Class and The Right to Housing - the Avoidable Tragedy of Grenfell Tower

Geraldine Van Bueren QC*

Introduction

The avoidable tragedy of Grenfell Tower starkly raises the issue of class, an area of investigation which has had insufficient analysis. The reasons behind the inadequate examination may include the many myths surrounding class and class discrimination,[1] which may also have contributed to the exclusion of class discrimination as a prohibited ground of discrimination in the Equality Act 2010. Therefore there needs to be a serious consideration of whether reference to class in 21st century legislation would represent a novel departure for English law. In addition, because of issues such as fluidity, and attributed and self-attributed identity, an analysis of whether class is too loose a category to be capable of satisfactory definition to constitute a category for protection is required. I will also analyse the reasons behind the wariness of class by some critical feminists and race scholars, and I will examine the right to adequate housing, which is a right guaranteed both under international law and in a growing number of national constitutions, including several European Constitutions,[2] but is regrettably not a right yet guaranteed in England. I will also enquire whether the hostility in England [3] to incorporating socio-economic rights is also a facet of class discrimination, and discuss how all of these matters fed into the avoidable tragedy of Grenfell Tower. Finally, I will consider whether class has been well or ill-served by intersectionality, and whether socio-economic status, as a prohibited ground of discrimination, which was originally drafted for inclusion in the Equality Act, would be an adequate alternative safeguard to a prohibition on class discrimination.

Class Discrimination – a modern legislative indefinable concept or a term capable of definition?

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*Professor Geraldine Van Bueren QC is Professor of International Human Rights Law at Queen Mary, University of London, and Visiting Fellow, Kellogg College, Oxford. This article is drawn from Van Bueren QC, Intersectionality, The Right to Housing and the Avoidable Tragedy of Grenfell Tower in in Atrey and Dunne, eds, Intersectionality and Human Rights, Hart (Forthcoming) and Van Bueren Grenfell Tower – The Avoidable Tragedy, 17 July 2017 at https://www.youtube.com/watch?v=bGWtxjwGMic and on a paper presented at the University of Bristol on 14 November 2018.

[1] These are examined at greater depth in Van Bueren QC, *Class and Law* Hart (forthcoming).

[2] These include France, the Netherlands and Spain. See below for a discussion of the French and Dutch legislation.

[3] There is arguably not the same attitude to socio-economic rights in Scotland and Wales. [See] for example on the right to food in Van Bueren QC, 'A justiciable right to food - a possibility for the United Kingdom?' *Public Law* 2019, at 146.

Class discrimination is perceived as being a particularly complex form of discrimination, because of the interaction between definition, resource distribution, stigma, wider participation and structural transformation. However, such a perception is erroneous, as to greater and lesser degrees these issues intersect with a range of other discriminations. Many states, including the United Kingdom, are still stratified by class, which in essence, like other forms of arbitrary discrimination, is hierarchical and unequal.[4] It is an issue not only of importance as a matter of individual and group justice to those whose social mobility has and continues to be impeded, but also to society, which is deprived of potential valuable contributions.

One of the assumptions behind the non-express inclusion of a prohibition of class discrimination in the United Kingdom is that class-based discrimination would disappear over time without the necessity of adopting specific legal remedies. This arguably has not occurred.[5] Class, with its different forms of economic, social and cultural capital, may accumulate a range of advantages and disadvantages, similar to the reasons behind the prohibition of sex, race, religions, disability and sexual orientation discrimination. As with the legally recognised inequalities,[6] the effects of class discrimination extend beyond economic disadvantage, and include disadvantages concerning mortality rights, healthcare and education. It is arguable that class also performed a significant role in the fire at Grenfell Tower and the local authority, the Kensington and Chelsea Management Organisation and governmental responses.[7]

Mortality and class discrimination also arise in areas other than local authority housing, and there is a significant and unacceptable difference in life expectancy in the United Kingdom between different classes in boroughs of the same city.[8] Class is not, in Kincheloe and McLaren's terminology, 'antiseptically privileged',[9] but class discrimination deserves equal consideration with the other forms of legally prohibited discrimination, because of its impact on an individual life's chances and duration. Despite its impact on life expectancy and arguably the right to life, there are a number of arguments raised against making class discrimination in the United Kingdom prohibited; these include an assumption that references to class are not a part of the British statutory tradition, and that class is too difficult to define in law.

