⁶ Should the actions continue, the local authority may apply for a possession application to the District Court.¹⁰⁷ The possession application sets out *inter alia*, the grounds for application including the name of the person responsible for the breach, and prior issued tenancy warning of the person in the last five years.¹⁰⁸

No less than ten working days before the hearing by the District Court, the housing authority must give the tenant notice in writing stating: the authority's intention to make such an application, the information included in the application and the date upon which the local authority intends to make the application.¹⁰⁹ The Court takes into account *inter alia*: the steps taken by the housing authority to secure the cessation or non-repetition of the breach; any tenancy warnings and the impact on the quality of life of persons living in the locality of the dwelling.¹¹⁰ If satisfied, the Court will grant a possession order specifying the commencement period for recovery no less than two to nine months which has the effect of terminating the tenancy on the date the housing authority recovers possession of the dwelling in pursuance of the order.¹¹¹

¹⁰⁵ Housing (Miscellaneous Provisions) Act 2014, s 3 (HMPA 2014).

¹⁰⁶ Ibid, ss 7, 8, 9.

¹⁰⁷ Ibid, s 12(1).

¹⁰⁸ Ibid, s 12(4).

¹⁰⁹ Ibid, s 12(3).

¹¹⁰ Ibid, s 12(9).

¹¹¹ Ibid, s 12(10).

The Emergency Measures in the Public Interest (Covid- 19) Act 2020 enacts amendments to legislation relating to housing, healthcare, mental health etc. Though focusing on private sector tenants, as a result of the Housing (Miscellaneous Provisions) Act 2009 tenancy agreements, social housing sector tenancies fall under the protection of the Act. Part II of the Act which focuses on the operation of the Residential Tenancies Act 2004 provides increased protection during the emergency period for the three months after the enforcement of the Act and any future extensions under Section 4 of the Act.¹¹² Part II, Section 5 of the Act prohibits the landlord from evicting the tenant during the emergency period, and requires tenancy termination dates made before or during the emergency period to be revised until the emergency period has ceased.¹¹³

Section 6 of Part II prohibits rental increases during the emergency period and collection for increases for this period once the emergency period ceases. Section 8 states that where a tenant who is served a notice in accordance with the 2004 Act before the emergency period but has remained in the dwelling regardless of the landlord's consent until the commencement of the emergency period, is entitled to remain in occupation of the dwelling until the expiration of the emergency period. Furthermore, their tenancy is subject to the same terms and conditions in respect to tenancy unless required to vacate by an adjudicator under Section 97(4) or by Tribunal under Section 108 of the Residential Tenancies Act 2004.

As made clear by Section 8(2) the 'tenant shall not, by virtue of the operation of this Section acquire any rights under Part 4 of the Act of 2004 which relates to landlords evicting tenants due to anti-social behaviour.'¹¹⁴ Though the Act itself does not confer any rights to the tenant which would provide greater rental security, it does afford a period of protection during the pandemic without which the landlord could evict the tenant for being unable to meet rental costs.

¹¹² Emergency Measures in the Public Interest (Covid-19) Act 2020, Part II, s 3(1) (EMPIA 2020).

¹¹³ Ibid, s 5 sub-ss (3), (4).

¹¹⁴ Ibid, s 8(2).

For the rental sector at least, tenants are protected against rent increases during a time where they do not have the financial capacity to meet these requirements and would ordinarily be at risk of homelessness. As long as they can prove that they have lived in the tenancy for a period of more than four weeks, work full-time and have faced a reduction in income as a result of Covid-19 or are experiencing symptoms of COVID-19.¹¹⁵ As the emergency period of the pandemic has passed, the legislation is no longer operable.

There is no clear segregated data provided by the DEHLG which holds responsibility over housing policy. Given the impact of the 2009 Housing Act introducing the Rental Accommodation Scheme which involves both public and private providers, there is a blur in data as a result of integration of social housing with the private sector. Given this, the statistics in relation to repossessions have been collected from the Residential Tenancies Board and the Department on the Environment, Community and Local Government.

Table 28: Notices Received by the Residential Tenancies Board for Termination 2019-2022

Notices Received by the Residential Tenancies Board for Termination 2019-2022¹¹⁶			
Year	Total No. Terminations as a Result of Breach of Tenant Obligations	Total No. Terminations of a Part 4 Tenancy	Total No. Accommodation No Longer Meeting Tenant's Needs (Total Quarters)
2019	131	17	7
2020	348	62	33
2021	298	66	54
2022	249	50	109

¹¹⁵ Citizens Information, 'Rent Supplement' (n 115).

<https://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/supplementary_welfare_schemes/rent_supplement.html#> Accessed 25 November 2021.

¹¹⁶ Residential Tenancies Board, 'Notices of termination (NoTs) Received by the RTB Q2 2019-Q2 2022' <<https://www.rtb.ie/data-hub/notice-of-termination-received-by-rtb>> Accessed 12 May 2023.

Table 29: Local Authority Rent Arrears (Euros) 2008-2019

Local Authority Rent Arrears (€)	
2008-2019¹¹⁷	
Year	Amount (€) (Total Quarters)
2008	32,853,872
2009	41,095,760
2010	50,835,303
2011	53,317,556
2012	58,264,925
2013	61,627,248
2014	124,100,049
2015	130,628,351
2016	139,783,382
2017	145,966,227
2018	155,399,386
2019	166,071,811

5.3.1.1 *Discussing Security of Tenure in Ireland*

In relation to the security of tenure, as set out by Housing Act 1966, it can be discerned that two types of tenure are provided through the Act: being temporary and permanent tenures leased by the local authority. While similar to the types of tenure provided in the United Kingdom, through the 2009 Act, the nature of tenure differs. The impact of Residential Accommodation Availability Agreements changes the nature of tenancy agreements to follow a fixed or temporary basis. As the agreements are not provided by the local authority but rather registered social housing landlords, the security of tenure provided to social housing tenants begins to resemble the contractual nature of tenures provided in the private sector.

¹¹⁷ Gov.ie, 'Local Authority Rented Sector Activity' <<https://www.gov.ie/en/collection/35601-local-authority-rented-sector-activity/>> Accessed 12 May 2023.

The Rental Accommodation Scheme represents a radical reform in social housing benefit where the local authority will assume responsibility for procuring accommodation for Rent Supplement claims over 18 months or longer on a phased basis from 2005 and 2008, and will be supplied with local authority housing where possible.¹¹⁸ The rationale behind this scheme is to address long-term problems associated with claimants in a number of ways, for example: eliminating unemployment traps; expanding the amount of private rented accommodation for Rent Supplement claimants; and facilitate a wider social mix of dwellings with the Rental Accommodation Scheme.¹¹⁹

Furthermore, these tenancies are governed under the Residential Tenancies Act 2004. The process of repossessions follows the procedures set out under the Act for private sector accommodation. While the nature of tenure is modernised to reflect the position of the private sector being the key supplier of housing to meet demand,¹²⁰ the nature of tenancies becomes more complex. Rather than being a direct contract between the lessor (the local authority) and lessee (social housing tenant) the insertion of the housing provider creates an agreement of a triangular nature where the local authority becomes not only a facilitator but a 'middleman' in the access of accommodation. However, the local authority is at the side lines in regard to repossession as the registered social landlord determines whether to engage in a process of terminating rental accommodation availability agreements.

Furthermore, both the landlord and tenant are able to end rental tenancies in the first six months of the agreement.¹²¹ After those six months, the landlord is able to provide the tenants notice for ending the tenant for a variety of reasons such as intending to sell the dwelling, refurbishing or require it for their own or a family members use.¹²² With this in mind, though Rental Accommodation Availability Agreements modernise contracts to be flexible, there is a greater insecurity of tenure for tenants given the ease in which the landlord is able to back out of agreements even after the 6 month period.

¹¹⁸ Michelle Norris and Dermot Coates (n 56) 21.

¹¹⁹ Ibid, 22.

¹²⁰ National Economic and Social Council, 'Ireland's Rental Sector: Pathways to Secure Occupancy and Affordable Supply' No. 141 (May 2015) xii.

¹²¹ Ibid, 61.

¹²² Ibid.

The inclusion of different grounds for breaches for a tenancy agreement such as a failure to pay rental contributions and anti-social behaviour provides the registered provider greater means of being able repossess dwellings. Additionally, the imposition of a duty of the local authority to develop an anti-social behaviour strategy in tandem with Garda Síochána has been described as criminalising a section of society as only the social housing renters are subject to the sanctions of anti-social behaviour whereas occupiers and housing authorities face no liabilities.¹²³ The inclusions of a warning system can on the one hand, be thought of as a buffer between the tenant before a dwelling may be repossessed by opening a dialogue with the tenant and provider. However, where the tenant engages in anti-social behaviour, the warning system represents a practice of good estate management where the best interest of the tenant community is also taken into consideration and may bolster proceedings towards repossession.

Empirically, the lack of data from 2008 prevents a holistic examination of whether social housing tenants enjoying security of tenure.¹²⁴ As a result of the 2009 Act placing repossession procedures under the Residential Tenancy Act 2004, the statistics provided cover both private and Registered Social Landlords, making it difficult to provide a direct examination of security of tenure for social housing tenants. What can be determined though is that through the recession, local authorities experienced a growth in rent arrears. As a result, the recession and resulting austerity programmes has impacted social housing tenants' tenure as a result of job losses or reliance on benefits in order to meet rent and other housing costs. However, this point can only serve as an assumption given the lack of data surrounding evictions of social housing tenants from 2008 onwards.

What is of interest to note is the continual rise in rental arrears experienced by local authorities, which may suggest a continued reliance on social welfare by housing tenants being unable to pay rent due to finding employment, or a growth in the number of tenancies being unable to meet social rent set by the local authority. However, it is unclear whether many tenants dwelling were repossessed as a result of rent arrears.

¹²³ Padraic Kenna 'Housing (Miscellaneous Provisions) Act 2009 (n 87) 39.

¹²⁴ Helen Russel et al (n 4) 65

In relation to repossessions, the pandemic legislation provides protection for all tenants from evictions. However, there is a growth in termination notices through the pandemic period as a result of breaches of tenant obligations, or the registered provider deciding to end or refuse commencement of Rental Accommodation Availability Agreements. Though it is difficult to discern the number of breaches carried out by social housing tenants, the growth in ending rental accommodation availability agreements may be a result of a variety of factors such as registered providers wanting to use accommodation to self-isolate or provide for family members or are aware the tenant may be unable to pay their rental contribution. Though the number of terminations of rental accommodation availability agreements are smaller in comparison to breaches, it is unclear whether the dwellings were repossessed after a notice of termination was received by the Board during the pandemic period or after the emergency period elapsed.

5.3.2 Availability of Services

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Availability of Services	<ul style="list-style-type: none"> • Are an adequate level of services, materials and infrastructure provided for? 	<ul style="list-style-type: none"> • Number of and total public expenditures on housing reconstruction and rehabilitation by evicted/displaced persons during the reporting period. • Share of public expenditure on provision and maintenance of sanitation, water supply, electricity and other services of homes.

Availability of services under General Comment 3 sets out that in order for housing to be considered adequate, facilities such as sanitation and heating must be present.¹²⁵ Following the prior chapter, availability of services focuses on social housing stock. The rationale behind this interpretation of availability of services is that for social housing to be accessed, there must be sufficient social housing stock to begin with. Assessing availability of services provides an understanding of whether social housing stock helps to meet national housing needs in Ireland.

Under the Housing Act 1966, the housing authority may ‘erect, acquire, purchase, convert or reconstruct, lease or otherwise provide dwellings.’¹²⁶ Furthermore, the

¹²⁵ UNCESCR General Comment 4 (n 23) 5.

¹²⁶ HA 1966 (n 89) s 56(1).

housing authority may also maintain in good order or repair, shops playgrounds, sites schools etc. in connection with the requirements of the persons for who the dwellings are provided for.¹²⁷ The term housing authority includes both local authorities as well as Approved Housing Bodies as a result of the Housing (Miscellaneous Provisions) Act 1992 providing housing the same powers to housing authorities as local authorities.¹²⁸ Additionally, the housing authority has a duty to review the cost of their housing services at a period specified by the Minister.¹²⁹ The housing authority may also provide sites for building purposes on land acquired under the Act as well as for incidental development for schools, recreational areas, playgrounds etc.¹³⁰ Moreover, housing authorities may at the request of the Minister, every five years adopt a building programme stating the works they wish to carry out in their area, such as the provision of houses, ancillary works or services, buildings, repair works etc.¹³¹

With the consent of the Minister of Finance, the Minister may lend money to a person for the purpose of acquiring or constructing a house.¹³² Furthermore, the Minister may offer grants 'out of moneys provided by the Oireachtas, to a person providing one or more than one house in respect of a grant' of a specified amount in the Act.¹³³ There are further conditions for the grants such as the number of rooms, the installation of water and sewage facilities and whether the person is a utility society.¹³⁴ Further grants are made by the Minister for the erection of separate self-contained flats or maisonettes, housing for elderly persons and others in amounts as set out in the Act.¹³⁵

The Housing (Miscellaneous Provisions) Act 2009 expands upon the functions of local authorities in social housing provision. The 2009 Act permits the housing authority to provide a range of services such as social housing support, subsidies and loans for Traveller accommodation sites and maintenance on housing, homelessness services,

¹²⁷ Ibid, s 56(2).

