
SECOND RIGHT TO HOUSING REPORT:
*The Right to Housing in
Comparative Perspective*

Mercy Law Resource Centre





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This report offers a comparative perspective on the right to housing. Through considering the legal systems of (i) Finland; (ii) Scotland; (iii) France; and (iv) South Africa, this report engages with well-ventilated arguments in Irish political discourse over legal protection of the right to housing. In doing so, we seek to offer a comparative perspective on the principled and practical concerns raised by proponents and opponents of a justiciable right to housing.

Our comparative analysis highlights that there are a wide variety of structural and institutional means by which the right can be guaranteed: there is no ‘one size fits all’ model. The variety of institutional means available to vindicate the right to housing demonstrates that concerns frequently ventilated against economic and social rights - particularly separation of powers concerns - can be addressed. The simple fact is that guaranteeing the right to housing does not necessarily equate to a significantly increased constitutional role for the judiciary. In terms of the efficacy of legal protection, our analysis suggests that a legally enforceable right to housing - while not a panacea - provides a valuable floor of protection. However, the experience of all the jurisdictions considered in this report also highlights that the effectiveness of the right to housing is heavily contingent on the existence of sufficient and enduring political will to vindicate such rights through difficult budgetary, policy and legislative choices.



PART I: CONTEXT AND PURPOSE OF REPORT

As the number of homeless individuals and families continue to rise, the question of how to robustly respond to Ireland’s growing homelessness problem remains pertinent and divisive. The vote of the Convention on the Constitution in favour of greater constitutional protection for economic, social and cultural rights increased the visibility of this debate in media and political circles.¹ As the crisis continues there appears to be growing momentum demanding an answer to whether Ireland ought to adopt a legally enforceable right to adequate housing and, if so, what form this right might take. This report offers a comparative perspective on the principled and practical arguments raised in debates between the proponents and opponents of a legal right to housing. Assessing the experience of other legal systems can be helpful in illuminating the possibilities and pitfalls of legislative or constitutional reform.

Political context of ‘Right to Housing’ in Ireland

Following the conclusion of the work of the Convention, in June 2016 the Special Oireachtas Committee on Housing and Homelessness² recommended that the Convention’s proposal for a referendum on ESC rights be considered in detail by the Joint Oireachtas Committee on Housing, Planning and Local Government.³ Meanwhile, in March 2017, Independent TD Thomas Pringle introduced a bill to Dáil Éireann providing for a referendum on the inclusion of ESC rights in the Irish Constitution.⁴ While the bill was defeated in the face of Government opposition, it spurred further debate and a commitment by the Government to give the matter serious consideration following receipt of the eventual recommendations of the Joint Committee.⁵

A few months later in September 2017, the Government announced a rough timeline for several referendums over a two-year period, many of which stemmed from recommendations made by the Constitutional Convention. However, the Government did not propose to hold a vote on whether to place justiciable economic and social rights in the Constitution.⁶ Instead, the Government reiterated once again that it would reserve its position until the Joint Oireachtas Committee on Housing, Planning and Local Government first considered the proposal of the Convention and reported on its findings.⁷ With the Joint Committee due to consider the Convention’s recommendation in the coming months, it appears there is growing momentum demanding an answer to whether Ireland ought to adopt a legally enforceable right to adequate housing and, if so, what form this right might take.

Debate over socio-economic rights in Ireland: principled and practical objections

The debate over the merits of a legally protected right to adequate shelter and housing has long divided Irish political circles. For many commentators- ranging from non-governmental organisations, religious organisations, political parties, academics, grass-roots movements- an essential plank of any robust response to Ireland's current housing and homeless difficulties must encompass provision of a legal right to adequate shelter and housing. For example, in its 2016 *Right to Housing Report*, Mercy Law Resource Centre took the position that a legally enforceable right, while not a panacea to the complex issues around homelessness, would “*provide a clear floor of protection in respect of basic, adequate housing for all.*”⁸ For persons and organizations sharing this view, the right to housing is a necessary, but not sufficient condition for any robust response to Ireland's current homelessness crisis. Conversely, there has been long standing opposition in some political quarters to providing for this kind of legal entitlement.

The major arguments deployed in the Irish context tend to mirror those found in international constitutional and political discourse more generally, and typically revolve around the undesirability of judicial enforceability of these rights.⁹ The arguments primarily focus on two-prongs: first, that judges lack the democratic legitimacy to enforce these rights and that they therefore risk undermining the separation of powers; and second, that they lack the institutional capacity to make the right practically efficacious.¹⁰ The former objection is frequently anchored on a principled basis, primarily based on concerns related to democratic legitimacy and an erosion of the prerogative of the elected branches over sensitive budgetary decisions and resource allocation.¹¹ The latter objection is a more practical one, and queries whether making something like the right to housing justiciable will be of practical benefit to those it is intended to safeguard. On this view, making a right to housing legally enforceable

will make little difference as courts will be unlikely, in practice, to robustly enforce this kind of socio-economic right. This is based on the premise that Courts generally will be unwilling to “*incur the wrath of the political branches*” or to fulfil undertakings traditionally seen as beyond their own capacity.¹²

These well-ventilated concerns were succinctly encapsulated in the recent Dáil debate over Deputy Thomas Pringle's ESC rights referendum bill. During the debate, different parliamentarians voiced both principled and practical arguments against the bill. One Minister expressed the view that the issue with the bill which concerned the Government was not about its substance, but its ramifications for the separation of powers¹³. This Minister said the “*primary difficulty*” with incorporating ESC rights into the Constitution and making them justiciable was that it might place decisions on resource allocation and taxation issues “*beyond the control of Government and the Dáil*”, insulating them from the “*wishes of the electorate*”.¹⁴ A second Minister similarly argued that the incorporation of ESC rights would place decisions on resource allocation and taxation under the ultimate “*aegis of the courts*” which would undermine the “*fundamental responsibility*” of legislators over these decisions.¹⁵ Aside from principled arguments from democratic legitimacy and the separation of powers, other deputies expressed concern about the *practical* utility of a justiciable right to something like adequate housing. One deputy expressed an “*open mind*” in respect of a justiciable right to housing and that he would be in favour of it if it resulted in “*individuals getting more housing and more housing being built*”.¹⁶ However, he added such a right may have limited efficacy and may only serve to make the “*political class feel very good about itself.*”¹⁷ He voiced concern that while many have argued for the importance of having a right to housing in the Constitution, in reality such a right “*may not assist as many people in practical terms as we hope it would.*”¹⁸

Purpose of Second Right to Housing Report- Informing debate with a comparative perspective

The foregoing debate robustly captures the essence of the discourse surrounding the question of justiciable ESC rights in Irish politics, and highlights how proponents and opponents of these rights are divided based on both *principled* and *practical* concerns. Having regard to this debate, this report seeks to address and contribute answers to some of its most pressing questions by offering a comparative perspective on the right to housing. The value of adopting a comparative perspective is that it provides access and insight into a powerful repository of accumulated experience and knowledge, gleaned from analogous legal and political actors in democratic systems grappling with similar problems to our own.¹⁹ Assessing the experience of other legal systems can then be helpful in illuminating the “possibilities and pitfalls” of various forms of statutory or constitutional design²⁰ which might be adopted to protect a legal right to housing in this jurisdiction. Through considering the legal systems of (i) Finland; (ii) Scotland; (iii) France; and (iv) South Africa, this report engages with well-ventilated arguments in Irish political discourse over legal protection of the right to housing. In doing so, we seek to offer a comparative perspective on the principled and practical concerns raised by proponents and opponents of a justiciable right to housing. Based on our comparative analysis of other jurisdictions, this report makes the following broad points:

- * Providing a legal right to adequate shelter and housing, whether by constitutionalisation or by statute, is common amongst well-functioning democracies. Ireland would not be an outlier in making similar provision;
- * There are a wide variety of structural and institutional means by which these rights can be guaranteed. There is no ‘one size fits all’ model;
- * Measures can range from constitutional judicial protection as in South Africa, to statutory judicial protection as in France and Scotland, or ex-ante (before a law is passed) constitutional protection where legislative measures are mainly reviewed by a parliamentary constitutional committee, as in Finland;
- * The variety of institutional means available to vindicate the right to housing demonstrates that concerns frequently ventilated against ESC rights- particularly separation of powers concerns- can be addressed. The simple fact is that guaranteeing ESC rights does not necessarily equate to a significantly increased constitutional role for the judiciary;
- * For example, a robust but amendable statutory right can be created by the legislature, as in Scotland or France;
- * Some countries also adopt alternative forms of constitutional review to protect the right to housing. Finland’s non-partisan Constitutional Parliamentary Committee is empowered to provide robust ex-ante (before a law is passed) scrutiny over government proposals which ensures that ESC rights are given adequate consideration and vindication in the legislative process. Under this system of review measures found to have a retrogressive impact on the right to housing can only be passed after the government has considered amendments to remedy the inconsistency;

- * Even if the right to housing is offered judicial constitutional protection, the South African and Finnish experience highlights that judicial involvement offers a floor of protection and does very little to alter the balance of power when it comes to decisions concerning the allocation of resources;
- * Even in South Africa, which has the strongest form of judicial protection, the Courts continue to offer considerable deference to measures adopted by elected representatives in respect of housing rights. There is no question that the political branches retain ultimate responsibility over taxation and resource allocation;
- * In respect of concerns over efficacy, our comparative analysis suggests that a legally enforceable right to housing, while not a panacea, provides a legal floor of protection in respect of basic, adequate housing. This has been the experience for each of the jurisdictions examined;
- * However, the experience of all the jurisdictions considered in this report also highlights that the effectiveness of an ESC rights provision such as a right to housing is heavily contingent on the existence of sufficient and enduring political will to vindicate such rights through difficult budgetary, policy, and legislative choices;
- * While the existence of a legally enforceable right may be a necessary condition for truly effective and robust protection of a right to housing, it is not a sufficient condition. The role of the elected branches in making difficult budgetary and resource-allocation decisions through the political process remains the most important condition for securing and protecting the right to housing.



PART II: FINLAND

Finland is an economically prosperous and politically stable parliamentary democracy, and widely considered an exemplar in its commitment to social democracy and human rights. The current Constitution of Finland²¹ includes a broad catalogue of rights that combines traditional negative rights and liberties with provisions on economic, social, and cultural rights.²² Finland has adopted a form of constitutionalism where both the democratically elected legislature and an independent judiciary are entrusted with a shared duty to protect constitutional rights. In Finland, constitutional rights to basic levels of social assistance- including housing assistance- have been used as a modest floor of individual legal protection for persons in vulnerable situations.

Constitutional right to housing

Provisions relating to economic, social and cultural rights are included in sections 16²³ (educational rights), 17 (right to protection of language and minority culture), 18 (right to work and freedom to engage in commercial activity), and 19 (right to social assistance, right to social security, right to social and medical services, and the right to housing). The right to housing is contained in section 19.4 and provides:

“ *The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing* ”

Another clause relevant to the provision of housing and shelter is section 19.1, which provides:

“ *Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care* ”

These clauses are primarily implemented and fleshed out through the enactment of ordinary legislation.²⁴ However, as will be discussed below, they are also considered justiciable by the courts.

Constitutional review of ESC rights in Finland

Before considering how ESC rights have fared in a Finnish legal setting, one must first contextualize Finland's system of constitutional review, which is quite distinct from Ireland's. Finland's model is considered a mid-way between perhaps the two most well-known models of constitutionalism, in which individual rights are either "supreme law, entrenched and enforced" by the judiciary or "ordinary law changeable by legislative majority" and protected by the political process.²⁵ Instead, Finland has adopted a form of constitutionalism where both the democratically elected legislature and an independent judiciary are entrusted with a shared duty to protect constitutional rights. Its uniqueness originates in its combination of *ex ante* review (before a draft law is passed) by a Constitutional Law Committee of Parliament and a limited form of *ex post* judicial review (after a law is passed) by the courts.

Review by committee of law before it is enacted

The duty of the Constitutional Committee is to determine the relationship between a draft bill and the Constitution and to assess whether the former is consistent with the latter before it is enacted into law. The Constitutional Law Committee is non-partisan and consists of Members of Parliament representing both government and opposition parties.²⁶ The committee frequently hears expert evidence from professors and scholars of constitutional law in assessing the constitutionality of a draft bill.²⁷ Committee scrutiny is robust and it is "not uncommon" that the committee finds a government bill has constitutional defects.²⁸ Should the Committee certify elements of a bill as unconstitutional there is usually a requirement that appropriate amendments are made to the bill during parliamentary consideration.²⁹

Judicial review of law after it is enacted

The Finnish model also provides for limited post-enactment review by a court. Section 106 of the Constitution provides that:

.....

“ If in a matter being tried by a court, the application of an Act of Parliament would be in manifest conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.”³⁰

.....

Section 106 was not intended to shift the task of securing the constitutionality of Acts of Parliament from the Constitutional Law Committee of Parliament to the judiciary.³¹ Rather, the section is designed to plug any loopholes left by the abstract *ex-ante* review of the constitutionality of government bills, in case there are unforeseen constitutional problems could arise in the courts' application of the law in particular cases.³²

ESC Rights before the Constitutional Committee

As noted above, section 19.4 has been primarily implemented and vindicated through the enactment of ordinary legislation. The state's good faith attempt to vindicate these rights means that there have been relatively few Committee reports concerning government bills specifically discussing them. However, the Committee has referred to the realization of housing rights as a pressing consideration when assessing the constitutionality of a bill. For example, in Opinion No.17 of 1997, the Committee considered government amendments to legislation governing subsidies to entities providing rental dwellings to social housing tenants. The amendments consisted of restrictions

on the ability of these entities to sell or dispose of the properties in question. The Committee held that the restrictions were designed to secure the legitimate aim of maintaining the provision of State-subsidized housing stock allocated based on need. The Court held that the restriction on the property rights of the housing entities was proportionate given the high social importance of securing the right to housing.³³

Although specific treatment of the 19.4 declaration of a right to housing has been relatively scarce, the Committee has provided more detailed *ex-ante* commentary on bills touching on the related entitlement to basic social assistance and subsistence. The Committee has, for example, emphasised the special characteristics of the right to indispensable subsistence and care, and described it as an unconditional individual right to a minimum level of subsistence required for the dignity of the person.³⁴ On one occasion, the Committee required an amendment to a social assistance bill to the effect that social assistance benefits could never be reduced to the extent that a person no longer received what amounted to indispensable subsistence in her individual case.³⁵ The Committee added that this right was one that could be directly invoked by an individual, even in the absence of legislation.

The role of the Committee in respect of ESC rights then appears to center on assessing whether government legislation is adequately giving effect to constitutionally protected rights, or conversely having a retrogressive impact that falls under what is constitutionally required.³⁶ The work of the Committee demonstrates its willingness to robustly scrutinize proposed legislation to ensure it results in better implementation of, and respect for, socio-economic constitutional rights.