Historically, legislative references to class and its position in England and Wales were intended to reinforce class barriers rather than remove them, so that sumptuary laws, such as the Statute Concerning Diet and Apparel 1363, prescribed who of which class

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[4] See *State of the Nation 2018-9,* the report of the Social Mobility Commission, April 2019. See for example, Nancy Isenberg, White Trash. The 400 year Untold History of Class in America, 2016.
[5] Within academia see, for example, the creation of the Association of Working Class Academics in 2019, which is chaired by the author.
[6] See section 4 Equality Act 2010. The following characteristics are protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.
[7] See the discussion below
[8] In relation to Glasgow see WHO, *Commission on Social Determinants of Health – final report*, 2009; See also Risk Managed Healthcare Policy. 2015; 8: 99–110, Perspectives on differing health outcomes by city: accounting for Glasgow's excess mortality, Simon DS Fraser and Steve George, in which they argue that class was one of the determining factors
[9] Kincheloe J.L., McLaren P. (2011) 'Rethinking Critical Theory and Qualitative Research', pp. 285-326, in Hayes K., Steinberg S.R., Tobin K. (eds) *Key Works in Critical Pedagogy. Bold Visions in Educational Research,* vol 32. Sense Publishers.

could wear specific styles of clothing and eat specific foods.[10] Sumptuary legislation also had significant consequences for different classes in relation to access to property and in restrictions on travel. Such detailed prescription may appear trivial or even absurd in the modern era, but this encompassed all the essentials of medieval life. Magna Carta 1215 focussed on the rights of the baronial class and on freemen, and this was expanded in Carta de Foresta 1217 and Hwyl Dda. [11] References to class, however, were not limited to the medieval period, and continued into the twentieth century. Voting restrictions, for example, applied to both class and gender through property ownership, and it was not until the Representation of the People (Equal Franchise) Act 1928 that class became formally invisible in the plebiscite. Hence, historically it has long been recognised that class is a legal relationship as well as a political, social and economic one, and is therefore an appropriate area for consideration by contemporary legislation. The fact that class has a tradition of legislative protection raises the question of whether class is still a relevant factor in contemporary life.

Such 'instruments of exclusion', as Marshall described them,[12] also continued at an informal level prior to Grenfell Tower. In both Rowntree's and Boothby's poverty maps of York and London, residents of streets were colour coded according to the moral standing of their inhabitants. This linkage, however, between property ownership, although formally invisible in electoral law, as distinct from property residence, arguably performed a significant and ultimately fatal role in Grenfell Tower, with perceptions concerning entitlement. Marshall's approach to class, which is at odds with a Marxist approach, is relevant, because he regarded the essence of social class as 'the way a man is treated'. In the Royal Borough of Kensington both Marshall's approach and Bordieu's cultural, economic and social capital[13] played out clearly. Those perceived, wrongly or rightly of having too little economic, cultural and social capital, perceptions based on residence, including in Grenfell Tower, may have led to assumptions of disentitlement in relation to the lesser weight placed on the evidence reinforcing their safety concerns. Hence assumptions about the social values and dignity of members of particular classes prevailed, and may have contributed to their deaths, and this at least raises a prima facie case for the need for contemporary legislation prohibiting class discrimination.

Class and the Justiciability of Socio-Economic Rights

One of the challenges faced by those who face class discrimination is that it is perceived as too difficult or more difficult to define than the other prohibited grounds found in the Equality Act. Firstly, because it is argued that there is fluidity to definitions of class, which distinguishes the concept from the other grounds of protected status. However, such arguments are open to challenge. The right to change one's religion recognised in international law under the International Covenant on

[10] See further Van Bueren QC, 'Socio-economic Rights and a Bill of Rights - an overlooked British tradition', *Public Law,* 821, 2013.

[11] ibid

[12] Marshall T.H., ed. *Class, Citizenship, and Social Development*, (1965) (2nd ed) Anchor Books.

[13] Bourdieu, P. (1986) 'The Forms of Capital', in J. Richardson (ed.) *Handbook of Theory and Research for the Sociology of Education* (New York, Greenwood), 241-258.