¹²⁸ Housing (Miscellaneous Provisions) Act 1992, s 23 (HMPA 1992).

¹²⁹ HA 1966 (n 89) s 54.

¹³⁰ Ibid, ss 56(2), 57.

¹³¹ Ibid, s 55.

¹³² Ibid, s 39.

¹³³ Ibid, s 15 sub-ss (1), (2).

¹³⁴ Ibid, s 15 sub-ss (1)(a), (b).

¹³⁵ Ibid, ss 18(1), 21.

ancillary services and reconstruction of houses.¹³⁶ Moreover, in terms of the provision of social housing support, the housing authority - in accordance with the Housing Acts 1966 to 2009 - may provide, facilitate or manage the provision of social housing support such as sales of dwellings, entering and maintaining rental accommodation availability agreements and provision of sites for Traveller Communities and for building purposes.¹³⁷

The housing authority also has a further duty to develop a housing service plan which contains its development plan for its administrative areas, summaries of its social housing assessment, demands for affordable housing and homelessness action plan.¹³⁸ The plan must also include that its housing services are delivered in a manner which promotes sustainable communities and counteracts segregation in housing, ensuring there is a mixture of dwelling types, sizes and classes of tenure to match the housing support needs in the area.¹³⁹ Through the pandemic, there were no provisions of legislation which altered the Housing Acts 1966 and 2009 in relation to the availability of social housing.

¹³⁶ HMPA 2009 (n 97) s 10.

¹³⁷ *Ibid*, s 19.

¹³⁸ *Ibid*, s 15(1).

¹³⁹ *Ibid*, s 15(1) sub-ss (f)(i)-(ii).

Table 30: Local Authority Housing Vote Spend with Capital and Current Expenditure 2008-2020

Local Authority Housing Vote Spend in tandem with Capital and Current Expenditure 2008-2020.¹⁴⁰					
Year	Local Authority Housing Funding (€ k)	Total Housing Capital Expenditure (€k)	Total Current Expenditure (€k)	Total Housing Expenditure (€k/mns)	Total Expenditure (€bns)
2008	979,729	1,392,602	168,253	1,560,855	71.1
2009	690,563	1,073,352	209,989	1,283,341	76.3
2010	418,669	708,858	219,899	928,757	106.1
2011	189,164	390,929	238,798	629,727	79.9
2012	116,879	320,883	261,471	582,354	74.2
2013	83,270	230,817	272,458	734,092	72.4
2014	88,536	206,237	272,755	685,229	72.4
2015	131,486	255,699	276,378	787,776	76.4
2016	206,311	343,587	360,982	1,048,156	75.8
2017	396,447	588,987	534,743	1,712,717	78.2
2018	810,679	1,118,743	712,542	2,950,028	83.0
2019	955,745	1,317,123	872,511	3,506,757	87.1
2020	890,575	1,269,534	1,118,957	3,658,025	103.3

¹⁴⁰ House of the Oireachtas, 'Housing in Ireland: Trends in Spending and Outputs of Social and State Supported Housing 2001-2020, 42 (2020)<
https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2022/2022-03-02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housing-2001-2020_en.pdf>
 17;CSO, 'Government Income and Expenditure'<
[cso.ie/releaseandpublications/er/giea/governmnetincomeandexpenditurejuly2021](https://www.cso.ie/releaseandpublications/er/giea/governmnetincomeandexpenditurejuly2021)>
 > Accessed 31 January 202

Table 31: Sale of Local Authority Housing 2008-2020

Sale of Local Authority Housing 2008-2020¹⁴¹	
Year	No. Purchases
2008	35
2009	42
2010	4
2011	3
2012	4
2013	3
2014	-
2015	2
2016	9
2017	325
2018	388
2019	361
2020	214

Table 32: Total Local Authority Rented Stock 2008-2013

Total Local Authority Rented Stock 2008-2013¹⁴²				
Year	Rented Houses	Rented Flats/Maisonettes Others	Local Authority Output¹³⁹	Housing Association Output
2008	57,968	1,734	5,970	1,896
2009	58,080	3,436	4,089	2,011
2010	63,770	4,003	2,178	741
2011	65,488	4,153	810	745
2012	67,900	4,510	714	677
2013	68,333	4,522	-	-

¹⁴¹ Gov.ie, 'Other Local Authority Housing Scheme Statistics' <<https://www.gov.ie/en/collection/0906a-other-local-authority-housing-scheme-statistics/>> Accessed 13 May 2023.

¹⁴² Gov.ie 'Local Authority Rented Sector Activity' (n 116); Housing Agency, 'Local Authority Dwellings & Housing Association Dwellings built (1980-2012)' <<https://www.housingagency.ie/data-hub/housing-historical-data-0>> Accessed 12 May 2023

5.3.2.1 Discussing Availability of Services in Ireland

The Housing Act 1966 sets out that the local authority is the key provider of housing to meet demand, with direct access to government grants to finance the construction and acquirement of dwellings. However, there is a growing prominence and involvement of other actors such as Approved Housing Bodies in meeting housing demand aside the private sector. The 2009 Act in particular consolidates this fact by placing the local authority on the side lines in the construction and procurement of social housing by facilitating other bodies in meeting housing need.¹⁴³ By providing ancillary services, loans and assistance to Approved Housing Bodies, voluntary and private bodies through partnerships, the local authority is relegated to monitoring and facilitating housing demand.

The 2009 Act shifts the role of the local authority to one of facilitation in relation to social housing provision.¹⁴⁴ By focusing on the role of management of their administrative areas and providing ancillary services, Approved Housing Bodies take a greater prominence in the supply of social housing to tenants.¹⁴⁵ Furthermore, given that the local authority oversees the management of rental accommodation availability agreements under the Rental Accommodation Scheme, the separation between social sector and private sector housing becomes increasingly muddled, placing further reliance on the private sector to meet demand for social housing needs.¹⁴⁶ Though the local authority holds the duty to oversee and plan the development of their area, there is an increasingly larger role for the private sector in the realisation of these plans,¹⁴⁷ which has the effect of further severing the connection of the local authority with its role in the supply and maintenance of social housing.

¹⁴³ Padraic Kenna 'Housing (Miscellaneous Provisions) Act 2009' (n 89) 37.

¹⁴⁴ *Ibid*, 36-37.

¹⁴⁵ Mary Lee Rhodes and Gemma Donnelly-Cox, 'Hybridity and Social Entrepreneurship in Social Housing in Ireland' (2014) 25 *Voluntas* 1630, 1641.

¹⁴⁶ Michelle Norris and Tony Fahey, 'From Asset-Based Welfare to Welfare Housing? Changing Function of Social Housing in Ireland' (2011) 26(3) *Housing Studies* 459, 460.

¹⁴⁷ Lima Valesca, 'An Overview of the Housing Crisis in Dublin' (2018) 5(1) *Critical Housing Analysis* 1, 8.

Empirically, this process can be seen clearly as local authority output dwindles from 2008 to 2012 from 5,970 units to 714 units. The funding provided to local authorities also falls exponentially through the recession as the budget for social housing is cut, only to begin a gradual recovery in 2015. The budget nearly reached 2008 levels in 2021.¹⁴⁸

Furthermore, it can be seen that in tandem with the budget for social housing is cut, the total capital expenditure for housing also falls significantly throughout this period to rebuild 2015 onwards into the pandemic period. Contrastingly, the current account expenditure increases throughout the 2008-2020 period. With these figures in mind, it can be discerned that while capital expenditure in housing decreased, for example in relation to the construction and acquisition of units, current account expenditure increased in order to accommodate the growth in numbers accessing RS and RAS as well as HAP and homelessness services.

On the one hand, these figures indicate an increase in government spending in relation to the affordability of housing, which is discussed later in this chapter. On the other, when considered in the context of overall total housing expenditure which has decreased over the whole period until substantially increasing from 2018 onwards, these proportions have also dwindled. Furthermore, the overall budget demonstrates there is an overall decrease in expenditure until 2014 upon which expenditure begins to rebuild from 2015 onwards. Total housing expenditure forms a small proportion of overall expenditure and in tandem with cuts in overall budget expenditure. When considering this in the context of availability of services, the total construction of housing units has fallen in terms of local authority housing and represents a small growth in terms of the housing provided by Approved Housing Bodies.

The sale of local authority dwellings is also most prominent in 2008 and 2009 as well as in 2017 until 2020. In tandem, though housing authority provided housing increases exponentially during 2008 and 2009, its provision is heavily hit in 2010 onwards barely maintaining a stable provision.

¹⁴⁸ House of the Oireachtas 'Housing in Ireland: Trends in Spending' (n 140).

What can be gathered from these statistics overall is that during the austerity period, local authority supply dwindled and became heavily reliant on Approved Housing Body provision, which produces output in smaller numbers. The sale of local authority provided dwellings is significant from 2017 onwards, highlighting the success of purchase schemes which heavily contribute to the reduction in available social housing stock. As a result, public sector housing became far more reliant on the private sector to meet the housing need of social housing tenants. However, once entering recovery funding for social housing has rebuilt and has increased even during the pandemic period highlighting a turn away from policies which underfund local authorities.

Despite the shift in housing policy approach, exiting lockdowns highlighted the disparaging effects of years of cutbacks in the production of social housing as many persons facing evictions once the eviction ban was lifted were unable to access social housing.¹⁴⁹ From this perspective, austerity measures have cemented in a significant deterioration of social housing stock through the sale of existing stock and the side-lining of the local authority in meeting local needs.

¹⁴⁹ Brian Pelan, 'Comment: It's Time for Public Housing to be at the Top of the Agenda as Thousands Face Homelessness After Eviction Ban is Ended' *View Digital* (14 March 2023).

5.3.3 Accessibility

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Accessibility	<ul style="list-style-type: none"> • Are the housing measures accessible to disadvantaged groups? • Are the special housing needs of disadvantaged groups taken into consideration? • Do the measures directly or indirectly discriminate against these groups in accessing housing? 	<ul style="list-style-type: none"> • Disaggregated homelessness statistics from CSO and ONS on barriers to accessing housing by race, gender, disability and household type. • Proportion of specialised social housing bodies for persons with disabilities. • Number of specialised housing units for persons with disabilities. • Percentage of minorities and marginalised groups living within shelters and emergency accommodation.

Accessibility focuses on whether housing is accessible for vulnerable and marginalised groups such as disabled persons, poor households, the homeless etc.¹⁵⁰ Assessing accessibility sets out whether Ireland is meeting its minimum core content obligations

¹⁵⁰ UNCESCR General Comment 4 (n 23) 5-6.

in ensuring housing is accessible for vulnerable and marginalised groups. Both the Housing Act 1966 and Housing Act 1998 set out housing assessments in which the housing authority utilises to allocate housing in accordance with general need and for homeless persons. The Housing Act 1966 states the duty of the local authority to create a scheme determining the priorities to be accorded to categories of persons specified in the scheme in letting social housing dwellings.¹⁵¹

The Housing Act 1988 sets out the allocation criteria for homeless individuals. Homelessness is defined as a person(s) 'without accommodation they can reasonably occupy or remain in occupation, or is living in a hospital, country home, night shelter or any such institution as they have no accommodation to reside in.'¹⁵² Furthermore, the applicant is deemed by the local authority to be unable to provide accommodation from their own resources.¹⁵³ Further provisions in relation to homeless individuals refer to the housing authority making financial arrangements with approval of the Minister for accommodation or lodgings.¹⁵⁴

Furthermore, the 1988 Act introduces housing assessment to be conducted by the housing authority - as directed by the Minister - to assess the need for adequate and suitable accommodation from the housing authority for persons who are in need and unable to provide housing from their own resources.¹⁵⁵ These assessments include: considering the needs of homeless, as well as persons living in unfit or overcrowded accommodation, the elderly, disabled, young persons in institutional care, or persons unable to meet the cost of accommodation.¹⁵⁶ The housing authority may also include voluntary organisations or other organisations in the provision of accommodation, shelter or welfare.¹⁵⁷

¹⁵¹ HA 1966 (n 89) s 60(1).