ESC rights before the Courts

Due to the structure of Finland's system of constitutional review, litigation in courts has not been the primary form of application of constitutional provisions on economic, social and cultural rights.³⁷ However, both the Constitutional Committee and the courts have had regard to the provisions on basic social assistance in assessing the constitutionality of government bills and administrative acts. Although playing a secondary role to the Constitutional Committee, the judiciary have gained an important role in developing the understanding of the legal nature and contents of various economic, social and cultural rights.³⁸ The Finnish courts have never invalidated legislation on the basis that it is inconsistent with the right to housing or other ESC rights. However, the rights have been used as a modest complementary form of individual redress against detrimental administrative decisions, providing a floor of legal protection for individuals in potentially vulnerable situations.

The courts have adopted a range of remedial approaches to protect ESC rights. One method deployed by the courts has been to uphold suits for compensatory damages for breaches of economic and social rights by government or local authorities. In one instance, the court upheld a claim for damages based on a failure to secure timely vindication of a family's right to child care support. The failure to award the relevant child care support entitlement resulted in a loss of income on behalf of the parents, who had to take leave to look after their child. The court awarded the applicants the cost of their lost income and their legal costs.³⁹ On another occasion, the court awarded compensatory damages for a clear failure of a local authority to vindicate an applicant's constitutionally protected right to work.⁴⁰

In addition to claims for damages, the courts also enjoy authority to judicially review administrative decisions of public bodies which interfere with constitutionally protected rights. For example, the courts have frequently quashed local authority

decisions denying social assistance based on a failure to vindicate the section 19.1 guarantee that “*those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care*”. In one instance, the court quashed a decision to deny social assistance to a university student based on a blanket policy presumption that the applicant, as a student, could obtain subsistence through study loans. However, on the facts of the case the student in question could not secure a study loan due to earlier debts she had accrued. The court quashed the decision to refuse social assistance based on a blanket policy assumption, and held that a decision engaging section 19.1 must be “*based on the real situation and needs of an individual and not on the fact that an applicant happens to be in a certain category of persons*”.⁴¹

In another case, the court quashed an administrative decision to refuse social housing assistance based on a blanket income-threshold based policy which did not take account of individual need. The applicant concerned had entered a debt repayment scheme to keep his home. Under the scheme a significant portion of his income was used to service the debt. As the applicant was struggling to meet the conditions of the scheme and cover his basic living costs, he applied for social assistance to cover his housing expenses. The local authority rejected his application based on a policy presumption that as his earned income was above a set threshold, he did not require social assistance. The Court quashed the decision on the basis that the “*applicant had a right to social assistance based on his factual life situation including housing costs, irrespective of the presumptions used when drawing up the debt readjustment scheme*”.⁴²

The prominent Finnish legal academic Professor Scheinin suggests that what emerges from judicial treatment of ESC rights is a requirement that applications for social assistance must be assessed on the basis of a person’s individual needs, and that a local authority may not exclude any category of persons from such individual assessment.⁴³ The courts therefore have a role to play when an individual invokes his constitutional right in relation to a state authority who seems to “*deny what has been promised in the Constitution*”.⁴⁴ Ultimately, the Finnish judicial approach to ESC rights has taken the form of individual rights and individual remedies being enforced through judicial review of the decisions of public bodies. While some of the cases may “*have system-wide implications, the courts have restricted themselves to deciding individual cases without speculating on such broader effect*”.⁴⁵ Thus, it can be said that the rights to basic levels of social assistance- including housing assistance- have been used as a modest floor of individual legal protection for persons in vulnerable situations.

Recourse to judicial remedies in Finland then is a complementary form of legal protection, and the main emphasis on vindicating ESC rights remains implementation through the legislative process. This is a very common theme amongst the different jurisdictions considered in this report. While a legally enforceable right to housing is a useful complementary floor of legal protection, its ultimate success is always bound to the existence of broader political commitment to vindicating the substance of the right though difficult budgetary, policy, and legislative choices. Providing an element of judicial protection does little to alter this reality.

“those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care”

PART III: SCOTLAND

Scotland's devolved parliament has introduced policies and legislation widely regarded to provide comparatively broad legal protection for those who are homeless or at risk of homelessness. Although not an unconditional right to housing, the Scottish statutory model has been referred to as one of the strongest possible legal frameworks in the world in relation to protecting people from homelessness. There is evidence to suggest that the measures adopted by the Scottish executive and assembly have contributed positively to combating or preventing instances of homelessness. Scotland's experience highlights the usefulness of a legally enforceable right as a complementary floor of individual protection, but also that its success is inextricably bound with broader political commitment to vindicating the substance of the right through difficult budgetary, policy, and legislative choices.

Statutory right to housing

Although a constituent part of the United Kingdom, Scotland has both a devolved parliament and executive with considerable law-making authority under the Scotland Act 1998. The devolution of housing powers to the Scottish parliament occurred in 1999. Since then, Scotland's devolved parliament has introduced policies and legislation widely regarded to provide comparatively broad legal protection for those who are homeless or at risk of homelessness.



Obligation to secure settled secure accommodation

A statutorily enforceable right to housing in Scotland is grounded in the Housing (Scotland) Act (1987) as amended by the Homelessness (Scotland) Act (2003). These acts make local authorities responsible for the long-term rehousing of homeless persons. The definition of homelessness in Scottish legislation is quite broad, and includes:

- * A person who has no accommodation in the United Kingdom or elsewhere. A person is to be treated as having no accommodation if there is no accommodation which he, together with any other person who normally resides with him as a member of his family are legally entitled to occupy;⁴⁶
- * A person who has accommodation but cannot secure entry to it, or it is probable that occupation of it will lead to violence from some other person residing in it or to threats of violence from some other person residing in it and those threats are likely to be carried out;⁴⁷
- * A person who has accommodation, but it is probable that occupation will lead to violence, or threats of violence which are likely to be carried out from some other person who previously resided with that person in that accommodation or elsewhere;⁴⁸
- * A person who has accommodation that is a movable structure, vehicle or vessel designed or adapted for human habitation, but there is no place where she is entitled or permitted to place it and reside in it;⁴⁹
- * A person who lives in accommodation that is overcrowded and may endanger the health of the occupants;⁵⁰
- * A person who is not in permanent accommodation in circumstances where, immediately before the commencement of her occupation, a local authority had a duty to house him.⁵¹

Prior to 2012, the Housing Acts defined which groups of homeless people were considered to have a “*priority need*” and therefore owed an affirmative statutory duty to be secured in settled accommodation by local authorities.⁵² This was commonly referred to as the “*main homelessness duty*”.⁵³ For those who were not considered priority need, a local authority owed a lesser statutory obligation to provide advice and assistance. Prior to significant reforms in 2012, priority need was typically reserved to particularly vulnerable categories of people like pregnant women; dependent children; someone vulnerable because of old age, mental illness, handicap or physical disability; as well as those made homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.