Civil and Political Rights[14]and in regional treaties, including the European Convention on Human Rights,[15] has not been regarded as an insurmountable obstacle to prohibiting religious discrimination. Similarly there is also a fluidity in definitions of gender, and a change in gender is not regarded as a bar to gender equality. The European Court of Justice, which is the supreme court of the European Union and separate from the European Court of Human Rights, has decided cases upholding the rights of transsexuals. In the 1996 case of *P. v. S. & Cornwall County Council*[16] a transsexual had been dismissed, and the ECJ ruled that discriminatory treatment of a person who has undergone a sex change operation was discrimination on the ground of belonging to a particular sex under the Directive on equal treatment for men and women. In the 2004 case of *KB v. National Health Service Pensions Agency*,[17] Ms KB claimed that her transsexual female–to–male partner would not be entitled to a survivor's payment because they were not married. They could not marry because her husband was registered as a woman and it was not then possible to change a person's sex in the British registry of birth after undergoing gender reassignment surgery. The ECJ ruled that the provision of the EC Treaty on equal pay for women and men also covered discrimination against transsexuals and as a consequence of the judgement the Gender Recognition Act 2004 was adopted.

This is not to deny the complexities surrounding class and other forms of discrimination; however, human rights law has always, since its inception, grappled with complex and challenging cases in both domestic and international contexts, indeed it is arguable that such complexity is the raison d'etre of human rights law. The *travaux preparatoires* of the United Nations Convention on the Rights of Persons with Disabilities 2006, for example, illustrate the challenges of definition, and to resolve such complexities it incorporates in article 1 a non-exhaustive definition of persons with disabilities. Similarly, in drafting the UN Convention on the Rights of the Child 1989 it took ten years for us to agree upon a definition (as well as other matters) but the political will was such that a definition was eventually agreed.[18]

There is in addition an alternative approach offered by international law, because the prohibited grounds of race, sex and gender discrimination have not been defined in their specific international instruments, but left to definition through a case-by-case approach. In defining class, guidance can therefore be sought from the approaches to definitions of gender, race, disability and sexuality. As with race and gender, inequalities of advantage and disadvantage are crystallised, which persist beyond a specific action or event and accumulates over a period of time as Bourdieu, himself from an impoverished family in Gascony, observed. In the 'Forms of Capital' he expanded the notion of capital beyond the economic definition, emphasising material exchanges, to include 'immaterial' and 'non-economic' forms of capital, described as cultural and symbolic capital. These different types of capital can be acquired, exchanged, and converted, and he also argued that an understanding of these multiple

[14] International Covenant on Civil and Political Rights, Article 18.
[15] European Convention on Human Rights, Article 9.
[16] Case C-13/94, *P. v. S. and Cornwall County Council,* (1996) ECR.
[17] Case C-117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health,* (2004) ECR.

[18] Allbeit that the definition was open ended. The author was one of the drafters.

forms of capital would help to elucidate the structure and functioning of the social world.

The term cultural capital represents the collection of non-economic forces such as family background, social class, varying investments in and commitments to education, different resources, etc. which influence academic success. Bourdieu distinguished three forms of cultural capital. The embodied state is directly linked to and incorporated within the individual and represents what they know and can do. Embodied capital can be increased by investing time into self-improvement in the form of learning. As embodied capital becomes integrated into the individual, it becomes a type of *habitus* and therefore cannot be transmitted instantaneously. The objectified state of cultural capital is represented by cultural goods, material objects such as books, paintings, instruments, or machines. They can be appropriated both materially with economic capital and symbolically via embodied capital. Finally, cultural capital in its institutionalised state provides academic credentials and qualifications which create a 'certificate of cultural competence which confers on its holder a conventional, constant, legally guaranteed value with respect to power ' and these academic qualifications can then be used as a rate of conversion between cultural and economic capital.[19]

There are others who are wary of focusing on class because of the lack of inclusion of other facets of identity, particularly gender and race. There is much substance to their criticisms when a historical approach to class issues is undertaken, however, such an exclusionary approach to class is both unjustified and not inherent in class. Class is intersectional and is not accurately described by reference only to Caucasian males. Class is a rich multi-dimensional concept, which embraces race, religion and gender as well as other fundamental aspects of identity. Intersectional approaches are necessary to move discussions of class beyond 'white working-class men'. By adding the dimension of a prohibition on class discrimination, the law will be strengthened not only in relation to class discrimination but also in relation to all the other protected characteristics.