¹⁵² Housing Act 1988, s 2 (HA 1988).

¹⁵³ Ibid.

¹⁵⁴ Ibid, s 10(1).

¹⁵⁵ Ibid, s 9(1).

¹⁵⁶ Ibid, s 9(2).

¹⁵⁷ Ibid, s 9 subs (4)(c).

The scheme shall also permits the housing authority to set aside a proportion of accommodation for categories of person to be let, provide emergency accommodation.¹⁵⁸ Additionally, the housing authority can disregard applicants who have 'deliberately or without good and sufficient reason done or failed to do anything' in occupying accommodation that is less suitable than what would be reasonably suitable for them to occupy.¹⁵⁹

The Housing (Miscellaneous Provision) Act 2009 introduces further changes to the Housing Act 1966 through adding further eligibility criteria to facilitate the housing authority to determine whether the household is qualified for such support as well as the most appropriate support for them.¹⁶⁰ The Minister may make regulations in regards to the eligibility criteria for social housing support, comprising of: income thresholds and the methodology to determine the income threshold; availability of alternative accommodation to access social housing need and social housing supports provided by the housing authority.¹⁶¹ Further regulations made to the procedures to receive housing support as well as the nature of housing support to be received by different categories of need.¹⁶² Households will not be deemed eligible for housing support if they have accrued 12 weeks or more in rent arrears in relation to other housing authority dwellings.¹⁶³

¹⁵⁸ Ibid, s 11(2)

¹⁵⁹ Ibid, s 11 subs (2)(b).

¹⁶⁰ HMPA 2009 (n 94) s 20(2).

¹⁶¹ Ibid.

¹⁶² Ibid, s 20 sub-ss (6), (7).

¹⁶³ Ibid, s 20(5).

In relation to homelessness, the housing authority will adopt a homelessness action plan pertaining to the measures to achieve the prevention and reduction of homelessness in its extent or duration, provision of services and assistance as well as co-ordination of activities to be taken by other bodies.¹⁶⁴ The plan shall also take into account any available information regarding the extent of need for services to address homelessness, cost of proposed measures and policies and objective of the Government and further Minister directions.¹⁶⁵ A Consultative Committee on homelessness may also provide information, views, advice or reports as to homelessness, provisions and modifications to draft homelessness actions plans.¹⁶⁶

In relation to marginalised groups the Housing (Traveller Accommodation) Act 1998 requires the housing authority to conduct housing assessments as to the housing needs of the Traveller Community and adopt and publish an accommodation programme required to address these housing needs.¹⁶⁷ The Act also appoints the National Traveller Accommodation Consultative Committee who may advise the Minister in relation to improving consultation and participation of Travellers in provision and management of accommodation and general matters in relation to the preparation, adequacy, implementation and co-ordination of Traveller accommodation programmes.¹⁶⁸

¹⁶⁴ Ibid, s 37.

¹⁶⁵ Ibid, s 37(3).

¹⁶⁶ Ibid, s 38(2).

¹⁶⁷ Housing (Traveller Accommodation) Act 1998, ss 6, 7, 9 (HTAA 1998).

¹⁶⁸ Ibid, s 19(2).

Table 33: Homelessness Statistics 2008-2020

Homelessness Statistics 2008-2020¹⁶⁹							
Year	Total Units Provided for Homelessness Prevention	Homelessness	Male/Female	Total Expenditure on Homelessness Prevention Services (€)	Homelessness Current Expenditure (€k)*	Total Expenditure (€bns)	Total Leases Offered
2008	-	-	-	-	53,235	71.1	-
2009	-	-	-	-	56,057	76.3	-
2010	-	-	-	-	54,703	106.1	-
2011	-	-	-	-	48,123	79.9	-
2012	-	-	-	-	46,546	74.2	-
2013	-	-	-	-	45,000	72.4	-
2014	1,955	2,858	1,173 (M) 695 (F)	64,315,566.69	49,206	72.4	-

2015	2,516	3,625	-	88,512,182.60	64,771	76.4	-
2016	3,079	3,885	2,329 (M) 1,556 (F)	125,866,293	88,676	75.8	-
2017	4,729	4,670	2,763 (M) 1,997 (F)	148,617,559	109,236	78.2	827
2018	5,135	5,837	3,375 (M) 2,462 (F)	178,029,032	139,000	83.0	1,001
2019	5,971	6,363	3,744 (M) 2,619 (F)	210,886,082	165,000	87.1	1,161
2020	5,886	6,697	4,067 (M) 2,630 (F)	241,733,509	270,900	103.3	1,440
2021	5,234	5,987	3,950 (M) 2,037 (F)	224,283,651	-	102.9	2,711

¹⁶⁹ Gov.ie, 'Homelessness data' <<https://www.gov.ie/en/collection/80ea8-homelessness-data/#homelessness-data>> Accessed 13 May 2023; CSO, 'Government Income and Expenditure' (n 140); Gov.ie, 'Other Local Authority Statistics' (n 141).

*These figures from ft 166 have been added together from various individual quarterly reports on estimated total spends from all local authorities in Ireland from years 2014-2021.

Table 34: Traveller Accommodation Data 2008-2021

Traveller Accommodation Data 2008-2021¹⁷⁰			
Year	Traveller Accommodation Sites assisted by Local Authority	On Unauthorised Sites	Private Houses and Voluntary Body Provision with Local Authority Assistance
2008	5,500	524	-
2009	5,617	422	610
2010	5,634	444	630
2011	5,922	327	626
2012	5,889	330	667
2013	5,935	361	308
2014	10,226	445	687
2015	9,997	534	649
2016	10,364	536	661
2017	6,819	585	753
2018	7,184	591	775
2019	7,267	529	900
2020	7,655	468	886
2021	8,094	487	9,754

¹⁷⁰ Ibid

5.3.3.1 Discussing Accessibility in Ireland

The assessment criteria for the allocation of social housing to tenants resembles the United Kingdom approach through allocating social housing to persons from overcrowded and inhabitable dwellings, elderly persons, persons suffering from medical illness etc. In particular, the focus on persons unable to acquire housing from their own resources reaffirms the policy approach of Ireland in providing social housing for persons who need it the most.¹⁷¹

In terms of its definition of homelessness, the inclusion of persons living in emergency accommodation presents a understanding of homelessness encompassing not only being not being able to afford housing and living on the streets, but also presiding in emergency accommodation and other institutions as a result of not having their own home to go to.¹⁷² Though there are no legislative provisions which emphasise an intentional element or residential connection which would impact support from the local authority – as seen in legislation in the United Kingdom in the prior chapter- policy practice by local authorities has involved an assessment whether the applicant has a local connection and if they are unintentionally or intentionally homelessness.¹⁷³

There is also legal recognition of the Traveller Community and their housing needs through the duty of local authorities to engage with the Committee and allocate sites for accommodation for Traveller families in their housing assessments. Empirically, in terms of the provision of Traveller sites, local authority provided sites have increased in small amounts over the recession period. However, upon economic recovery there is significant growth in 2015 where the number of sites almost doubles. Though the number of sites provided to the Traveller Community falls post 2016 there are gradual increments in amounts which are still higher than its provision in 2008.

¹⁷¹ UNCESCR Concluding Observations 2015 (n 7) para 27.

¹⁷² UNCESCR General Comment 4 (n 23) 5-6.

¹⁷³ Padraic Kenna 'Housing Law, Policy and Practice' (n 89) 88.

What can also be seen is that over time the private sector and voluntary bodies begin to provide sites for the Traveller Community incrementally, which exponentially rises in 2021 to become higher in amount than local authority provided sites. The increased provision of sites by both the local authority and private and voluntary bodies helps to explain why the number of Traveller families on sites remains somewhat low, only rising slightly during the period 2015 to 2018. However, these increases in private and voluntary sector allocations speak to a lack of funding being drawn by local authorities to meet the shelter needs of the Travelling community as many families are on sites.¹⁷⁴ Therefore, despite accessible funding, the needs of The Traveller Community are infrequently met by local authorities, creating a greater reliance on the voluntary and private sector. Even during the pandemic, despite the operation of national partnerships to assist the Traveller Community, many Traveller families lived in substandard and overcrowded conditions preventing their ability to self-isolate.¹⁷⁵

The introduction of the 2009 Act diversifies the role of the local authority in conducting their housing assessments to consider present and future housing needs as well as a series of measures of support to prevent and alleviate homelessness. The eligibility criteria focusing on income reinforces the approach that social housing shall only be available to persons deemed to need it the most, which siphons off the access to housing for households who are not well off, but also do not meet the criteria in order to access local authority provided housing. Though they may receive alternative supports in the form of financial assistance to access the private sector, there is no direct access to social housing.

Empirically, though there are not many statistics for the recession period, what can be seen is that current expenditure on homelessness services undergoes a series of rises and falls until 2016 where it rises steadily until 2020. The instability in current expenditure can be attributed to the volatility in current budget expenditure which also increase before substantially being cut until 2014.

¹⁷⁴ Kitty Holand, 'Only a Third of Traveller Housing Budget Spent' *The Irish Times* (22 August 2022).

¹⁷⁵ Jacopo Villani *et al*, 'A Community-Health Partnership Response to Mitigate the Impact of the Covid-19 Pandemic on Travellers and Roma in Ireland' (2021) 28(2) *Global Health Promotion* 46, 50; Noel Baker, 'Travellers Disproportionately Affected by Covid-19 Survey Finds' *Irish Examiner* (07 July 2021).

During economic recovery, what can be seen through economic recovery is the increased allocation on homeless prevention units to aid individuals to live independently as well as increased funding from economic recovery and through the pandemic to support homeless persons. While it can be assumed that the cutbacks in social housing stock as a result of austerity and neoliberal policies, created further reliance on the private sector,¹⁷⁶ there is a steady increase in expenditure in relation to homelessness prevention expenditure from 2014 onwards. This increment in expenditure aligns well with the overall budget expenditure which is also cut until 2015. Further research has highlighted the growing prominence of homelessness of families as a result of the lack of re-housing capacity by the local authority.¹⁷⁷ Additionally, changes in the Rent Supplement increases in thresholds and tenant contributions, there has been an increase in homelessness.¹⁷⁸

In Dublin alone, there was a fourfold increase of families living in alternative accommodation such as B&Bs from 271 families to 2,416 families from 2014 to 2017.¹⁷⁹ Through the pandemic period there was an increased allocation towards providing persons who are homeless or at risk of homelessness with accommodation. The amount of expenditure towards homelessness prevention also increased from 2015 onwards to meet the growing homelessness rates from 2014. What is of interest is to note is that the leases offered by local authorities in comparison to homelessness prevention units are miniscule in proportion.

¹⁷⁶ Valesca Lima, Rory Hearne and Mary P. Murphy, "Housing Financialisation and the Creation of Homelessness in Ireland" (2022) *Housing Studies* 1, 15.

¹⁷⁷ Focus, 'Out of Reach: The Impact of Changes in the Rent Supplement' (2012) 2.

¹⁷⁸ Focus, 'Comeback When You're Homeless: Preventing Family Homelessness through Assisting families to Stay in Their Homes or to Find Alternative Affordable Accommodation' (2015) 4.

¹⁷⁹ Rory Hearne and Mary Murphy, 'An Absence of Rights: Homeless Families and Social Housing Marketisation in Ireland' (2018) 66 *Administration* 9, 5.

The statistics highlight that in spite of incremental funding and units provided for homeless persons, there are still homeless people who have not been allocated accommodation. Therefore, the capacity of local authorities to meet housing demands of the homeless has reduced over the years as a result of austerity measures and political will. The pandemic response to the homeless emphasises this point, as in order to socially distance homeless persons, further emergency accommodation units and individual rooms were made available to homeless persons.¹⁸⁰ Therefore, accessibility of social housing and accommodation services for marginalised groups has largely been circumvented by legislation, policy and public expenditure cuts.

¹⁸⁰ Valesca Lima, 'The Impact of the Pandemic on Services Oriented Towards Single Homeless Persons' *Public Policy.IE* (08 April 2021)

5.3.4 Habitability

Assessment of the Doctrine of Non-Retrogression in relation to the Right to Housing: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Habitability	<ul style="list-style-type: none"> • Are housing measures providing habitable accommodations with adequate space and protection from cold, damp, heat, rain etc. 	<ul style="list-style-type: none"> • Proportion of population with sufficient living space (persons per room or rooms per household) or average number of persons per room among target households. • Proportion of households living in permanent structure in compliance with building codes and by-laws. • Proportion of households living in or near hazardous conditions.