However, in 2012 the Scottish government issued the Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012. The effect of this Order has been significant, and means that the provisions of the 1987 and 2003 Act ensure local authorities owe a mandatory statutory duty to secure settled accommodation for all eligible applicants who are unintentionally homeless. Broadly speaking, with the removal of the priority/non-priority distinction, if an individual is found to be unintentionally homeless as prescribed by legislation, then local authorities have a mandatory legal duty to provide them with permanent, settled housing. This legal duty derives from 31(2) of the Housing (Scotland) Act 1987 as amended, which provides that where a local authority is satisfied that an individual is unintentionally homeless, “*they shall... secure that permanent accommodation becomes available for his occupation*”.⁵⁴ In the interim, the local authority has a duty to provide temporary housing until suitable permanent accommodation is available.⁵⁵ These affirmative legal duties are enforceable through judicial review if they are not fulfilled.⁵⁶ Although not an unconditional right to housing, the Scottish statutory model has been referred to as one of the strongest possible legal frameworks in the world in relation to protecting people from homelessness.⁵⁷

Obligation to provide suitable interim accommodation

As already noted, while a local authority is attempting to discharge its statutory duty to provide secure settled accommodation it has an interim duty to provide temporary accommodation. S.32(5) of the Housing (Scotland) Act 1987 as amended provides that accommodation must meet any special needs of the applicant, must be reasonable for the applicant to occupy and cannot be overcrowded.⁵⁸ In addition, under the Housing Acts, the Scottish executive has the power to specify by statutory instrument the kind of accommodation which may or may not be used to fulfill this interim duty. This power has been used to make the Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2004. The purpose of the Order was to end the use of unsuitable accommodation to house vulnerable individuals, such as children and pregnant women. The Scottish Executive's "Code of Guidance on Homelessness" discussing the order states that:

*"Many local authorities, through their homelessness strategies, have been reducing the use of B&B accommodation for homeless families... The Executive has made a new Order (unsuitable accommodation order) on standards which temporary accommodation for households with children and pregnant women must meet. The purpose of this Order is to put an end to the routine use of B&Bs and other unsuitable accommodation for these households."*⁵⁹

The suitability of accommodation is assessed by reference to three types of standards: physical, proximity, and safety. Physical standards include provision of bedrooms, washing, and cooking facilities suitable for the needs of household, as well as living space for children to play and do homework. Accommodation must also be usable by the household for 24 hours a day, which is to prevent households being locked out of accommodation for part of the day.⁶⁰ Proximity standards relate to whether the accommodation ensures the accessibility of health and education facilities which are being used by the applicant.⁶¹ Safety standards refer to whether the accommodation is overall suitable for use by children and that it does not pose a risk to safety or well-being.⁶² If the accommodation does not meet these standards then it is unsuitable.



Statutory efforts to prevent homelessness

Section 11 of the Homelessness (Scotland) Act 2003 is a statutory measure designed to prevent homelessness, or if it cannot be prevented, to ameliorate its effects and facilitate rehousing as soon as possible. S.11 places a duty on all registered social landlords, private landlords, and creditors, to notify the relevant local authority when proceedings are raised for the possession of a dwelling house.⁶³ Policy guidance issued by the Scottish executive to local authorities described the rationale of the s.11 duty as a means of ensuring that local authorities are alerted to households at “*risk of homelessness due to eviction or property repossession at an early stage*” so that they “*may be able to respond on an individual basis to prevent homelessness occurring.*”⁶⁴

A criticism advanced by some Scottish NGOs working with the homeless is the notable absence of sanctions for a breach of the s.11 duty. The policy guidance note issued by the Scottish executive in respect of s.11 concedes that there are no direct sanctions against non-compliance with the duties under section 11. However, it adds that failure to comply with the duties may impact on landlords and creditors in other ways through decisions or actions taken by other parties, such as regulatory and registration bodies.⁶⁵ The guidance note also suggests that it is open to local authorities to take action to address non-compliance through awareness raising and provision of information. In respect of the overall impact of s.11 one prominent NGO suggest that:

*“There is a mixed picture of how local authorities are dealing with the process. All local authorities give advice and assistance of some level to households who have been notified to the local authority as potentially homeless. The amount of assistance varies however between local authority and type of tenancy from a simple advice letter to the offer of specialist one to one advice.”*⁶⁶

Impact of statutory reform

There is evidence to suggest that the measures adopted by the Scottish executive and assembly have contributed positively to combating or preventing instances of homelessness. The experience highlights the usefulness of a legally enforceable right as a complementary floor of individual protection. A 2016 independent review of the legal duties owed to homeless people commissioned by the homelessness NGO Crisis outlined how:⁶⁷

*“Statutory homelessness peaked in Scotland in 2005/06, having grown as a direct result of the gradual expansion in the priority need categories post the 2003 Act, and has been reducing for the past five years...In 2014/15 Scottish local authorities recorded 35,764 homelessness applications, of which 28,615 were assessed as statutorily homeless. The total number of applications has fallen by 37 per cent since 2009/10. In the most recent year, total applications fell by four per cent while ‘assessed as homeless’ cases dropped by five per cent.”*⁶⁸

While this success has been welcomed, commentators have noted that these improvements face significant challenges in the form of a fall in government investment and a reduction in the supply of social housing builds across Scotland. One commentator has observed that the challenge remains for the Scottish executive and assembly to continue to meet their considerable legal commitments in a very different operating context of greater economic uncertainty.⁶⁹ The Scottish approach reflects a common theme amongst the different jurisdictions considered in this report, namely, that while a legally enforceable right to housing is a useful complementary floor of legal protection, its success is inextricably bound with broader political commitment to vindicating the substance of the right through difficult budgetary, policy, and legislative choices.

PART IV: FRANCE

Like the Scottish experience, the French adoption of a statutory right to housing highlights the usefulness of a legal right as a complementary floor of individual protection, but also the immense importance of equipping such a law with adequate resources to ensure its effective implementation. The experience of both jurisdictions highlights that it is not enough to adopt laws enshrining the enforceability of the right to housing; this will not in itself guarantee people's rights. Instead, the primary responsibility remains with the elected branches, and the existence of sufficient and enduring political will to vindicate the right to housing through difficult budgetary and policy choices.

Statutory right to housing

Following prolonged campaigning by a broad coalition of NGOs and political actors and aided by high-profile protests by activist groups, in 2007 France's serious homelessness issues were forced into the national spotlight.⁷⁰ In response to sustained political pressure, law-makers passed legislation known as the DALO Act⁷¹, creating a legally enforceable statutory right to housing. The Act had the result of "completely overhauling French housing policy,"⁷² and stipulates that:

*"The right to decent and independent housing... is guaranteed by the State to all people who reside in the French territory on a regular basis and in conditions of permanence (defined by a decree the Council of State) and who are not able to access or maintain housing of their own. This right is first exercised through mediation and, if necessary, through an adversarial process."*⁷³

The DALO Act is patterned after the Scottish model, and is designed to ensure universal enjoyment to housing for those who cannot access it through their own means. Thus, the DALO Act includes both an entitlement to emergency shelter and a legal cause of action for individuals who have been denied the right to secure long-term housing, thereby helping to ensure security of tenure and accessibility. The most important element of the DALO Act is said to be its "creation of a legal cause of action for a broad range of individuals" who are homeless and entitled to adequate housing.⁷⁴



Qualifying conditions for protection under DALO Act

Individuals qualifying for protection under the DALO Act include:

- a) People with ‘priority housing needs’, which is defined as those who are already eligible for social housing and are additionally:
- * Are without housing or shelter;
 - * Are threatened with eviction and have no other housing access;
 - * Are housed temporarily in a facility or transitional housing;
 - * Are housed in premises unfit for habitation or otherwise unhealthy or dangerous;
 - * Are housed in overcrowded or clearly substandard facilities;
 - * Have a disability;
 - * Are the guardian of at least one minor child; or
 - * Have at least one dependent with a disability.⁷⁵
- b) From January 2012, the concept of ‘priority housing need’ was expanded to people eligible for social housing who have been waiting for an “*abnormally long*” amount of time and not been offered housing.⁷⁶

Structure of DALO Act remedial mechanisms

Mediation commission

If the above qualifications are met, an individual may file a petition with a local housing mediation committee for urgent rehousing.⁷⁷ These Commissions are composed of state representatives, local county and municipal representatives, representatives of social housing organizations, and individuals from tenants’ rights organizations.⁷⁸ The mediation committee undertake an evaluation of the petition to determine whether an individual genuinely has priority status and whether he or she qualifies for urgent rehousing. If the mediation committee decides that the applicant qualifies for urgent housing under the Act they refer his or her case to the local authority Prefect, who is the Central government’s representative at the local authority level. The Prefect must then find suitable social housing for the applicant within a time-period determined by the mediation committee, which is generally between three and six months.⁷⁹



Participation of Grassroots Organizations and Housing Nonprofits

Administrative court

If a person with a recognised emergency housing need is not rehoused within the time-period determined by the mediation committee, the individual may appeal to an administrative court to have the right judicially enforced. Before January 1, 2012, the only appealable cases were those that were initially deemed “priority” by the mediation committee. However, since then any petitioner may appeal to have the mediation committee’s decision enforced.