It may be argued that, because there is already a focus on social exclusion in policies and within the Council of Europe treaty system,[20] therefore including class discrimination as a prohibited ground would not have had any impact on preventing the Grenfell Tower fire. Social exclusion, originally a French concept, is defined in the literature as applying to those who are systematically excluded from participation in society.[21] Participation in this context refers to four dimensions: the capacity to purchase goods and services; participation in economically or socially valuable activities, political engagement and social interaction.[22] Social exclusion arises from a

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[19] In 'Ökonomisches Kapital, kulturelles Kapital, soziales Kapital.' in *Soziale Ungleichheiten (Soziale Welt, Sonderheft 2*, edited by Reinhard Kreckel. Goettingen: Otto Schartz & Co. 1983. pp. 183-98

[20] However the United Kingdom is not party to this section of the Charter.

[21] Contemporary political interest in the concept began in 1974 when René Lenoir, then Secretary of State for Social Action in a French Gaullist government, first popularised the term.

[22] See, *Social Exclusion Meaning, Measurement and Experience and Links to Health Inequalities: a review of literature*, Jane Mathieson, Jennie Popay, Etheline Enoch, Sarah Escorel, Mario Hernandez, Heidi Johnston and Laetitia Rispel, WHO Social Exclusion Knowledge Network Background Paper .1.

variety of causes, which are partly material, but also relate to other issues, such as living in a deprived area, suffering partnership breakdown, or being a member of an ethnic minority, or being elderly or disabled. Social exclusion, as with class, is not just a temporary phase of poverty; it is systemic, often passed from generation to generation and can be self-perpetuating. Although social exclusion is valuable in tackling poverty, it has demonstrated that by itself combating social exclusion is insufficient, as the figures on inequality and social mobility in the United Kingdom continue to demonstrate.[23] Nor did social exclusion create a binding obligation on a local authority to weigh the concerns and entitlements of Grenfell Tower residents equally with other concerns. This is not to argue that social exclusion policies or the concept itself should be abandoned; rather, it is to maintain that adopting both a social exclusionary approach reinforced by a prohibition on class discrimination would be more effective.

A similar approach is arguable in relation to socio-economic status. Firstly because the term socio-economic status does not provide positive definitions of identity nor provide autonomy. I may choose to describe my origins as working class, which is an important facet of my identity, but I and others do not self-identify as from a low socio-economic status. There is nothing positive about low socio-economic status, whereas many of us are proud either of continuing to be live working class lives or from coming from working class backgrounds. There is also a risk that courts would not regard discrimination on the grounds of socio-economic status in the same light as racial discrimination, and instead adopt the approach of the US Supreme Court. In *San Antonio Independent School District v. Rodriguez* the Supreme Court rejected a claim that policies which discriminate against poor people can attract heightened judicial scrutiny.[24] This was in part because the judgment did not conceptualise poverty [25]as similar to race. In American jurisprudence racial classifications were suspect, because they concerned a discrete and insular minority, but 'poor people could not be regarded as discrete or insular.[26] Hence a system which funded local schools on the basis of local taxes and therefore led to under-resourced schools in poorer areas should not, according to the Supreme Court, be subject to the heightened scrutiny which would have been appropriate for a system which provided inferior schools to African-Americans.

Although there have been attempts at the European regional human rights level to recognise, as in *Garib v Netherlands*, that the applicant belongs to 'the sociologically underprivileged' and that the applicant's poverty constituted a threat to the 'ordre publique', such an approach has only been in occasional dissenting judgements. [27] This invisibility of class has continued when even the UK mission of the UN Special Rapporteur on Extreme Poverty and Human Rights, argued for the need to combat

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[23] *State of the Nation 2016: fourth annual 'state of the nation' report from the Social Mobility Commission,* published 16 November 2016.

[24] *San Antonio Independent School District v. Rodriguez* 411 US 959, 93 SCt 1919.

[25] In contrast during the parliamentary debates on the inclusion of socio-economic status there were a minority of Members of Parliament who appeared to equate socio-economic status and class, see for example the discussions in HC Deb 11 May 2009, vol 492, col 614.