Habitability focuses on whether social housing stock is free from damp, hazards and provides protection from the elements etc.¹⁸¹ Assessing habitability determines whether social housing tenants live in housing which is of a quality which does not detriment their health or living standards. The Housing Act 1966 sets out that the housing authority must make inspections of houses in their area every five years to ascertain the extent that houses are unfit or unsuitable for human habitation or overcrowded.¹⁸²

¹⁸¹ UNCESCR General Comment 4 (n 23) 5-6.

¹⁸² HA 1966 (n 89) s 53(1).

Furthermore, the housing authority shall have regard to the repair, closure or demolition of houses which are unfit in respect for human habitation and the elimination of overcrowding.¹⁸³ In relation to rented houses the housing authority may also make by-laws to ensure that the house has proper drainage, ventilation and lighting, water supplies, food storage and preparation, as well as repairs to maintain the structure of the home.¹⁸⁴

Furthermore, the Act defines overcrowded and unfit housing. Overcrowded housing is defined as where the air space in any room used as a sleeping apartment is less than four hundred cubic feet and where persons any two persons sleeping in the room are above ten years of age, members of the opposite sex and not husband and wife.¹⁸⁵ The housing authority may by written notice, require the owner or occupier of the house to provide information on the total number and dimension of rooms in a house, the purposes for each room and the number of persons occupying each room as well as the sanitary and cooking facilities available to each to the occupants.¹⁸⁶ Additionally, the housing authority may serve a notice to the owner of the house stating the maximum number of persons who can occupy a room-- which may include desisting from causing or permitting overcrowding- which if refused shall be convicted of a summary offence convicting of a fine or imprisonment at court discretion.¹⁸⁷

In determining whether housing is unfit for human habitation, the housing authority will take into consideration several factors in relation to housing, such as *inter alia* its stability, resistance to fire, safety of staircases and common passages, resistance to moisture, transmission to heat, infestation, sound, its water supply, sanitary arrangements and drainage, air space and ventilation etc.¹⁸⁸ Where housing is deemed unfit for habitation, the housing authority may serve a repairs notice to the owner specifying how the house is unfit for habitation, and the necessary works and costs to make the housing fit for habitation.¹⁸⁹

¹⁸³ Ibid, ss 60(3) sub-ss (a)-(b), 67.

¹⁸⁴ Ibid, s 70.

¹⁸⁵ Ibid, Part IV, s 63.

¹⁸⁶ Ibid, s 64.

¹⁸⁷ Ibid, s 65.

¹⁸⁸ Ibid, Second Schedule, ss 2, 66.

¹⁸⁹ Ibid, s 66 sub-ss (1), (3).

In this process both persons of interest and the owner engage in consultation with the housing authority as to the work needed to make the house fit for repair, in which the house will not be inhabited.¹⁹⁰ Where there is no undertaking of repairs to make the house fit for human habitation, the local authority may make a closing order prohibiting the use of a part of the house or as a whole, or provide notice to vacate the house in twenty-eight days, which after vacating will demolish the house and remove debris and erect a barrier to prevent entry onto the land.¹⁹¹ After providing a demolition order, the housing authority may also come to an agreement with the owner that the house will be used for purposes other than habitation.¹⁹² Refusals to demolition and closing orders will result in a summary offence resulting in a fine or imprisonment not exceeding one month.¹⁹³

During the pandemic, regulations were passed in regard to Approved Housing Bodies. Approved Housing Bodies had to risk assess repairs and carry out essential and emergency maintenance, postponing all other repairs, recording repairs not carried out to be resumed once their operational capacity resumes.¹⁹⁴ Risk assessments involved considering access and health and safety risks to staff and other occupants such as tenants.¹⁹⁵ Where works were to be completed, Approved Housing Bodies needed to carry out a review of all legal and compliance obligations to ensure a risk was not imposed to tenants.¹⁹⁶ Changes in delivery and service and policies were also required to be clearly established and communicated to key stakeholders such as tenants, staff and contractors.¹⁹⁷

¹⁹⁰ Ibid, s 66 sub-ss (4), (5).

¹⁹¹ Ibid, s 66(6).

¹⁹² Ibid, s 66(8).

¹⁹³ Ibid, s 68.

¹⁹⁴ Housing Agency Regulation Office, 'Six Key Areas for Consideration for AHBs During the Current Pandemic' (2020)

<https://www.housingagency.ie/sites/default/files/Regulation/AHB%20Regulation%20Overview/20.03.2_AHB%20Key%20Considerations%20March%202020.pdf> 4.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

Table 35: Repair and Leasing Scheme on Vacant Stock 2017-2022

Repair and Leasing Scheme on Vacant Stock 2017-2022¹⁹⁸		
Year	Dwellings Delivered	Total Capital Spend (€)
2017	9	196,385
2018	80	1,613,107
2019	76	1,837,121
2020	69	2,425,282
2021	45	2,875,849
2022	101	8,229,134

5.3.4.1 Discussing Habitability in Ireland

Normatively, the legislation for determining whether social housing is habitable is impressive as it defines both the meaning of overcrowding and uninhabitable housing. Furthermore, the powers held by local authorities to not only conduct repairs but serve notices to owners of properties to either desist from overcrowding or conduct repairs, further emphasises the role of the local authority in monitoring the quality of housing.

Moreover, in relation to demolition notices, the opportunity for dialogue between key owners and tenants and local authorities highlights a process which on the surface takes into account tenants accommodation needs, concerns and grievances. Even through the pandemic the risk-based assessment approach in carrying out repairs, prioritise public health while ensuring that emergency repairs are carried out in a manner that prevents harm towards staff and tenants.

Empirically, there is a lack of data such as the number of uninhabitable housing units which have been demolished. This prevents a complete analysis of whether the legislation is effective in ensuring that social housing meets the legislative requirements.

¹⁹⁸ Gov.ie, 'Other Local Authority Statistics' (n 141)

As a result, the habitability of social housing in Ireland comes into question with regards to the local authority and registered providers ability to conduct repairs or refurbish existing social housing stock. As highlighted by Social Justice Ireland, 115,667 households were in need of sustainable social housing in 2017.¹⁹⁹

The significant need for sustainable social housing speaks volumes as to the quality of existing social housing stock both in the public and private sector. Though the repair and leasing scheme ended in 2022,²⁰⁰ the limited extent of the scheme fall shorts on meeting requirements for habitable social housing. Residents in social housing in cities such as Dublin, Limerick and Cork face dire housing conditions such as damp and mould,²⁰¹ only highlighting the lack of Government efforts in addressing the habitability of social housing.

¹⁹⁹ Social Justice Ireland, 'Public Housing Provision-Cost Rental as an Affordable, Sustainable Solution' <<https://www.socialjustice.ie/content/policy-issues/public-housing-provision-cost-rental-affordable-sustainable-solution>>.

²⁰⁰ Gov.ie, 'Other Local Authority Statistics' (n 137).

²⁰¹ Kitty Holland, "Poor Council Housing: 'It's like Angel's Ashes in here sometime" *The Irish Times* (11 March 2021).

5.3.5 Affordability and Social Housing Welfare

Assessment of the Doctrine of Non-Retrogression In relation to the Right to Housing and Social Security: The Backwardness of the Measure		
General Comment 4 Adequacy Components	Is the Measure Normatively Retrogressive?	Is the Measure Empirically Retrogressive?
Affordability	<ul style="list-style-type: none"> • Is housing affordable, in the sense that housing costs do not compromise other basic needs? 	<ul style="list-style-type: none"> • Proportion of households that receive public housing assistance, including those living in subsidised rental and subsidised owner-occupied housing.
Retrogressive criteria under General Comment 19	<ul style="list-style-type: none"> • There was reasonable justification for the action. • Alternatives were comprehensively examined. • There was genuine participation of affected groups in examining the proposed measures and alternatives. • The measures were directly or indirectly discriminatory. • The measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security 	<ul style="list-style-type: none"> • Public expenditures for targeted social assistance schemes in relation to access housing. • Proportion of requests for social assistance i.e., income transfer, subsidised housing reviewed and met. • Averages of weekly social rents. • Proportion of population at risk of poverty. (SILC data and ONS data on median income line, if possible

	<p>rights or whether an individual or group is deprived of access to the minimum essential level of social security; and</p> <ul style="list-style-type: none"> • Whether there was an independent review of the measures at the national level. 	<p>disaggregated data on gender, family type, race, disability).</p>
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As mentioned in the previous chapter, there is a dissonance in the understanding of affordability in a human rights and social housing context. The Committee on Economic, Social and Cultural Rights in General Comment 4 considers affordability of housing to refer to where housing costs do not compromise other income of persons to afford other household costs such as food.²⁰² Further definitions are provided by the OECD as being where households do not spend more than 30% of their gross income on housing costs.²⁰³ Affordability of housing can also be interpreted to refer to ‘a diversity of housing tenures... provided for those on low or moderate incomes offered at sub-market rents or prices.’²⁰⁴

Legislation in Ireland relating to the development of housing in the social housing context and available subsidies are examined in this section. The affordability element of housing includes that the State Party shall ‘establish housing subsidies for those unable to afford housing, as well as forms and levels of housing finance which adequately reflect housing needs.’²⁰⁵ The lack of expansion on the requirements of housing subsidies requires incorporation of the retrogressive requirements as found in General Comment 19.

Before examining the Housing Act (Miscellaneous Provisions) Act 2009 which introduces

²⁰² UNCESCR General Comment 4 (n 23) 5-6.

²⁰³ OECD, ‘Affordable Housing Database:HC1.5 Overview of Affordable Housing Indicators’ <http://oe.cd/ahd> Accessed 05 February 2024, 5; Helen Russel et al (n 2) 77.

²⁰⁴ Nicole Gurrán and Christine Whitehead, ‘Planning and Affordable Housing in Australia and the UK: A Comparative Perspective’ (2011) 26(7-8) Housing Studies 1193, 1196.

²⁰⁵ UNCESCR General comment 4 (n 23) 5.

a variety of purchasing schemes, it is essential to briefly note the impact of Planning and Development Acts taking place before 2008. The Planning and Development Act 2000 made the community need for social and affordable housing a key planning consideration. The Act placed a responsibility on local authorities to develop housing strategies which have regard to: assessments of housing need as found under the Housing Act 1998; existing and likely future need of housing; the availability of housing for different income levels; mixture of housing types; and need to counteract housing segregation of persons with different backgrounds.²⁰⁶

The housing authority shall provide an estimate of housing for persons in need of housing and for affordable housing.²⁰⁷ As a result, the Act provides that in relation to the development of land, 20 percent of the land zoned for residential purposes shall be reserved for the provision for social and affordable housing.²⁰⁸ The effect of the legislation provides for a somewhat stable supply of social and affordable housing in private sector development, however was met with resistance by developers.²⁰⁹ As a result, the Planning and Development (Amendment) Act 2002 allowed a developer to transfer other land and sites to local authorities rather than land zoned for development.²¹⁰

The effect of the 2002 amendment serves to highlight how the needs of the community for social and affordable housing were overlooked or rather prioritised under private sector planning developers. While some form of land is transferred to housing authorities for the purpose of meeting social and affordable requirements, the adequacy of the land allocated in terms of space, quality and terrain may not provide an adequate foundation upon which social and affordable housing can be built, which in turn affects its affordability as a result of increased costs undertaken by the housing authority to carry out works to ensure that the housing produced is adequate.

²⁰⁶ Planning and Development Act 2000 s 94 sub-ss (1), (3); Padraic Kenna 'Housing Law, Policy and Practice' (n 84) 99.

²⁰⁷ Ibid, s 94(a).

²⁰⁸ Ibid, s 94 (c).

²⁰⁹ Padraic Kenna 'Housing Law, Policy and Practice' (n 86) 99-100.

²¹⁰ The amendment can also be found in the Planning and Development Act 2000 s 96(3)(iii).