Judicial remedies available through the administrative courts include an order requiring the Prefect to house the petitioner in a certain location or the imposition of a fine on the government if the court’s time-frame is not met.⁸⁰ Thus, if individuals are recognized as statutory rights holders by the commission they can go to court and request timely enforcement. It has been observed that the availability of a legal remedy has profoundly “changed the logic of the right to housing. The right was made enforceable, providing for a possibility to appeal to court, replacing the State’s ‘best efforts’ obligation with a performance obligation.”⁸¹

One of the more “*unique aspects of DALO is its utilization of community organizations in nearly every aspect of the law.*”⁸² Examples highlighted by these commentators include:

- * The composition of the mediation committee, which includes representatives from social housing organizations and tenants’ rights groups;
- * The Monitoring Committee, which oversees DALO’s implementation and includes a vast number of representatives from community and housing organizations;
- * The committees tasked with reviewing municipalities that fail to meet social housing requirements, which include members of local housing advocacy organizations; and
- * The ability for homeless people to receive assistance from government-approved housing organizations during the petitioning process.

Allowing these groups to play a significant role is seen to promote the dual benefit of increasing the likelihood that housing policy will be tailored to community needs, as well as taking pressure off the government when it comes to developing housing policy.⁸³





Effect of enforceable right under DALO Act

Since its adoption, the DALO Law has received a mixed reception. In 2016, the Minister for Housing commissioned a report to identify the strengths of DALO and ways to improve its effectiveness. The study captures many of the positive effects of the DALO Act. For example, the report concludes that the DALO Act has helped lead to more than 100,000 households being rehoused since its adoption in 2007.⁸⁴ In its report, the committee notes the significant changes in government housing policies over the past 10 years—particularly increasing housing supply for the most disadvantaged households— and suggests that the risk of judicial proceedings against the State has helped spur this result.⁸⁵

However, for other commentators the statutory right is best regarded “*as an additional state aid to accessing housing and not the consecration of a right to housing*”.⁸⁶ For example, it has been pointed out that since the Act’s introduction the number of households waiting to be rehoused has increased year-on-year, reaching almost 60,000 in 2014. The foregoing demonstrates that while statutory reform has helped ensure a “*significant amount of housing has been provided to people in need, DALO still has large strides to make*.”⁸⁷ As with other jurisdictions then, the biggest challenge to the successful implementation of DALO is the frequent limited availability of social housing units when measured against need. The drafters of DALO Act realized

that housing supply would pose a problem and included provisions for encouraging the development of social housing. However, the construction of more affordable rental homes and public housing is undoubtedly an expensive and long-term task. Indeed, the Monitoring Committee established to track the DALO Act’s progress has found that the housing budget must increase substantially to have enough properties to satisfy DALO’s requirements. Based on current predictions, the Committee estimated 500,000 new housing units must be built each year to ensure the right to housing to all who petition and qualify.⁸⁸

Like the Scottish experience, the French adoption of a statutory right to housing highlights the usefulness of a legal right as a complementary floor of individual protection, but also the immense importance of equipping such a law with “*adequate resources to ensure its effective implementation*.”⁸⁹ The experience of both jurisdictions highlights that it is “*not enough to adopt laws enshrining the enforceability of the right to housing; this will not in itself guarantee people’s rights*.”⁹⁰ Instead, the primary responsibility remains with the elected branches, and the existence of sufficient and enduring political will to vindicate the right to housing through difficult budgetary and policy choices.

PART V: SOUTH AFRICA

The institutions, rights, and values created by South Africa's transformative Constitution introduced seismic shifts in the political and legal landscape that had prevailed during long periods of colonial and apartheid rule. Perhaps the most fundamental change was the displacement of the apartheid-era government with a constitutional democracy that adopted uniquely strong textual protection for a broad spectrum of both civil and socio-economic rights. While poverty and inequality remain extremely high, the constitutional provisions on housing provide a hitherto unavailable basic legal floor of protection for some of the most vulnerable in the State. Aside from practical utility, the South African experience provides lessons that may inform the principled debate over justiciable socio-economic rights in the Irish legal order. South Africa ultimately demonstrates that a justiciable right to housing offers a floor of legal protection, and does relatively little to alter the institutional balance of power over decisions concerning the allocation of public monies and resources.

A Transformative Constitution

The Republic of South Africa is a relatively new constitutional democracy that emerged after a traumatic and violent history of colonialism and apartheid. In 1996, South Africans adopted what has been dubbed a “transformative constitution”.⁹¹ The preamble of the new Constitution proclaims that the new constitutional order was created to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” and dedicated to improving “the quality of life of all citizens and free the potential of each person”.⁹² Liebenberg notes that the institutions, rights, and values created by the Constitution undoubtedly introduced “seismic shifts in the political and legal landscape that had prevailed during the long periods of colonial and apartheid rule”.⁹³ Perhaps the most fundamental change was the displacement of the apartheid-era system of parliamentary sovereignty with a constitutional democracy that includes uniquely strong textual protection for a broad spectrum of both civil and socio-economic rights.⁹⁴

Despite these perceptible shifts, South Africa's deeply troubled legacy of apartheid and colonialism continues to leave “deep scars on the political,

economic and social landscape” of the State.⁹⁵ South Africa's level of prosperity is not on par with the other countries considered in this report, with poverty levels estimated to be in the vicinity of 45%.⁹⁶ Moreover, compared to countries like Ireland, South Africa's unemployment rate stands at a staggering 24%, with youth unemployment rate nearing around 50%.⁹⁷ Although poverty levels have declined since the establishment of the new republic, South Africa still boasts some of the highest levels of income inequality in the world. Most of those below the poverty line are still drawn from the historically severely marginalised black community. It is important not to overlook this context when adopting a comparative perspective on the right to housing. The challenges facing Ireland and South Africa in respect of housing and homelessness are very different in their nature and magnitude. That said, the accumulated experience and knowledge gleaned from South African legal and political actors dealing with questions pertinent to the Irish debate- such as how to reconcile justiciable socio-economic rights to democratic legitimacy and separation of powers concerns- can still better illuminate the possibilities and pitfalls of various forms of constitutional design and reform.⁹⁸

Constitutional protection for right to housing

Section 26 of the 1996 South African Constitution contains three sub-sections relating to housing. Sections 26(1) and (2) provide for the right of access to adequate housing, albeit with important qualifications. The relevant sections read:

- 1) Everyone has the right to have access to adequate housing.
- 2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

Section 26(3) of the Constitution focuses on unlawful evictions, providing that:

- 3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In interpreting these provisions the Constitutional Court of South Africa has issued judgments in respect of claims that the State has (i) failed to respect and protect existing socio-economic rights to housing, its negative duty; and (ii) failed to promote and fulfill such rights, its positive duty. I consider both in turn.