[27] *Garib v Netherlands,* application no. 43494/0, 6 November 2017.

social injustice with human rights but failed to consider the impact of class on poverty. [28]

Class, socio-economic rights and the right to adequate housing

In essence the avoidable tragedy of Grenfell Tower concerned the right of everyone to adequate housing. Therefore, it is also necessary to explore the resistance shown by many, but not all, wealthier states to enshrining the right to adequate housing and other justiciable socio-economic rights into their constitutional structure; this includes the United Kingdom. In the United Kingdom resistance to enshrining justiciable socio-economic rights has been shown by political parties on the left and the right. Although the major statute on human rights is entitled the Human Rights Act, it omits the express codification of socio-economic rights, and it is pertinent to enquire whether this is the result of unconscious class bias and/or because of other grounds. The partial incorporation of the European Convention on Human Rights and the only partial ratification of the European Social Charter also raise similar questions.[29]Although socio-economic rights share with civil and political rights the right of everyone within the state's jurisdiction to benefit from them, socio-economic rights may have a particular value be to members of social classes with less or access to less resources.

Symbolically and practically justiciable socio-economic rights reduce class inequality. Symbolically, because the state is shown to be creating a route for all classes to enjoy the protected entitlements such as the right to adequate housing, nutrition and water, clothing and standard of living necessary for a good quality of daily life. Practically, because justiciable socio-economic rights transform some members of the community, including those living in welfare states, from beneficiaries into social actors. This is the reasoning behind the Universal Declaration of Human Rights 1948 enshrining several socio-economic rights. Although it is commonly and erroneously assumed that rights such as the right to adequate housing were incorporated only at the urging of the Soviet states and therefore are an expression of Communist values, an examination of the *travaux preparatoires* provides evidence that the socio-economic rights were included at the insistence of the Latin American states, and later reiterated in binding treaty form by a wide range of member states of the United Nations with diverse political systems.

The principal umbrella social justice rights treaty, the International Covenant on Economic, Social and Cultural Rights 1966,[30] paved the route for additional human rights treaties aimed at protecting specific groups in the global community, in the UN Convention on the Rights of Persons with Disabilities, [31] the Convention on the

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[28] UN Doc A/HRC/41/39/Add.1. 23 April 2019.

[29] Although the Human Rights Act is commonly referred to as incorporating the European Convention on Human Rights this is not accurate because the Human Rights Act does not incorporate article 13 nor all of the Protocols' substantive rights.

[30] Art 11

[31] CRPD, Art. 28(1)

Elimination of All Forms of Discrimination against Women [32], the Convention on the Rights of the Child [33]and the International Convention on the Elimination of all Forms of Racial Discrimination,[34] all of which may also raise questions in relation to Grenfell Tower, for example, the additional mobility challenges of older people and those living with disabilities on upper floors of tall buildings. Because of the lack of incorporation of the International Covenant and its deprioritisation, the right to housing has not been incorporated into the law of the United Kingdom. [35]In addition, although the UK is also bound by the Council of Europe's European Social Charter 1961, which guarantees the right of the family to social, legal and economic protection, and makes explicit reference to an obligation to protect family life and provide 'family housing',[36] and will remain bound regardless of Brexit, the United Kingdom has not ratified the entire revised European Social Charter 1996 treaty, and therefore considerations of the United Kingdoms' legal obligations in relation to Grenfell Tower are limited by the non-applicability of both a right to petition and of the express right to housing.[37]

Another omission, which although beneficial to all within the jurisdiction, has a disproportionate impact of people with less resources, is the lack of full ratification of the European Social Charter. The United Kingdom, in contrast to other states including Ireland, France and Portugal has only ratified the barest minimum of the treaty[38] and the nervousness of all of the political parties in Government of socio-economic rights has been a major obstacle to ratification of the entire revised Charter. Full ratification would have offered the possibility for those living in Grenfell Tower to have had the possibility of having their safety concerns raised earlier. This is evidenced by the Council of Europe's Committee of Social Rights interpretation of the right to housing as requiring states both to ensure an adequate supply of housing and to ensure that existing housing is of an adequate standard.[39]

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[32] CEDAW, Art. 12(2)(h)
[33] CRC, Art. 27(3)
[34] CERD, Art. 5(e)(iii)
[35] See the argument for incorporation in Van Bueren QC, The New Social Contract – A Dignified Life for Both the Poor and the Wealthy in Gunnarsson, Murbe, Weiss eds., The Human Right to a Dignified Existence in an International Context, Nomus, Hart Publishing, 2019.
[36] Article 16

[37] Domestic law in England provides piecemeal rights and protections for tenants through the Housing Act 2004, the Landlord and Tenant Act 1985, the Environmental Protection Act 1990 and the Building Regulations 2010. In the wake of the Grenfell in England, there is no general obligation to ensure that properties are fit for human habitation. In Wales, the Renting Homes (Wales) Act 2004 introduces a new requirement for rented dwellings to be fit for human habitation. In Scotland, the Housing (Scotland) Act 2006 gives tenants greater rights to enforce basic standards of habitability. After the Grenfell Tower fire, Karen Buck MP reintroduced the Homes (Fitness for Human Habitation) Bill, which would require residential rented accommodation to be provided and maintained in a habitable state. The Bill is currently before Parliament.