The Housing Act 1966 permits the housing authority to sell or lease a dwelling to a tenant, or an unoccupied dwelling to any person.²¹¹ The Housing (Miscellaneous Provisions) Act 2009 introduces new schemes for the purchase of social housing. One such scheme is incremental purchase which permits a housing body or Approved Housing Bodies to sell housing to eligible households by means of a transfer order.²¹² The price of the housing is an amount equal to a percentage of market value.²¹³ Sales will not be carried out where tenants have breached terms of their tenancy or have engaged in anti-social behaviour.²¹⁴ Though this scheme excludes apartments, the housing authority under a separate scheme may also sell apartments complexes to tenants provided the apartments are consistent in good estate management in accordance with policy objectives and must have a tenant plebiscite in which 65 percent of tenants wishing to act as management directors of the apartment complex.²¹⁵

Additionally, the 'Affordable Dwelling Purchase Agreements' are also established under the Act where the housing authority may enter into agreements with an eligible household at an amount equivalent to a percentage of market value depending on the households current housing circumstances.²¹⁶ To procure the dwellings the housing authority may also enter into agreements with Approved Housing Bodies or private partnerships which may be subsidised via grant by the Minister with the consent of the Minister of Finance.²¹⁷

²¹¹ HA 1966 (n 89) s 90.

²¹² HMPA 2009 (n 97) s 45(1).

²¹³ Ibid, ss 2, 48(5).

²¹⁴ Ibid.

²¹⁵ Ibid, Part 4, ss 51-55.

²¹⁶ Ibid, ss 83, 84(2), 90.

²¹⁷ Ibid, ss 79.

²¹⁸ HMPA 2014 (n 105) s 39.

In relation to social housing welfare, aside from the Rent Supplement, the Housing (Miscellaneous Provisions) Act 2014 introduces the Housing Assistance Payment (HAP) whereby the housing authority may provide financial assistance to a qualified household in accessing a dwelling provided the dwelling and landlord meet the requirements as set out by prior Housing Acts.²¹⁸ If satisfied, the local authority pays the private landlord and in turn HAP tenants pay the local authority their rent contribution.²¹⁹ Eligibility is further determined by the local authority and the rent is based on the differential rent scheme of the local authority.²²⁰ The HAP has a range of benefits to recipients such as permitting households to work while receiving the benefit, regulate private sector rent and accommodation and transfer to different accommodation with the help of the local authority.²²¹ The eligibility criteria for the HAP is open to all households, including Rent Supplement recipients, as long as they are not housed by a local authority.²²²

While there is no outright provision in The Emergency Measures in the Public Interest (Covid-19) Act 2020 which maintains housing must be affordable, Part II of the 2020 Act prohibits rental increases during the emergency period and collection for increases for this period once the emergency period ceases. The Pandemic Unemployment Payment (PUP) offered a flat rate of €350 per week to those who lost their jobs because of the lockdown or are waiting to return to work.²²³ While on the one hand, through the pandemic we see a shift in Government policies to provide a greater safety net to individuals who have lost their jobs, the tapering off of the PUP and installing a means-based test after three months of the pandemic demonstrated a return to work activation policies, where those on lower incomes under €300 per week received €250 per week to encourage them to return to employment.²²⁴

²¹⁹ 'How Does HAP Work? | Housing Assistance Payment' <<http://hap.ie/howhapworks/>> Accessed 25 November 2021.

²²⁰ Ibid.

²²¹ Ibid.

²²² 'What Is HAP? | Housing Assistance Payment' <<http://hap.ie/whatislap/>> Accessed 25 November 2021.

²²³ Department of Employment Affairs and Social Protection, 'COVID-19 Pandemic Unemployment Payment' (2020). <[https://www.gov.ie/en/service/be74d3-covid-19-pandemic-unemployment-payment/#:~:text=The%20COVID%2D19%20Pandemic%20Unemployment%20Payment%20\(PUP\)%20is%20open,details%20about%20your%20payment%20here.](https://www.gov.ie/en/service/be74d3-covid-19-pandemic-unemployment-payment/#:~:text=The%20COVID%2D19%20Pandemic%20Unemployment%20Payment%20(PUP)%20is%20open,details%20about%20your%20payment%20here.)>

²²⁴ Ibid.

Alongside the PUP, the Rent Supplement has also been amended to provide benefits to survivors of domestic violence for a period of three months without a means-based test, as well as tenants unable to pay private rents as per Part II of the Emergency Measures in the Public Interest (Covid-19) Act 2020. As long as they can prove that they have lived in the tenancy for a period of more than four weeks, work full-time and have faced a reduction in income as a result of Covid 19 or are experiencing symptoms of COVID 19.²²⁵

The Affordable Housing Act 2021 amends the Housing Acts 1966 to 2014 through aiding housing authorities' ability to sell dwellings under the affordable housing scheme. The housing authority must make a scheme of priority in which it may sell dwellings to eligible households for affordable and open market dwelling.²²⁶ Eligibility is determined through the combined income of the household and if they have any interests in prior properties.²²⁷ Additionally, the housing authority is able to provide financial assistance to eligible households purchasing an affordable dwellings through contributions that are the difference between market rent and the price paid by the applicant.²²⁸

The 2021 Act expands the number of persons the housing authority may create arrangements with in the procurement or construction of affordable housing units, such as the Land Development Agency and Community-based organisations.²²⁹ The Minister of Local Housing, Government and Heritage may also, with the consent of the Minister of Finance, provide a grant to housing authorities or other bodies for such purposes.²³⁰ The housing authority may also enter into direct sales agreements with developers as under the Part V of the Planning and Development Act 2000 to directly sell dwelling to eligible applicants.²³¹

²²⁵ Citizens Information 'Rent Supplement' (n 112). These criteria for benefits are no longer operational given the passing of the emergency period since exiting lockdowns,

²²⁶ Affordable Housing Act 2021, s 11 (AHA 2011).

²²⁷ Ibid, s 2.

²²⁸ Ibid, s 12.

²²⁹ Ibid, s 6(2).

²³⁰ Ibid, s 6(4).

²³¹ Ibid, s 7.

The introduction of the Affordable Housing Act 2021 increases the number of actors in housing construction, providing a greater means of financing for the housing authority in the acquirement of land and selling of dwellings. The effect of having direct sales agreements helps to further streamline the process of sale to eligible households as one person such as a private entity or Approved Housing Body sells directly to eligible households.²³² However, it could be argued that having a direct sales developer to sell to applicants places the housing authority on the side lines even in the sale of dwellings, similar to how the local authority facilitates the production and sale of its dwellings.

The eligibility criteria while focusing on the income of a household, reaffirms the aim that social housing, or rather that affordable housing is only available to persons who need it the most. The effect of such legislation siphons off affordable housing to a particular category of persons, which when focused on the poor groups is encouraging. However, a point which can be drawn is difference between the dichotomy of affordability from a human rights-based perspective, where housing should not compromise the income of households so that they cannot afford other basic costs,²³³ and through a social policy context where 'affordability is based on your income.' This is a point that holds importance, especially for groups of persons who are deemed ineligible for affordable dwelling purchases but may have inadequate access to resources to be able to afford private sector housing.

²³² Ibid, s 6(2).

²³³ UNCESCR, General Comment 4 (n 23) 5.

Table 36: Housing Assistance Payment (HAP), Rental Accommodation Scheme (RAS) and Rent Supplement (RS) Statistics 2008-2021

Housing Assistance Payment (HAP), Rental Accommodation Scheme (RAS) And Rent Supplement (RS) Statistics²³⁴							
Year	HAP Expenditure (€k)	Active HAP Tenancies	RAS Expenditure (€k)	RAS Tenancies	Total RS Expenditure (€k)	Total Social Protection Expenditure (€ mns)	Total Expenditure (€bns)
2008	-	-	53,025	-	2,001,639	17,809	71.1
2009	-	-	83,394	-	1,794,092	20,536	76.3
2010	-	-	100,076	-	1,445,618	20,850	106.1
2011	-	-	115,917	16,815	1,132,475	20,970	79.9
2012	-	-	125,430	17,386	1,004,890	20,776	74.2
2013	63	-	130,887	20,173	876, 184	20,247	72.4
2014	394	485	133,513	20,473	817,339	19,785	72.4
2015	15,644	6,165	122,789	20,834	843,136	19,905	76.4
2016	57,700	16,493	130,998	20,306	979,859	19,802	75.8
2017	152,697	17,916	142, 838	19,756	1,354,300	19,942	78.2
2018	276,604	2,287	143,337	18,916	2,006,305	30,312	83.0
2019	382,408	52,529	134,290	18,154	2,314,864	20,759	87.1
2020	464,649	59,821	132,964	17,682	2,521,581	30,448	103.3
2021	504,152	61,907	121,995	17,183	29,33,775	30,274	102.9

²³⁴ Gov.ie, 'Other Local Authority Statistics' (n 137); Housing Agency, 'Housing Trends:2001-2020' (n 140); Department of Social Protection, 'Statistical Information on Social Welfare Services: Annual Report 2022' (2022) 12; Department of Social Protection, 'Statistical information on Social Welfare Services 2013' (2013) 12

Table 37: Poverty Rates 2008-2021

Poverty Rates 2008-2021²³⁵			
Year	At Risk of Poverty Rate (%)	Deprivation Rate (%)	Consistent Poverty Rate (%)
2008	14.4	13.8	4.2
2009	14.1	17.1	5.5
2010	14.7	22.6	6.3
2011	16.0	24.5	6.9
2012	17.3	26.9	8.5
2013	16.5	30.5	9.1
2014	17.2	29.0	8.8
2015	16.9	25.5	8.7
2016	16.2	21.0	8.2
2017	15.7	18.8	6.7
2018	14.0	15.1	5.6
2019	12.8	17.8	5.5
2020	13.2	14.3	4.7
2021	11.6	13.8	4.0

Table 38: Pandemic Unemployment Payment (PUP) Statistics 2020-2022

Pandemic Unemployment Payment (PUP) Statistics 2020-2022²³⁶				
Year	No. Recipients	Expenditure on Male recipients (€mns)	Expenditure on Female Recipients (€mns)	Total expenditure (€mns)
2020	796,946	2,736.1	2,324.2	5,060.3
2021	572,269	2,225.2	1,751.3	3,976.5
2022	87,595	118.4	80.7	199.2

²³⁵ Central Statistics Office, 'Survey on Income and Living Conditions (SILC)' <<https://www.cso.ie/en/statistics/socialconditions/surveyonincomeandlivingconditionssilc/>>Access ed 14 May 2023.

²³⁶ Department of Social Protection, 'The Pandemic Unemployment Payment in Numbers' 15, 24.

5.3.5.1 Discussing Affordability and Social Housing Welfare in Ireland

In relation to the affordability of housing, the 2009 Act has provided a transformative role in increasing the financing avenues for local authorities a variety of different actors. Furthermore, the Act provides a range of different schemes for the sale of housing for tenants at a percentage of market rent. In addition, Part V of the Planning Development Acts 2000 to 2006 passed the cost burden of social housing construction onto those who purchased new properties as 20 percent of new developments were expected to be set aside for social and affordable requirements. Therefore, it can be inferred that the costs of constructing new social housing became seriously limited as often local authorities and Approved Housing Bodies are unable to pass on the high costs of construction onto social welfare tenants.

As a result, these series of Acts favoured private construction and the private housing market to provide supply for the social housing sector as well, which has severely stunted social housing stock.²³⁸ The 2021 Act furthers the sale of housing at discounted rates, however, places eligibility criteria on the conditions for sale such as the income of the social housing tenant. Therefore, as prior mentioned, the purchasing criteria creates a barrier to access of affordable housing for households that do not meet the criteria. Furthermore, the improved access to sale for tenants encourages build to purchase schemes, which meets demand though reduces available social housing stock. During the pandemic, while there was a prevention of rise in rental prices, there is little other legislation of relevance bar from the plethora of welfare schemes such as the PUP and Temporary Wage Subsidy Scheme.

Empirically, the main two housing benefits accessible to welfare recipients were the RS and RAS. As can be seen the expenditure on the RAS increases until 2014, before undergoing a series rises and falls until 2021. In tandem, the number of the RAS tenancies increases from 2011 to 2016 before falling in number until 2021. The RS expenditure decreases in expenditure until 2016 before rising significantly in amount from 2016 onwards.

²³⁷ Emma Heffernan *et al* (n 78) 137.

²³⁸ *Ibid*, 138

These decreases in expenditures for RS can be attributed to the introduction of RAS in 2009 and in tandem the fall in expenditure amount and number of the RAS can be attributed to the introduction of the HAP in 2014. From 2013 onwards there is a significant increase in the expenditure for the HAP until 2021 in tandem with the number of tenancies. In relation to overall social protection expenditure, housing benefits forms a smaller proportion of expenditure.

However, it is noted that overall social protection expenditure increases in amount from 2008 until 2013, where there is a minor fall. After which expenditure largely re-builds until 2021. In relation to overall public expenditure which undergoes a series of cuts from 2008 until 2015, social protection expenditure has an inverse relationship. However, it is important to note that despite these increases in expenditure both for housing benefits and overall social protection spending, these spends form a small part of the overall budget expenditure.