Negative protection for right to housing and shelter

The introduction of a right to housing means that measures which interfere with the right to shelter- for example an eviction- must comply with the *proportionality* principle. A good example of this principle in action came in *Port Elizabeth v Various Occupiers*⁹⁹, which concerned the operation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998. Under this Act, a court could only order the eviction of squatters from private land where it was “*just and equitable*” to do so, taking into consideration factors such as the availability of alternative accommodation. The local authority argued that when seeking the eviction of squatters, it was not bound to provide alternative accommodation to avoid homelessness. The Constitutional Court disagreed and held that the Act was designed to implement the constitutional right not to be arbitrarily deprived of a home and shelter, and that this entitlement had to be given significant weight in legal proceedings concerning eviction. Sachs J. held that the constitutional protection of the right to housing meant that “*the expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation.*”¹⁰⁰ In these circumstances the judicial function:

“ is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case ”¹⁰¹

The availability of suitable and secure alternative accommodation was considered a very significant factor in this assessment¹⁰², and in this case the Court held that eviction in the absence of suitable alternative accommodation was disproportionate. In other words, the courts can assess the *proportionality* of any measure that would have the result of interfering with the right to shelter. Liebenberg writes that the right to housing has transformed adjudication involving eviction disputes where there is a potential for homelessness. Prior to the 1996 Constitution, private property rights represented a “trump, which outweighed other interests, including the interest people have in maintaining occupation of their homes”.¹⁰³ In contrast, the existence of a legally enforceable right to housing means that courts are now empowered to balance property entitlements and to ensure those at risk of homelessness have their rights adequately protected. It provides a concrete form of protection for vulnerable individuals which previously did not exist.

Positive protection of right to housing and shelter

One of the earliest and most influential decisions of the Constitutional Court discussing the state’s positive duty towards the Constitution’s housing rights provisions remains *Government of South Africa v Grootboom*¹⁰⁴. In *Grootboom* a group of homeless adults and children who had been evicted from their informal homes (which had been built on private land) sought an order from the courts requiring the government to provide basic shelter until they could obtain permanent accommodation. The applicants, because they had nowhere to go, had been congregating in a sports stadium to escape the severe winter cold.

The Constitutional Court began by noting that although the debate over the justiciability of socio-economic rights was a well-trodden and controversial one, in the South African legal order the issue was put beyond all doubt by the text of Article 26. The question then turned to *how* these rights would be enforced by the courts. The Court noted that while Article 26 imposed affirmative and positive obligations on the State, and not just negative ones, these were qualified and not absolute. Instead, the Court said the extent of the State’s positive obligations had to be determined by reference to a *reasonableness* standard. This was to be determined by reference to the three factors in the text of Article 26: (a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realization” of the right; and (c) “within available resources”. Applying this standard, the Court issued a declaratory order that the Government was in breach of its obligations, and that Article 26 required the government to adopt an effective and sufficiently inclusive policy for those with urgent housing needs or living in intolerable circumstances.

The South African reasonableness standard has been described as stronger than a traditional administrative law model of reasonableness found in jurisdictions like Ireland, which is generally satisfied whenever a decision is not arbitrary or capricious.¹⁰⁵



In contrast, the South African standard requires that measures designed to positively implement socio-economic rights must not only be non-arbitrary, but also “coherent”, “balanced and flexible”, and “comprehensive and workable”.¹⁰⁶ The Court added that:

“It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”¹⁰⁷

In a later case dealing with access to healthcare, *Minister for Health v Treatment Action Campaign*¹⁰⁸ the Court justified its reasonableness standard, arguing that courts were not institutionally equipped to make wide-ranging factual and political enquiries necessary for demarcating a so-called mandatory ‘minimum core’ standard which the political branches would be obliged to adhere to.¹⁰⁹ This reasonableness model then is designed to accord the political branches a broad latitude to make the “necessary policy choices to give effect to the rights”, whilst at the same time stipulating “factors to guide judicial intervention” when this latitude is exceeded.¹¹⁰ That is, it attempts to provide life and reality to the right to housing without intruding into the primary responsibility of the elected branches to allocate resources and formulate policy. The Constitutional Court stated that the reasonableness standard better ensures that the “judicial, legislative and executive functions achieve appropriate constitutional balance” in discharging their respective roles.¹¹¹

Implications of constitutional protection for socio-economic rights

As already noted, the institutions, rights and values created by the Constitution undoubtedly introduced “seismic shifts in the political and legal landscape” of South Africa.¹¹² In terms of practical utility, while poverty and inequality remain extremely high, the constitutional provisions on housing continue to provide a hitherto unavailable basic legal floor of protection for some of the most vulnerable in the State. Aside from practical utility, the South African experience provides lessons that may inform the principled debate over justiciable socio-economic rights in the Irish legal order. Ultimately, South Africa demonstrates that a justiciable right to housing offers a floor of legal protection, and does relatively little to alter the institutional balance of power over decisions concerning the allocation of public monies and resources. By adopting a reasonableness standard, the South African Courts continue to offer considerable deference to the decisions of the political branches, who retain ultimate responsibility over the difficult policy, taxation, and resource allocation decisions required to give positive effect to the right to housing.

PART VI: CONCLUSION

This report has sought to engage with well-ventilated arguments in Irish legal political discourse over legal protection of the right to housing. To recap, the most prominent arguments are two-fold. The first is a principled objection that legal protection for a right to housing fundamentally undermines the prerogatives of the elected branches over policies implicating tax and resource allocation. The second is a practical objection, based on the premise that courts are ill-suited to protect this kind of legal right, and that the utility of such a measure will be nugatory. This report has offered a comparative perspective on the right to housing through considering of the legal systems in (i) Finland; (ii) Scotland; (iii) France; and (iv) South Africa. We consider our examination has implications for the principled and practical concerns raised by proponents and opponents of a justiciable right to housing. Based on our comparative analysis of other jurisdictions, we make the following broad observations:

1. Providing a legal right to adequate shelter and housing, whether by constitutionalisation or by statute, is common amongst well-functioning democracies. Ireland would not be an outlier in making similar provision;
2. There are a wide variety of structural and institutional means by which these rights can be guaranteed. There is no 'one size fits all' model;
3. Measures can range from constitutional judicial protection as in South Africa, to statutory judicial protection as in France and Scotland, or ex-ante (before law is passed) constitutional protection where legislative measures are mainly reviewed by a parliamentary constitutional committee, as in Finland;
4. The variety of institutional means available to vindicate the right to housing demonstrates that concerns frequently ventilated against the right to housing - particularly separation of powers concerns- can be addressed. The simple fact is that guaranteeing a right to housing does not necessarily equate to a significantly increased constitutional role for the judiciary over same;
5. Even if the right to housing is offered judicial constitutional protection, the South African and Finnish experience highlights that judicial involvement offers a floor of protection, it does very little to alter the balance of power when it comes to decisions concerning the allocation of resources;
6. Moreover, even in South Africa, which has the strongest form of judicial protection, the courts continue to offer considerable deference to measures adopted by elected representatives in respect of housing rights. There is no question but that the political branches continue to retain ultimate responsibility over taxation and resource allocation;
7. In respect of concerns over efficacy, our comparative analysis suggests that a legally enforceable right to housing, while not a panacea, provides a legal floor of protection in respect of basic, adequate housing. This has been the experience for each of the jurisdictions examined;

8. However, the experience of all the jurisdictions considered in the report also highlights that the effectiveness of an ESC rights provision is heavily contingent on the existence of sufficient and enduring political will to vindicate them through difficult budgetary, policy, and legislative choices;
9. While the existence of a legally enforceable right may be a necessary condition for truly effective and robust protection of a right to housing, it is not a sufficient condition. The role of the elected branches in making difficult budgetary and resource-allocation decisions through the political process remains the most important condition for securing for protecting the right to housing.