[38] Ireland ratified the European Social Charter on 07/10/1964 and the Revised European Social Charter on 04/11/2000, accepting 92 of the 98 paragraphs of the Revised Charter. Ireland ratified the Additional Protocol providing for a system of collective complaints procedure on 04/11/2000. It has not yet made a declaration enabling national NGOs to submit collective complaints.

[39] See *ERRC v Bulgaria. Collective Complaint No. 31/2005, European Roma Rights Centre (ERRC) v. Bulgaria,* 18 October 2006.

Successive United Kingdom governments have not ratified the full revised European Social Charter 1996, which does include the right the housing.[40] It is this failure to place a similar priority on socio-economic rights as civil and political rights that raises, at least prima facie, questions of class, because the additional value of adopting a right to adequate housing would be that the right to housing would be applicable to all people irrespective of income and access to economic resources. The former Council of Europe Commissioner on Human Rights, Thomas Hammarberg, has stated it is critical to support victims of housing rights violations, because access to housing is a precondition for exercising all other fundamental rights. This approach is reinforced by the General Comment of the Committee on Economic, Social and Cultural Rights, which also provides that states, as a matter of legal obligation, are obliged to conceptualise that adequate housing is not equated only with shelter but equally importantly is its facets of security, living in peace, and proximity to essential entitlements.[41]. The Committee has begun to put this into effect through rulings on complaints, such as the case of *I.D.G. v. Spain* in 2015[42], which established that the State has an obligation to provide for effective remedies in foreclosure procedures related to defaulting on mortgage payments, to ensure that all appropriate measures are taken to guarantee personal notification in foreclosure procedures, and to guarantee that legislative measures are adopted to prevent repetition of similar violations in the future.

In the Netherlands an entitlement of housing is guaranteed by the Dutch Constitution,[43] which in article 22(2) provides that, 'it shall be the concern of the authorities to provide sufficient living accommodation'. This constitutional protection has its origins in the Dutch Housing Act 1901.

From these arguments it may be tempting to conclude that if the United Kingdom had incorporated a right to housing it would have prevented the fire, deaths and injuries in Grenfell Tower. However, this does not necessarily follow, as, less than two years after the Grenfell Tower fire, two buildings, one occupied, collapsed in Marseilles, killing residents. France, prior to this and as a consequence of a finding of breach of the European Social Charter,[44] had adopted an enforceable right to housing.[45]

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[40] Article 31(1)

[41] A principle reiterated by the UN Rapporteur adequate housing in 2016, 'The right to housing cannot be viewed in isolation from other human rights, in particular the rights to life, to respect for private and family life, and to property.' See 'Adequate housing as a component of the right to an adequate standard of living', available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/71/310.

[42] Communication 2/2014.

[43] The Constitution of the Kingdom of the Netherlands 2008.

[44] In *FEANTSA v. France*, the ECSR found that France violated Article 31 by not making sufficient progress toward eradicating sub-standard housing, failing to pass legislation to prevent evictions, having an insufficient supply of social housing, and having a poor social housing allocation system.

[45] *Loi n° 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale (1). NOR: SOCX0600231L Version consolidée au 27 mars 2019,* which introduced an enforceable right to be housed (the DALO law) charged prefects with the task of making the social housing application process more efficient by allocating accommodation to applicants deemed to have priority. This responsibility is exercised under the supervision of an

Although fortunately fewer people were killed than in Grenfell Tower there appeared to be certain similarities. These included the providing of notice to the authorities of the risk of fire, the rich ethnic diversity of the residents including refugees and asylum seekers, and issues of class. A right to adequate housing, however, would mean that it would be open to the courts in the United Kingdom to adopt jurisprudential approaches similar to that adopted by the courts in South Africa, which does enshrine rights to housing.[46] In the *Joe Slovo* case the judge criticised Thubelisha Homes for deficiencies in the process of engagement, particularly for a 'top-down approach' rather than involving the community 'as partners in the process of decision-making itself.' [47]

A prohibition on class discrimination would not automatically guarantee that the avoidable tragedy of Grenfell Tower would have been prevented, but it would add to the obligations of the local authorities to consider class as a legal duty and to avoid being discriminating in their response to the warnings. This would reduce the risk of such tragedies reoccurring.