However, from poverty rates it can be observed that at risk of poverty rates were on the increase until 2016, alongside deprivation rates and consistent poverty rates. Therefore, it can be discerned that the austerity regime carried out by the Fianna Fáil-Green and Fine Gael-Labour coalitions had a lasting impact on the living standards of the population despite increments in housing and social protection expenditure. While these rates do go down from the 2015/16 period, through the pandemic period all these rates gradually decrease before spiking slightly in response to the pandemic and lockdowns where many persons lost their employment.

Rory Hearne and Mary Murphy note that the HAP alongside the Rent Supplement and RAS has further consolidated the marketisation of social housing to be reliant on the private housing sector, which is unlikely to provide a long-term housing solution.²³⁹ Furthermore, it has been suggested that the introduction of HAP has only served to further fuel rental prices.²⁴⁰

²³⁹ Rory Hearne and Mary Murphy (n 179) 9.

²⁴⁰ Umfreville and Sirr (n 77) 219.

Similar to both the Rent Supplement and RAS, private landlords have been reluctant to accept HAP tenancies given the greater regulation of housing standards and tax compliance by the local authority.²⁴¹ This becomes more apparent as Part IV; Section 35 of the Private Rental Tenancies Act allows private landlords to end tenancies for reasons such as selling the property or requiring the accommodation for a family member.²⁴² This Section places welfare tenants and private rental tenant in an unstable position where their own rental tenancies could end at any point and places both individuals and families at risk of poverty.

As noted by Corrigan and Watson through an Economic and Social Research Institute (ESRI) report in 2019, the overall social housing landscape for households or individuals with inadequate resources such as savings and credit are divided amongst short term and long-term need.²⁴³ Those ineligible for social housing but have a short term need are allocated the Rent Supplement in the private rental sector, whereas households with long-term need are either provided with the HAP to rent in the private sector or are provided local authority or Approved Housing Bodies, though where social is housing is limited, they may have to resort to other means of accommodations such as sharing accommodation, couch surfing or homelessness.²⁴⁴

What becomes essential to note here is that despite the Rent Supplement, RAS and HAP addressing a large proportion of housing need for those with inadequate resources to access housing, there is a policy failure for the following reasons. First, those who do not meet the eligibility criteria for social housing, nor able to access private housing with the HAP have to accept lesser circumstances or even homelessness in order to access shelter either through their own capabilities and ingenuity or through charitable assistance. Second, it becomes clearer that the impact of austerity measures has created a fallacy in which the current housing system is heralded despite 6,906 individuals sleeping rough or in alternative accommodation as of the 2016 Census.²⁴⁵

²⁴¹ Michelle Norris and Dermot Coates (n 56) 21.

²⁴² Rory Hearne and Mary Murphy (n 179) 13.

²⁴³ Eoin Corrigan and Dorothy Watson, 'Social Housing in the Irish Housing Market' (ESRI Working Paper 2018) See diagram on 214.

²⁴⁴ Ibid.

²⁴⁵ Ibid; 'Homeless Persons in Ireland - CSO - Central Statistics Office' <<https://www.cso.ie/en/releasesandpublications/ep/p-cp5hpi/cp5hpi/hpi/>> accessed 25 November 2021.

Alongside the HAP, there have been variations of the scheme such as Homeless HAP in Dublin, where homeless families are able to access higher rates of subsidies than on HAP.²⁴⁶ As a response to this emergency accommodation hubs for families were developed by the Irish Government, which have accommodated 437 families in 2017.²⁴⁷ While these policy decisions not only relieve the pressure of the private rental sector in providing housing for both social and private sector tenants, it also allows for greater family security in these hubs as they are designed with the needs of a family in mind. However, concerns have been noted in relation to families receiving the HAP, such as the inability to compete for accommodation in the private sector and the insecurity of tenure in private sector accommodation.²⁴⁸ In terms of Homeless HAP, there are concerns relating to family hub conditions as living behaviour is monitored, visitors are not permitted and absence from the hub is limited to three days which prevents families being able to live a normal family life.²⁴⁹

The ESRI estimated that pandemic conditions would result in an unemployment scenario of 600,000 job losses and a 20 percent in disposable incomes in families.²⁵⁰ The PUP offered a flat rate of 350 euro a week to those who lost their jobs because of the lockdown or are waiting to return to work.²⁵¹ The ESRI posits that the introduction of the PUP scheme has reduced the number of those exposed to extreme financial losses by one third, while the Temporary Wage Subsidy Scheme had a minimal effect due to its lack of generosity to low-income earners.²⁵²

²⁴⁶ Rory Hearne and Mary Murphy (n 179) 14.

²⁴⁷ *Ibid*, 15.

²⁴⁸ *Ibid*, 19.

²⁴⁹ *Ibid*, 21.

²⁵⁰ Keelan Beirne *et al*, 'The Potential Costs and Distributional Effect of COVID-19 Related Unemployment in Ireland' (Budget Perspectives 2020) 6.

²⁵¹ Department of Employment Affairs and Social Protection, 'COVID-19 Pandemic Unemployment Payment' (2020). Available at: [https://www.gov.ie/en/service/be74d3-covid-19-pandemic-unemployment-payment/#:~:text=The%20COVID%2D19%20Pandemic%20Unemployment%20Payment%20\(PUP\)%20is%20open,details%20about%20your%20payment%20here](https://www.gov.ie/en/service/be74d3-covid-19-pandemic-unemployment-payment/#:~:text=The%20COVID%2D19%20Pandemic%20Unemployment%20Payment%20(PUP)%20is%20open,details%20about%20your%20payment%20here).

²⁵² Keelan Beirne *et al* (n 250) 6.

Empirically, the initial expenditure and recipients of PUP is largest in 2020 and begins to reduce upon exiting the pandemic recovery. What is of interest is to note the uneven expenditure on the PUP between male and female recipients, which may suggest an uneven uptake of the benefit between male and female recipients. The charity Focus has noted that due to the generosity of the PUP alongside the moratorium on rental evictions, there were reduced flows of homelessness as a result of the pandemic.²⁵³ On the one hand, through the pandemic we see a shift in Government policies to provide a greater safety net to individuals who have lost their jobs. On the other hand, the tapering off of PUP and installing a means- based test after three months of the pandemic demonstrated a return to work activation policies, where those on lower incomes under €300 per week received €250 per week to encourage them to return to employment.²⁵⁴

The tapering the amount of benefit reduced the burden of cost to the Government given the flooding in of applicants for PUP. In 2021, the Fianna Fáil-Fine Gael- Green Party Government introduced a €3.6 billion budget to boost the economy through cutting back PUP payments and introducing 50,000 training positions in digital and green jobs, stating that doing so was the opposite of austerity measures.²⁵⁵ While time will tell if these measures under the current budget are the opposite of austerity measures imposed after the economic crisis, there has already been controversy over Government policies in terms of PUP and Temporary Wage Subsidy Scheme.

Due to amendments made by the Government under Section 3 of the Finance Act 2020, the PUP is taxable in real time over 4 years,²⁵⁶ placing the burden on the welfare recipient to pay back. Though non-austerity-based recovery is promoted by the Government, it still can be seen that tactics of placing the economic burden on the population used during the 2008 crisis have been reutilised in relation to the pandemic recovery.

²⁵³ Mike Allen, Emma Byrne, Focus Ireland, 'The Winter Eviction Ban and Homelessness' <<https://www.focusireland.ie/focus-blog/has-the-eviction-ban-failed/>>.

²⁵⁴ Gov.ie, 'Minister Humphreys announces €2.3 billion euro expenditure on income and employment as part of July Stimulus Package' <<https://www.gov.ie/en/press-release/cbee8-minister-humphreys-announces-23-billion-expenditure-on-income-and-employment-supports-as-part-of-the-july-stimulus-package/>> Accessed 23 May 2023.

²⁵⁵ Jack Horgan- Jones, Cliff Taylor, and Pat Leahy, 'Economic Recovery Plan "the Opposite of Austerity"', Says Taoiseach' *The Irish Times* (1 June 2021).

²⁵⁶ Citizens Information, 'COVID-19 Pandemic Unemployment Payment (PUP)' <https://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/unemployed_people/covid19_pandemic_unemployment_payment.html> Accessed 25 November 2021.

This is concerning given the economic hardship imposed on individuals and domestic companies alike who have only just survived and entered some form of recovery from the lockdown.²⁵⁷

5.4 Conclusion

From the qualitative review of social housing and welfare debates, Ireland's justifications for the use of austerity measures can be viewed as deliberately retrogressive, given the prioritisation of reducing the budget deficits and encouraging private sector growth. However, the shift to the Fine Gael and Labour Coalition in 2011 changed the nature of deliberateness to be one of imposition of the legacy of an austerity regime as set out by the 'Troika' agreement. As the intent differs upon the exit from the 'Troika' programme, from an intentional standpoint the measures introduced are not deliberately retrogressive, given the greater references to increased spending in social housing and social welfare.

Irish social housing legislation addresses General Comment 4's adequacy requirements such as habitability, accessibility, affordability etc. However, what is pertinent to note is how legislation entrenches residuality. Through incorporating income eligibility requirements to accessing social housing – whether through renting or through homeownership - has the effect of siphoning off housing to the State's perception of the 'most needy' through regulations set by the Minister. Therefore, individuals and families who do not meet these criteria and are equally unable to access or maintain living in private sector housing are circumvented from accessing an affordable social housing.

While on the one hand, reserving affordable housing to persons who need it the most ensures that the minimum core content is met for poor, vulnerable and marginalised groups. On the other hand, such requirements present a subjective understanding of the 'most needy' which may not truly reflect the demographic of with insufficient resources to access housing. Moreover, the side-lining of local authorities in the monitoring or sale of housing, highlights a prioritisation of other actors, both public and private in the construction and allocation of housing.

²⁵⁷ Padraic Hoare, 'Change in PUP Tax Payments Criticised' *Irish Examiner* (10 February 2021).

These measures have produced a housing system which is heavily reliant upon the private sector in order to meet housing demand. Similar to the points made by the prior Special Rapporteur on the Right to Adequate Housing and Non-Discrimination, Leilani Farha, these measures demonstrate a neoliberal approach where the private sector has been prioritised over the needs of the population.²⁵⁸ Contrastingly, some may argue that the growth in social protection expenditure, in particular individual targeted subsidies payments argues the opposite. Furthermore, since the 1950s there has been a gradual increase in total expenditure.²⁵⁹ The thesis doesn't aim to contend that an increased provision of individually targeted subsidies is inherently neoliberal and in turn retrogressive. Rather, from a holistic approach, the use of legislation and policies which have sidelined local authorities and prioritized the private sector in meeting housing demand have created a countercyclical cycle where the availability of housing is subject to financial shock.²⁶⁰

The increased social expenditure on housing subsidies solely consolidates upon largely neoliberal policy thereby creating further reliance and competition in the private housing sphere leading to crises in supply. For example, the observations of the Committee on Economic, Social and Cultural Rights noted Ireland's lack of housing supply during the global financial crisis.²⁶¹ As a result, increased social expenditure addresses only part of the accessing housing, as supply has to be sufficient to meet demand, which is not the case for Ireland given the ongoing housing crisis as persons are unable to access or afford housing.²⁶²

²⁵⁸ UNHRC Special Rapporteur Leilani Farha, 'Report of 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' (18 January 2017) UN Doc A/HRC/34/51, paras 1, 10.

²⁵⁹ Brian Barbieri and Gemma Bewley, 'Historical Public Spending in Ireland: An Experimental Dataset', Irish Fiscal Advisory Council Analytical Note No.15 (April 2022) 9.

²⁶⁰ Michelle Norris (n 2) 60.

²⁶¹ UNCESCR Concluding Observations 2002 (n 7) para 20; UNCESCR Concluding Observations 2015 (n 7) para 26.

²⁶² Rory Hearne, 'Ireland's Housing Crisis is a Disaster for its People- And A Gift to Far-Right Fearmongers' *The Guardian* (11 December 2023)

Through the pandemic, however, there seemed to be a shift in the policy approach taken by the State, given increased spending and construction of housing units to meet demand rather than a return to the use of austerity measures. In terms of the housing sector, academics have posited that the housing sector overall has little role to play compared to the remains in the current domestic crisis as the growth since the spread of Covid-19.²⁶³ Despite this, Rory Hearne has pushed for a referendum on the right to housing, noting how a 'new social contract is required to recreate our economies and societies as socially and environmentally just and sustainable in the post Covid-19 world.'²⁶⁴ Alongside this, if a right to housing were to become incorporated in the Irish Constitution, this would confer a right to both private and social tenants in accessing redress for issues relating to affordability, quality in private and local authority housing and access damages from local authorities or Approved Housing Bodies.