Considering these findings, Mercy Law Resource Centre maintains its view that a legally enforceable right to housing, whether provided by increased statutory protection or through the constitution, would not “give a key to a home for all”.

Instead, a legally enforceable right would put in place a basic floor of protection, in “recognition that a home is central to the dignity of each and every person and a foundation of every person’s life”.¹¹³



ENDNOTES

- 1 <https://www.irishtimes.com/news/politics/convention-votes-to-protect-economic-social-cultural-rights-1.1701832>.
- 2 On 14 April 2016, the Dáil agreed to establish a Special Committee -- the Committee on Housing and Homelessness -- to review the implications of the problems of housing and homelessness, and to make recommendations in that regard. The Committee held its first meeting held on 20 April, and was required to present a final report to the Dáil on 17 June 2016. See http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/housing-homelessness/.
- 3 The Special Committee stated that acknowledging (i) the submissions and evidence provided to the Committee; (ii) the provisions in the Programme for a Partnership Government 2016; and (iii) the work of the Convention on the Constitution in relation to enshrining the right to housing in the Constitution, the Oireachtas Committee on Housing, Planning and Local Government (which is expected to be established shortly by Dáil Éireann) should bring the deliberations in this regard to a conclusion as quickly as possible by bringing a recommendation on the matter to the Government. See Report of the Oireachtas Committee on Housing and Homeless, June 2016: <http://www.oireachtas.ie/parliament/mediacommittees/32housingand-homelessness/Final-Report-.pdf>.
- 4 <https://beta.oireachtas.ie/en/debates/debate/dail/2017-03-22/31/>.
- 5 <http://www.thejournal.ie/right-to-housing-bill-3609627-Sep2017/>.
- 6 <https://www.irishtimes.com/news/politics/government-agrees-on-seven-referendums-in-2018-and-2019-1.3234818>.
- 7 Minister for State David Stanton TD stated that the Programme for a Partnership Government provided that “the recommendations made in the eighth report of the Constitutional Convention, particularly on the balance of rights, proper governance and resources, will be referred for consideration to the new Oireachtas committee on housing.” He added that it was “for this reason, the Government will vote against the Bill.” See <https://beta.oireachtas.ie/en/debates/debate/dail/2017-03-22/31/>.
- 8 Mercy Law Resource Centre, ‘The Right to Housing in Ireland’, (May 2016), p.19.
- 9 David Landua, ‘The Reality of Social Rights Enforcement’, Harvard International Law Journal, Vol 53, (2013) 190-246, 194.
- 10 Ibid.
- 11 Sandra Libenberg writes that “Central to this debate is the question whether it is possible for courts to play a meaningful role in vindicating the rights of those living in poverty without usurping the democratic policy-making and governance functions of the legislative and executive branches of government”, “Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow”, Dublin University Law Journal Vol 37(1) (2014), 137-171.
- 12 Ibid, 195.
- 13 Minister for State at the Department of Health Helen MacEntee TD, See <https://beta.oireachtas.ie/en/debates/debate/dail/2017-03-22/31/>.
- 14 Minister of State at the Department of Justice and Equality, David Staunton TD, <https://beta.oireachtas.ie/en/debates/debate/dail/2017-03-22/31/>.
- 15 Ibid.
- 16 Jim O’Callaghan TD, See <https://beta.oireachtas.ie/en/debates/debate/dail/2017-03-22/31/>.
- 17 Ibid.
- 18 Ibid.
- 19 Jeremy Waldron, “Foreign Law and the Modern Ius Gentium”, Harvard Law Review, Vol 199(1) (2005), 129-147, 138.
- 20 Sandra Libenberg, “Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow”, Dublin University Law Journal Vol 37(1) (2014), 137-171.
- 21 Constitution of Finland, Act No.731 of 1999. The Constitution entered into force on March 1, 2000.
- 22 Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, “Rights-based constitutionalism in Finland and the development of pluralist constitutional review” International Journal of Constitutional Law, Vol 9(2) (2011) 505-531, 509.
- 23 Ibid.
- 24 Martin Scheinin, “Protection of the Right to Housing in Finland”, in (ed) Scott Leckie, *National Perspectives on Housing Rights*, (Kluwer Law International, 2003) 241-252, 242-243.
- 25 Broadly speaking, Ireland would be a case of the former, the United Kingdom the latter.
- 26 Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, “Rights-based constitutionalism in Finland and the development of pluralist constitutional review” International Journal of Constitutional Law, Vol 9(2) (2011) 505-531, 511.
- 27 Ibid.
- 28 Ibid.
- 29 Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, “Rights-based constitutionalism in Finland and the development of pluralist constitutional review” International Journal of Constitutional Law Vol 9(2) (2011) 505-531, 510-511.
- 30 Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, “Rights-based constitutionalism in Finland and the development of pluralist constitutional review” International Journal of Constitutional Law Vol 9(2) (2011) 505-531, 517.

- 31 Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, “Rights-based constitutionalism in Finland and the development of pluralist constitutional review” *International Journal of Constitutional Law*, Vol 9(2) (2011), 505-531, 517.
- 32 Finnish constitutional scholars note that the ““criterion of a “manifest conflict” (in section 106) is deliberately designed to channel the constitutional interpretations and arguments applied at legislative stage by the Constitutional Law Committee into the concrete legal argumentation of the judiciary. The travaux préparatoires of section 106 explicitly state that, as a rule, a court should not regard the conflict as manifest, if the Constitutional Law Committee, in its ex ante review, already has considered the constitutional issue at hand and held that the relevant act of Parliament should be regarded as in harmony with the Constitution.” See Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, “Rights-based constitutionalism in Finland and the development of pluralist constitutional review” *International Journal of Constitutional Law*, Vol 9(2) (2011), 505-531, 518.
- 33 Opinion No. 17 of 1997. See Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism- Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 270.
- 34 Opinion No. 31 of 1997. See Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism- Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 261.
- 35 Ibid.
- 36 See Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism- Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 284.
- 37 See Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism- Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 245.
- 38 Ibid.
- 39 Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism- Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 253.
- 40 Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism- Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 252.
- 41 Administrative Court of Hame 1 June 1999. No.368/3. See Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism- Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 247.
- 42 See Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism - Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 249.
- 43 Martin Scheinin, “Economic, Social and Cultural Rights: Models of Enforcement”, Keynote Address at the Irish Human Rights Commission conference, at p.5. Dublin 9-10 December 2005. Text available at: < <https://www.ihrec.ie/documents/prof-martin-scheinin-keynote-address-ihrc-conference-9-and-10-december-2005/>>.
- 44 See Martin Scheinin, “Protection of Economic, Social and Cultural Rights in Finland- A Rights-Based Variant of the Welfare State?”, in Martin Scheinin (ed), *Welfare State and Constitutionalism- Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245-285, 283.
- 45 Martin Scheinin, “Economic, Social and Cultural Rights: Models of Enforcement”, Keynote Address at the Irish Human Rights Commission conference, at p.8. Dublin 9-10 December 2005. Text available at: < <https://www.ihrec.ie/documents/prof-martin-scheinin-keynote-address-ihrc-conference-9-and-10-december-2005/>>.
- 46 S.24 of the Housing (Scotland) Act 1987, as amended.
- 47 Ibid.
- 48 Ibid.
- 49 Ibid.
- 50 Ibid.
- 51 Ibid.
- 52 The relevant statutory provisions use the term “shall” in respect of the local authority’s duty, in contradistinction to the more discretionary “may” in the Irish Homelessness Act 1988.
- 53 https://www.crisis.org.uk/media/20606/crisis_the_homelessness_legislation_2015.pdf.
- 54 <https://www.legislation.gov.uk/ukpga/1987/26/section/31>.
- 55 Fiona King, “Scotland: Delivering a Right to Housing”, *Journal of Law and Social Policy*, Vol 24 (2015), 155-161, 158.