Although the leaving the European Union by the United Kingdom would release the United Kingdom from legal human right obligations under European Union law, including the EU Charter of Fundamental Human Rights, it would have no effect on the obligations which the United Kingdom has by virtue of being party to the Council of Europe Convention on Human Rights. As well as providing for a right to life in Article 2, the Convention provides in Article 14 that there is a right not to be discriminated against on 'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' This list of prohibited grounds of discrimination is not exhaustive, and is prefaced by '*any* ground *such as*' (emphasis added). Arguably, this, together with *'other status*', would mean that the right is a right not to be discriminated against on a ground other than those listed, when there is no rational relationship between the ground and the different treatment based on that ground.

An inclusion of class discrimination either through reading it in to 'social origin…birth or other status', which is enshrined in the Human Rights Convention both in article 14 and in Protocol 12 would also add to the armour of the European Court of Human Rights and therefore of domestic courts, including in the United Kingdom. If class discrimination was expressly prohibited under the European

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administrative judge Any person in difficulty, whose application for housing has not been satisfied, may apply to a mediation committee and then, in certain cases, lodge an appeal with an administrative court if they wish to pursue their application. In its first case the court ruled that in order for the state to meet its obligation to protect the right to housing, families must not merely have a place to stay for the night but an adequate home.' See further Kyra Olds, 'The Role of Courts in Making the Right to Housing a Reality throughout Europe: Lessons from France and the Netherlands', 28 *Wis. Int'l L.J.* 170 (2010) at 170 and 171.

[46] Constitution of the Republic of South Africa 1996, Article 26. Housing , '1. Everyone has the right to have access to adequate housing.'

[47] *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* (CCT 22/08) [2011] ZACC 8; 2011 (7) BCLR 723 (CC) (31 March 2011).

Convention on Human Rights, then questions raised by the European Court of Human Rights into race discrimination could also be applied to class discrimination. The reasoning, for example, of the European Court of Human Rights in *Moldovan and Others v. Romania*,[48] particularly in relation to the approach of public officials and the manner by which their grievances were handled, which were found to have violated the European Convention of Human Rights, could also be relevant to class discrimination and could reinforce arguments concerning the right to life.

Although there is not an express right to housing under Europe's civil and political right principal treaty, article 2, which enshrines that 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally', has provided an indirect method of compensation in relation to extreme violations of the right to housing. According to the European Court there is a positive obligation on governments to take 'all appropriate steps' to safeguard life for the purposes of Article 2. These positive obligations must apply 'in the context of any activity, whether public or not, in which the right to life may be at stake' and this clearly applies to the regulations concerning high-rise buildings. Specifically the European Court of Human Rights has considered cases which have resulted in a loss of life and the question that has to be asked is: are the principles which emerge from this jurisprudence applicable to the government and Grenfell Tower?

In *Oneryildiz v Turkey*[49] the court stressed that there was practical information available, that the inhabitants were faced with a threat to their physical integrity on account of the technical shortcomings of the municipal rubbish tip. Similarly with Grenfell Tower, the risks would appear to have been made known to the government. This is not the place to examine all the evidence in great length, but of particular significance is the information arising from the inquest into the fire in Lakanal House in 2009, information provided by the All-Party Parliamentary Fire Safety and Rescue Group and directly communicated to the Government before the refurbishment, and information provided by the tenants. In *Oneryildiz* the European Court of Human Rights found that the timely installation of a safety system before a situation became fatal would have been an effective preventative measure 'without diverting the state's resources to an excessive degree'. Similarly it would be open to a domestic court to consider under the Human Rights Act whether the installation of safer cladding panels and the cost of a sprinkler system would have diverted the resources of the United Kingdom 'to an excessive degree'. It is unlikely that such a cost would have been found to have been excessive. An additional factor relied upon by the European Court