There have also been growth in housing rights groups such as the Community Action Tenants Union (CATU) which aim to represent tenants in housing policy to ensure greater representation to tenants' rights.²⁶⁵ Both activists such as CATU and Hearne have noted the inequalities prevalent in housing which have been further exacerbated by the pandemic, therefore a referendum on the right to housing becomes necessary to insert a right to adequate, affordable and sustainable housing in the Irish Constitution.²⁶⁶ Expanding on this, it becomes pertinent to highlight that returning to a counter cyclical social housing sector would be beneficial in providing greater stability to individuals at risk to homelessness access to housing given inequality and the pandemic have increased our vulnerability towards crises.²⁶⁷

²⁶³ Matthew Allen-Coghlan and Kieran Michael McQuinn, 'The Potential Impact of Covid-19 on the Irish Housing Sector' (2021) 14 *International Journal of Housing Markets and Analysis* 636, 636.

²⁶⁴ Rory Hearne, *Housing Shock: The Irish Housing Crisis and How to Solve It* (Bristol Policy Press 2020) xvi.

²⁶⁵ CATU 'About - Community Action Tenants Union' <<https://catuireland.org/about/>> Accessed 6 December 2021.

²⁶⁶ Rory Hearne (n 261) xvi.

²⁶⁷ *Ibid.*

6. Conclusion

From assessing the doctrine of non-retrogression in relation to social housing and welfare policies in the United Kingdom and Ireland, the glaring role austerity has played in the transformation of social housing and welfare is clear. As explored in this dissertation, austerity is not a phenomenon isolated to the 21st Century. It is a macroeconomic concept which has foundations in works such as Adam Smith's *Wealth of Nations* and has developed ideological features through neoliberalism in the State policy toolkit. Key examples can be drawn from the Thatcher and Raegan administrations' adoption of neoliberal policies, such as privatisation of national industries and policies to promote economic freedom of the individual through accessing the market economy.¹

The global financial crisis consolidated upon an existing structure of austerity regimes from the past through the rhetoric of there being no other alternative, of which neoliberalism was the only suitable vehicle for economic recovery.² As social housing and social welfare are key components to the individuals' empowerment from State assistance, cutting back these services is vital to incentivise the individual to find employment and become an active consumer in the market economy. From public expenditure cuts for social housing to entrenching austerity in eligibility criteria and allocation schemes to access social housing - as laid down in legislation - austerity is a dynamic and adaptable tool to aid the State in balancing their budget deficits in response to the global financial crisis. The impact of austerity measures implemented from 2008 onwards is well known, having significantly impacted sectors such as health, education, housing and social welfare to a point where these public sectors have been rendered ineffective in meeting the demands of the lockdowns from the Covid-19 pandemic.³

Against this backdrop, exploring how the doctrine of non-retrogression can be applied to examine the impact of austerity on social housing and related welfare policies is key

¹ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (Michel Senelart (ed), Graham Burchell (tr.), Palgrave Macmillan 2007) 84.

² Asbjørn Wahl, 'Austerity Policies in Europe: There Is No Alternative' (2012) 3 *Global Labour Journal* 191, 191.

³ Aoife Nolan, *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2015) 123.

to shed light on how great the extent of austerity measures has damaged the pillar of social housing in the United Kingdom and Ireland. As highlighted in the introductory chapter, the doctrine of non-retrogression obliges that the State Party of the Covenant take no backwards steps in the realisation of economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights.⁴ Through the work of academics such as Nolan, the doctrine of non-retrogression can be examined from a normative and empirical dimension, which traces the legislative protections of the Covenant rights in tandem with *de facto* statistical observations.⁵

Though Nolan has produced a framework which applies an assessment of the doctrine of non-retrogression in relation to austerity measures, the thesis favoured the interpretative stance of Warwick based on General Comment 3. The rationale behind this approach was to provide greater flexibility in applying the General Comments 4 and 19 in relation to the rights to adequate housing and social security to provide a commentary on the enjoyment of the rights to housing and social security directly as a human rights-based analysis, rather than an analysis on austerity measures as a whole. Furthermore, utilising normative and empirical retrogression makes possible an examination of existing social housing and welfare legislation to be compared with its actual enjoyment in relation to statistical data, providing a foundation upon which a human rights-based commentary can be forged in relation to the impact of legislation passed throughout austerity regimes.

Utilising empirical retrogression to provide a statistical analysis of the enjoyment of the right to housing and social security is met with some criticisms. Primarily, as posited by Aoife Nolan, utilising empirical retrogression engages a series of methodological challenges, one of which is that:

An unreasonably strict set of criteria on retrogressive measures would create rigidity and prohibit adjustments in social or economic policies necessary to protect ESR in a context of dynamic macroeconomic conditions. An excessively stringent non-retrogression standard – if it sets out prohibitions to backsliding without clear conditions on the permissibility of adjustments – has also been argued to have the unintended effect of holding Governments which have taken

⁴ Ibid, 123.

⁵ Ibid, 255.

positive steps over previous years to a higher standard than those who have done nothing.⁶

On the one hand, utilising an analysis of empirical retrogression may create stringent targets which would penalise State Parties who are in compliance to the Covenant. However, from observing the impact of austerity measures which have had a long-term impact on the enjoyment of Covenant rights and the living standards of populations, invites an opportunity to utilise empirical retrogression. Empirical retrogression provides a secondary means of examining the impact of legislation on the population and the enjoyment of their Covenant rights. As has been posited by Warwick, empirical retrogression is ‘an effective way of identifying and recognising the expressive harms of retrogression.’⁷

There is a qualitative nature to empirical retrogression which allows for grievances of the population to be heard in relation to public services when falling upon deaf ears of policy makers. There are barriers to an analysis of empirical retrogression such as evidential correlation requirements for judicial assessment,⁸ which would interfere with the will and macroeconomic policy approach of Parliament.⁹ However, as posited by Sandra Liebenberg ‘if fiscal consolidation measures [such as austerity measures] in this area are immunised from constitutional scrutiny, they will end up eroding the social programmes and institutions that give socio-economic rights.’¹⁰ Furthermore, applying a ‘worst case scenario’ rhetoric to avoid an empirical analysis closes off opportunities of dialogue to consider how empirical retrogression can be utilised by policy makers, such as by pre-legislative parliamentary committees¹¹ and civil society organisations to hold the executive accountable for legislative and policy decisions which have a retrogressive impact.

⁶ Ibid, 131.

⁷ Ben Warwick, ‘Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights’ (2019) 19 Human Rights Law Review 467, 472.

⁸ Aoife Nolan (n 3)127-129.

⁹ Ibid, 128.

¹⁰ Sandra Liebenberg, ‘Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression’ (2021) 37(2) South African Journal on Human Rights 181

¹¹ Ben Warwick (n 7) 478.

With this in mind, in assessing the doctrine of non-retrogression in relation to austerity measures, the overall framework utilised in the thesis as follows:

Stage of Assessment	Sub-Criteria to Consider
The backwardness or stagnation of the measure.	<ul style="list-style-type: none"> ● Is the measure normatively retrogressive-? Have existing legal guarantees/protections deteriorated? ¹² ● Is the measure empirically retrogressive? Can it be shown through <i>de facto</i> statistics that the enjoyment of the right has deteriorated? ¹³
Are maximum available resources being used?	<ul style="list-style-type: none"> ● Has the minimum core content been protected at all times?¹⁴
Can the measure be proven to be deliberate?	<ul style="list-style-type: none"> ● Does the measure show an intent of being deliberately retrogressive and is retrogressive? ¹⁵
Was the measure taken in careful consideration?	<ul style="list-style-type: none"> ● Is the measure directly or indirectly discriminatory? ● Have alternatives been considered and involved genuine participation of affected groups? ● Is the measure necessary and proportional? ● Is the measure temporary?
Can the measure be justified by reference of the totality of Covenant rights?¹⁶	<ul style="list-style-type: none"> ● The extent to which other economic, social and cultural rights are enjoyed within the jurisdiction.

¹² Aoife Nolan (n 3) 123.

¹³ Ibid.

¹⁴ Ibid, 140.

¹⁵ Ben Warwick (n 7) 475.

¹⁶ Ibid, 487.

Although the scope of the thesis is too limited to be able to sufficiently cover the whole framework, the thesis has undertaken an examination of the backwardness and stagnation of the measures adopted by the United Kingdom and Ireland in relation to social housing and welfare policies, and whether these measures were deliberately retrogressive. In examining the deliberateness of the measures implemented, a qualitative review utilising NVivo was undertaken on selected national debates on the national budget, social housing and welfare and Covid-19 policies to examine the State justifications for the policies and legislation implemented from 2008-2020.

The rationale behind utilising a qualitative examination while perhaps not sought out by judges and lawyers, permits an understanding of the political nature of austerity measures and its detrimental nature to the enjoyment of economic, social and cultural rights. Taking this route - rather than a purely doctrinal approach utilising General Comment 19 to examine the steps taken by State Parties - provides a platform for charities and civil society organisations to examine how austerity may present itself in a Government narrative, and its dissonance with the human rights language as set out in General Comments of the Committee on Economic, Social and Cultural Rights. In carrying out this examination, it has been interesting to examine how the justifications for austerity measures between the United Kingdom and Ireland are diverse and distinct from each other.

As discussed in Chapter 3, in relation to the United Kingdom there is a clear deliberate intention in the adoption of measures such as public expenditure cuts to social housing and social welfare. The justifications have focused on revitalising the private sector and balancing a budget deficit caused by the prior Labour Government. In particular, the focus on the public sector being an inefficient market is a primary point for delegitimisation and encouraging expenditure cuts to push for greater efficiencies in each sector. Furthermore, there is greater focus on utilising social welfare to incentivise recipients to find employment, thereby justifying lower rates to encourage the recipient to enter the private sector for work. The use of these narratives is systematic until the Covid-19 pandemic.

In comparison, Ireland utilised similar rhetoric in relation to public sector and the need to balance the budget deficit, however had greater appeals to emotion, noting how everyone will bear the brunt of the austerity programme together. However, with the electoral defeat of the Fianna Fáil-Green Coalition and the coming into power of the Fine Gael-Labour Coalition, a different narrative for the adoption of austerity measures was presented. The austerity programme conducted was referred to as a legacy of the predecessor Government and of the 'Troika' agreement of which the executive was helpless to prevent. Upon exit from the agreement, the commitments to increase expenditure highlighted how the use of austerity measures were temporary in nature.

In comparison, it can be argued that Ireland after the change in Governments did not have the deliberate element to pass policies which are retrogressive, yet the State Party has been held accountable by the Committee for agreeing to 'Troika' terms which have had a detrimental impact on the population and the enjoyment of various economic social and cultural rights.¹⁷ However, the Committee remains silent on the retrogressive nature of the austerity programme conducted by Ireland. Later statements produced by the Committee in relation to public debt have highlighted that when seeking financial assistance, the State Party 'should be aware that any conditions attached to a loan that would imply an obligation on the State to adopt retrogressive measures in the area of economic, social and cultural rights that are unjustifiable would be a violation of the Covenant.'¹⁸ Therefore, though the Fine Gael-Labour Coalition may not directly had the intent to adopt austerity measures that are carried out through the 'Troika' agreement, however, the awareness of the retrogressive nature of these measures can be considered sufficient to form a deliberate intent.

In terms of examining the normative and empirical retrogression of the enjoyment of the rights to housing and social security in relation to social housing and related welfare policies, there are correlations between the measures adopted by the United Kingdom and Ireland. One predominant correlation of social housing policies in the United Kingdom and Ireland is the incorporation of private and voluntary actors in social

¹⁷ UNCESCR, 'Concluding Observations on the Third Periodic Report of Ireland' (8 July 2015) UN Doc E/C.12/IRL/CO/3, para 11.

¹⁸ UNCESCR, 'Statement by the Committee on Economic, Social and Cultural Rights: Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights' (22 July 2016) UN Doc E/C.12/2016/1, para 4.

housing provision. On the one hand, the number of actors in social housing provision may facilitate a diversification of housing stock to meet different categories of need for example disabled persons and the elderly.