- 56 However, Scottish academic Beth Watts has observed that “legal challenges are very rare in the context of a wide consensus” concerning the “entitlements owed to homeless people.” See <https://www.faiobserver.com/region/europe/tackling-homelessness-difference-rights-make-24876/>.
- 57 Anderson and Serpa, “The Right to Settled Accommodation for Homeless People in Scotland: A Triumph of Rational Policy-Making?” *European Journal of Homelessness*, Volume 7(1) (2013) 13-39, 14.
- 58 <https://www.legislation.gov.uk/ukpga/1987/26/section/32>.
- 59 Scottish Executive, ‘Code Guidance on Homelessness: Guidance on legislation, policies and practices to prevent and resolve homelessness (May 2005)’, at p.55. See <http://www.gov.scot/Resource/Doc/53814/0012265.pdf>.
- 60 *Ibid*, at p.56.
- 61 *Ibid*, at p.57.
- 62 *Ibid*.
- 63 These include proceedings related to: where a creditor serves a calling up notice, a notice of default, or applies to court for remedies on default; where a landlord raises possession proceedings of a house which is let on a protected tenancy or a statutory tenancy; where a landlord raises possession proceedings of a house let on an assured tenancy; where a landlord raises possession proceedings of a house let on a Scottish secure tenancy or a short Scottish secure tenancy; and where a creditor commences proceedings to eject a proprietor in occupancy of a house. See S.11 Scottish Executive Guidance Note: ‘Homelessness (Scotland) Act 2003 Guidance for Local Authorities on Section 11’, <http://www.gov.scot/Topics/Built-Environment/Housing/homeless/las/s11/s11guidance>.
- 64 *Ibid*.
- 65 *Ibid*.
- 66 Crisis, ‘The homelessness legislation: an independent review of the legal duties owed to homeless people’, See https://www.crisis.org.uk/media/20606/crisis_the_homelessness_legislation_2015.pdf.
- 67 *Ibid*.
- 68 Crisis, ‘The homelessness legislation: an independent review of the legal duties owed to homeless people’, See https://www.crisis.org.uk/media/20606/crisis_the_homelessness_legislation_2015.pdf. Similarly, a 2011 report by Shelter Scotland has noted that in the last decade there have been tangible improvements to the homelessness situation in Scotland. The report observed that there have been reductions in the levels of people presenting to local authorities as homeless, evidence that accommodation and support services are working in better partnership, that the services people are receiving are better and that in some cases the standard of allocated accommodation is greatly improved. See Shelter Scotland, *Progress and Drift: A Review of the Homelessness Task Force Recommendations*, (Shelter Scotland Policy Library, 2011).
- 69 Fiona King, “Scotland: Delivering a Right to Housing”, *Journal of Law and Social Policy*, Vol 24, (2015), at 155-161, 155.
- 70 The proposal to adopt a Scottish style statutory right had a consensus from “right and left parties”. Levy-Vroelant: “The Right to Housing in France: Still a Long Way to Go from Intention to Implementation”, *Journal of Law and Social Policy*, Vol 24 (2015) 88-108, 94.
- 71 DALO being an abbreviation of the French phrase *droit au logement*, meaning “right to housing”.
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- 73 Levy-Vroelant: “The Right to Housing in France: Still a Long Way to Go from Intention to Implementation”, *Journal of Law and Social Policy*, Vol 24 (2015) 88-108, 94.
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- 92 Sandra Liebenberg, “Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow”, *Dublin University Law Journal* Vol 37(1) (2014), 137-171, 140.
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- 95 Sandra Liebenberg, “Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow”, *Dublin University Law Journal* 2014, 37(1), 137-171.
- 96 If one measures this by a poverty line of approximately 53 US dollars per person per month, See Sandra Liebenberg, “Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow”, *Dublin University Law Journal* 2014, 37(1), 137-171, 138.
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- 99 2004 (12) BCLR 1268 (CC).
- 100 2004 (12) BCLR 1268 (CC), at para 23.
- 101 2004 (12) BCLR 1268 (CC), at para 23.
- 102 Ibid, at para 28. Sachs J. considered that while there was “no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available” in “general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme”.
- 103 Sandra Liebenberg, “Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow”, *Dublin University Law Journal* 2014, 37(1), 137-171, 162.
- 104 2001 (1) SA 46 (CC) (S. Afr.).
- 105 A good example of this standard in action in the context of homelessness law can be seen in the recent decision in *Tee v Wicklow County Council* [2017] IEHC 194. The High Court held that local authorities’ discretion in relation to their duties to homeless individuals “must be exercised within well settled norms as explained in cases such as *O’Keefe v. An Bord Pleanála* [1993] 1 I.R. 39 so that it must not be exercised in an arbitrary or capricious manner or in a manner that flies in the face of fundamental reason and common sense. Absent that however, the court cannot interfere with the Council’s determination.” This is evidently a much more deferential standard.
- 106 Katherine G. Young, ‘Proportionality, Reasonableness, and Economic and Social Rights’, p.9, in (eds) Vicki Jackson and Mark Tushnet, *Proportionality: New Frontiers, New Challenges*’ (Forthcoming, 2017).
- 107 2001 (1) SA 46 (CC) (S. Afr.), at para 44.
- 108 [2002] (5) SA 721.
- 109 [2002] (5) SA 721, at para 37-38.
- 110 Sandra Liebenberg, “Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow”, *Dublin University Law Journal* 2014, 37(1), 137-171, 149.
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- 112 Lucy A. Williams, “The Right to Housing in South Africa”, *Columbia Human Rights Law Review*, Vol 45(3) (2014), 816-845, 817.
- 113 Mercy Law Resource Centre, ‘The Right to Housing in Ireland’, (May 2016), p.2

Mercy Law Resource Centre (MLRC) is an independent law centre, registered charity and company limited by guarantee. MLRC provides free legal advice and representation for people who are homeless or at risk of becoming homeless. It also seeks to advocate change in laws, policies and attitudes which unduly and adversely impact people who are at the margins of our society. MLRC provides five key services: free legal advice clinics; legal representation in the areas of housing and social welfare law; legal support and training to organisations working in the field of homelessness; policy work; and a befriending service. Our clients are local authority tenants and people who are homeless or at risk of becoming homeless. They include people who are trying to move away from homelessness who may be struggling with issues often linked to homelessness e.g. addiction, leaving prison, mental illness and relationship breakdown.

MLRC has built strong working relationships with organisations working in the field of homelessness, including Focus Ireland, Crosscare, and Dublin Simon. Since our inception in 2009, MLRC has provided advice and/or court representation in public interest litigation to approximately 3900 individuals, families and organisations.

For more about our work, please see www.mercylaw.ie





Mercy Law Resource Centre

25 Cork Street, Dublin 8

T 01 453 7459 **F** 01 453 7455

E info@mercylaw.ie

W www.mercylaw.ie

 Mercy Law Resource Centre

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