On the other hand, the shift in local authorities becoming an agent of facilitation and monitoring of existing housing stock speaks to a greater prioritisation of private sector actors in the construction of housing to meet demand. This prioritisation of private sector actors over local authorities resembles the points made by the prior Special Rapporteur on the Right to Adequate Housing and Non-Discrimination, Leilani Farha, where neoliberalism has promoted the private sector to a level where the needs of the population are being under prioritised in comparison to the private sector.¹⁹

As a result, it is of interest to note how retrogression presents differently between both the United Kingdom and Ireland. In relation to the United Kingdom, though there is 'deliberately' intent, through legislation the procedures and protection of social housing tenants remain the same bar reforms to the allocation of social housing by the local authority. over the whole period of time. Through conducting greater sales of social housing stock in tandem with reduced through social housing expenditure, as shown through statistics, has highlighted that current social housing stock is insufficient to meet the demand.

In the case of Ireland, legislation is predominantly utilised to place the local authority on the side lines to facilitate a greater role of the private sector and voluntary bodies in meeting housing demand. Empirically, there is a lack of data to be able to provide an analysis on the enjoyment of the right to housing in a holistic manner. As a result, we are presented with two different alleged deliberately retrogressive practices adopted in relation to the United Kingdom and Ireland: empirical in the United Kingdom and normative in Ireland respectively.

The overall central research question which gauges whether the austerity measures adopted in relation to social housing and welfare would be inherently retrogressive could be answered with 'yes.' However, the answer is not simple, rather is quite

¹⁹ UNHRC Special Rapporteur Leilani Farha, 'Report of 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' (18 January 2017) UN Doc A/HRC/34/51 paras 13-18; UNHRC Special Rapporteur Olivier De Schutter, 'Looking Back to Look Ahead: A Rights-Based Approach to Social Protection in the Post COVID-19 Economic Recovery' (11 September 2020) UN Doc A/HRC/RES 44/13, 5, para 8.

complex for a variety of reasons. Primarily, examining the backwardness and stagnation and deliberateness of the measures only forms a small part of the overall framework to examine austerity measures. Following this framework set out in the thesis would also need to answer, for example, whether the measures are justifiable in reference to the totality of Covenant rights and maximum available resources.

To proceed with the assumption that from the work carried out in the thesis that both the United Kingdom and Ireland have contravened or violated the Covenant would ignore the greater complexity of the doctrine of non-retrogression as well as the complexity in making fiscal decisions. Secondly, social housing and related welfare policies form a small part of the right to adequate housing and social security. Therefore, it is unclear whether measures which are retrogressive in nature would constitute as a violation of the rights to housing and social security altogether. Thirdly, there are limitations in data gathering for empirical retrogression. Where there is an absence of data, it is difficult to provide a holistic understanding of the retrogressive nature of legislation and policies adopted by the State Party.

Finally, the ability to determine and gauge whether a State Party has acted in violation of the Covenant in relation to the enjoyment of the rights to social housing and welfare policies remains with the Committee on Economic Social and Cultural Rights. Though, it is possible for other UN bodies or even National Human Rights Institutions to hold State Parties accountable for measures they believe to be deliberately retrogressive. For example, the UN Special Rapporteur on Extreme Poverty and Human Rights has re-emphasised the prohibition of retrogressive measures in light of the United Kingdom's 2023 austerity budget.²⁰ Such statements hold validity given the knowledge and expertise of these bodies. However, the Committee holds the final say on whether measures are deliberately retrogressive due to the reporting procedure where the State Party determines its human rights benchmarks with the Committee.²¹

Knowledge of these benchmarks and how to balance Covenant obligations permit the Committee to make a holistic analysis as to whether austerity measures adopted by the

²⁰ Robert Booth, 'UN Poverty Envoy Tells Britain This is 'The Worst Time' for More Austerity' *The Guardian* (02 November 2022).

²¹ Diane A Desierto and Colin E Gillespie, 'A Modern Integrated Paradigm for International Responsibility Arising from Violations of Economic, Social, and Cultural Rights' (2014) 3 *Cambridge International Law Journal* 556, 567.

State Party are deliberately retrogressive. As has been noted by Desierto, the doctrine of non-retrogression, the minimum core content and the doctrine of non-discrimination form a normative lattice which the Committee apply to the progressive realisation of Covenant Rights by a State Party.²² Therefore, the doctrine of non-retrogression is balanced alongside other Covenant obligations. Additionally, as has been shown through Committee Concluding Observations in the Chapters 2, 4 and 5, there is great reluctance for the Committee to outrightly label measures as deliberately retrogressive.²³

Furthermore, through the Committee 2012 letter, addressing State Parties of the Covenant in relation to the use of austerity measures, the Committee has noted that 'economic and financial crises, and a lack of growth, impede the progressive realisation of economic, social and cultural rights and can lead to retrogression in the enjoyment of those rights.'²⁴ The Committee's letter from 2012 regarding the global financial crisis, rather than forging a link between the use of austerity measures and retrogressive practices, highlights that measures that do not encourage growth in economic crises and impact the progressive realisation of Covenant rights may become retrogressive. The letter implies that as austerity measures were the preferred policy front to encourage economic growth, and their use is accepted provided that they are temporary, necessary and proportional and non-discriminatory in nature.²⁵ The lack of linkage to the use of austerity measures and the doctrine of non-retrogression only highlights the out-of-date nature of the letter which does not take into consideration the negative impact of austerity measures on economic growth and in turn the progressive realisation of Covenant rights.

As a result, the Committee's 2012 letter further muddies the water in establishing a link between austerity measures and the assessment on the doctrine of non-retrogression in relation to the rights to housing and social security. The thesis contends that the Committee should recognise the link between austerity measures and deliberately retrogressive practices. By doing so, the Committee can remain up-to-date with existing

²² Ibid, 556.

²³ Aoife Nolan (n 3) 126.

²⁴ UNCESCR, 'Letter Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (16 May 2012) UN Doc CESCR/48th/SP/MAB/SW.

²⁵ Ibid.

scholarship which highlights that austerity measures have caused more damage to the enjoyment of Covenant rights than good. Finally, by establishing the link between austerity measures and deliberately retrogressive measures has the potential to shift away from an emphasis on the minimum core content of Covenant rights and emergency model caused by the Committee's 2012 letter.

Although, even if the link between austerity measures and deliberately retrogressive measures is established by the Committee, given the time-consuming nature of the reporting procedure, Governments which have adopted austerity measures which are deliberately retrogressive may no longer be in power or may enact further policies deteriorating the enjoyment of Covenant rights.²⁶ Though there are methodological challenges to utilising an analysis of the doctrine of non-retrogression in relation to the enjoyment of Covenant rights, there are further ideological barriers.

The neoliberal influence on the enjoyment of human rights – in this case economic, social and cultural rights - has been considered by a variety of academics.²⁷ For example, Samuel Moyn has posited that through neoliberalism and capitalism, 'the selective attention of human rights politics toward a minimum provision of the good things in life ... has devoted itself most unerringly to the intensification of material hierarchy.'²⁸ On the other hand, the Committee on Economic, Social and Cultural Rights have through a variety of statements and General Comments – as seen in Chapter 2 - fleshed out Covenant rights such as the rights to housing and social security beyond their minimum core content, as well as introducing statements which introduce a human rights-based approach to poverty and public debt and the obligations of businesses.²⁹

²⁶ Ben Warwick (n 7) 483.

²⁷ See David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press 2009); Rhoda Howard-Hassman, *Can Human Rights Promote Human Rights?* (Penn State University Press 2010); Susan Marks, *A False Tree of Liberty: Human Rights in Radical Thought* (OUP 2020); Susan Marks, 'A False Contingency' (2009) 62 (1) *Current Legal Problems* 1; David Kinley *et al*, *Human Rights: Old Problems, New Possibilities* (Elgar 2013).

²⁸ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Bellknap Press 2019) xii.

²⁹ UNCESCR, 'Public Debt' (n 18); UNCESCR, 'General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)' (04 February 2008) UN Doc E/C.12/GC/19; UNCESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (14 December 1990) E/1992/23; UNCESCR, 'General Comment No.24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E.C.12/GC/24; UNCESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and

Despite the Committee's more recent efforts, the importance of the minimum core content of Covenant rights has been re-emphasised through the Committee 2012 letter.³⁰ As long as the State Party maintains a basic level of programmes and services such as providing shelter, food and housing, they would not fail to discharge their Covenant obligations.³¹ Though already discussed, the Committee letter accentuates the minimum core content of Covenant rights under the 'assertion that economic growth no matter how skewed in favour of a few, will ultimately benefit all by providing resources for the realisation of human rights.'³²

Neoliberal influences on human rights can be traced back as far as the Universal Declaration of Human Rights. Jessica Whyte notes the neoliberal influence of the Mont Pelerin Society throughout the drafting process of the Universal Declaration of Human Rights which has aimed to protect the traditional role of the family from the State.³³ It would be inaccurate to state that the influence of the Mont Pelerin Society has remained even through the ratification of the Covenant given the participation of a variety of actors, such as the ILO in the Covenant drafting process. Though, it is important to remember that the development of the international human rights system and neoliberalism have occurred in parallel to each other.³⁴

Cultural Rights, Statement Adopted by the Committee on Economic, Social and Cultural Rights on 04 May 2001' (10 May 2001) UN Doc E/C,12/2001/10.

³⁰ Ben Warwick, 'Socio-Economic Rights during Economic Crises: A Changed Approach to Non-Retrogression' (2016) 65 *The International and Comparative Law Quarterly* 249, 251.

³¹ UNCESCR, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 10.

³² Sarah Gammage *et al*, *Economic Policy and Human Rights: Holding Governments to Account* (Bloomsbury Academic & Professional 2011) 2.

³³ Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019) 84.

³⁴ Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 *Law & Contemporary Problems* 147, 149.

³⁵ David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press 2009) 1-3.

With this in mind, during the 1970s, given the revolutionary nature of the international human rights system, an opportunity was presented to be able to tame and guide growth of globalisation and the transnational market system.³⁵ On the other hand, it is foreseeable that there would be some overlap between neoliberal economic doctrine and human rights on the international scale given the tensions of the Cold War.³⁶ As posited by Whyte, human rights NGOs during the 1970s did little to advocate against the evisceration of social welfare and public services.³⁷ Rather, neoliberal economic doctrine was utilised by these NGOs to establish a moral order which protected the market economy.³⁸

Placing this in the context of the International Covenant on Economic, Social and Cultural Rights, a similar point can be made in relation to the Covenant's drafting process. As discussed in Chapter 2, both Articles 9 and 11 of the Covenant have been drafted to be textually vague. As has been discussed, the vagueness of both Articles permits the State Party to tailor Covenant rights to their circumstance. However, the thesis contends that keeping Articles 9 and 11 vague increased the chances of more State Parties ratifying the Covenant. As a result, the Covenant has had to cater to international economic and political fragility in order to be operational on an international scale. Though the Committee's General Comments and statements have fleshed out Covenant rights and obligations - as seen in Chapters 4 and 5 - State Parties such as the United Kingdom and Ireland may rely on the textual vagueness of the Covenant to cherry pick the extent to which Covenant rights are domestically justiciable.

It is not the intention of the thesis to contend that human rights - especially economic and social rights - have not equally provided leverage against neoliberal developments.³⁹ The Committee in recent years have stepped up and encouraged State Parties such as the United Kingdom and Ireland to review their policies which have negatively impacted vulnerable and marginalised groups.⁴⁰

³⁶ Jessica Whyte (n 33) 34

³⁷ Ibid, 31.

³⁸ Ibid, 33.

³⁹ Samuel Moyn (n 28) 151.

⁴⁰ UNCESCR, Concluding Observation 2015 (n 16) paras 20,21; UNCESCR, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (14 July 2016) UN Doc E/C.12/GBR/CO/6, para 9

However, as seen from thesis, the impact of austerity measures and neoliberal policies have impacted the enjoyments of the rights to housing and social security – in the context of social housing and social housing welfare - significantly. Against this backdrop, it can be seen that in the time human rights have been operable their impact has not made a strong enough difference to respond to neoliberal policies which impact the enjoyment of Covenant rights.⁴¹

Overall, the thesis cannot provide an exact answer as to whether the austerity measures adopted by the United Kingdom and Ireland in relation to the rights to housing and social security are deliberately retrogressive. Despite this, it can be said generally that the adoption of austerity measures by the United Kingdom and Ireland has deteriorated the public services which protect the enjoyment of Covenant rights such as social security, housing, education, and health. The thesis has demonstrated how the doctrine of non-retrogression can be expanded upon to support an analysis of the deterioration of economic, social and cultural rights as a result of austerity measures. Whether the results from such an assessment would hold weight when balanced against other Covenant obligations and Covenant rights is uncertain. Despite this, the doctrine of non-retrogression holds great utility for a variety of actors to hold State Parties accountable for the measures adopted which deteriorate the enjoyment of Covenant rights.

⁴¹ Samuel Moyn (n 28) 15

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