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[48] *Moldovan v. Romania,* applications nos. 41138/98 and 64320/01, Judgment No. 2, 12 July 2005. The entire judicial process was tainted by racial comments made by public officials ranging from the police to the mayor. Although overwhelming evidence was presented incriminating the police and their involvement in the riot, the military prosecutor refused to prosecute the police officers. The Court ruled that procedures and justice were ignored because of the ethnicity of the victims and this amounted to discrimination. The Court found that the petitioners' living conditions were so horrible that they interfered with human dignity. 'Due to the destruction of their homes by government officials, the petitioners, which included children and the elderly, were subjected to live in "inhuman conditions in cellars, hen houses, and stables".'

[49] *Oneryildiz v. Turkey*, application no. 48939/99, [2004] ECHR 657, (2005) 41 EHRR 20.

was the lack of an effective supervisory system, and this would also be a consideration for a domestic court considering the fire safety inspections at Grenfell Tower.

A second relevant case, which indirectly concerned the right to adequate housing is *Budayeva v Russia*[50], where an authority knew a dam had been weakened but failed to tell the residents, who were living in the path of any breach of the dam. The European Court of Human Rights stated that where lives are at risk there is a smaller margin of appreciation given to states parties. In *Oneryildiz v Turkey* the court also stressed that there was practical information available that the inhabitants were faced with a threat to their physical integrity on account of the technical shortcomings of the municipal rubbish tip. In essence the questions which arise from this jurisprudence are - what the government knew, and what the government ought to have known, from the knowledge communicated to it, and whether and how the government acted upon this knowledge. Any evidence of the London Fire Brigade's policy of stay-put would not weaken this chain, although there may be further questioning of this policy in the second stage of the Inquiry particularly since the Lakenal House Inquiry made recommendations to amend the stay put policy.[51]

In respect of less serious violations, however, the European Convention's protection of the right to life has not provided a shield, because, with some justification, the European Court has regarded this as protecting a right to housing through the back door without the express consent of the states parties.

There is also the potential of article 3 of the European Convention on Human Rights being applied to the Grenfell Tower fire and in particular inhuman treatment. In *Selcuk and Askar v Turkey*[52] the Court found a violation of article 3 when the applicants, who were over 50 years old and who had lived there their entire lives in their village, were forced to watch their village being burnt and destroyed by members of the Turkish security forces. This amounted to inhuman treatment. If the European Court of Human Rights held that it amounted to inhumanity in Turkey, then it is arguable that for people to stand and watch not only their homes and memories burn, but also their family and friends, then this would also equate to inhumane treatment, even though Grenfell Tower was not a deliberate burning. However, the fundamental flaw in seeking to argue that reliance on articles 2 and 3 of the European Convention on Human Rights undermines arguments for the necessity of the United Kingdom incorporating a justiciable right to adequate housing, is that a right to adequate housing would be preventative, whereas arguments before the European Court generally have to be post-violation. A right to adequate housing is preventative because if the actions expressly stated in the General Comment were fully implemented, the possibility of such a fire as occurred in Grenfell Tower would be significantly reduced.

Class Wariness

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[50] *Budayeva v Russia*, applications no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008.

[51] I am grateful to Daniela Nadj for this information.

[52] *Selcuk and Asker v. Turkey*, applications no. 12/1997/796/998-999, 24 April 1998.

Because intersectionality has failed to prevent class discrimination in the United Kingdom, it is necessary to enquire whether a rationale for excluding a prohibition on class discrimination is that it is sometimes twinned with revolution and violent discontent. However, this ignores the possibility of legislative solutions which embody peaceful evolution. The goal of prohibiting class discrimination is not to lead to a structural dismantling of the state or its total restructuring. It is to ensure greater social mobility and a wider access to state resources based upon equality and human rights principles. Although class is often bound up in the public imagination with the writings of Marx, the *travaux preparatoires* of the Universal Declaration provide evidence that it is legitimate to uncouple class discrimination from Marxist goals, as such an approach was accepted by non-revolutionary democratic states during the drafting of the foundational human rights instrument, the Universal Declaration of Human Rights. Nor will prohibiting class discrimination hinder full participation to the detriment of the individual, the community and the state; equally significantly, it will not divert attention from wealth inequalities,[53] but as with the other equality protections in the United Kingdom, it will enhance participation.

For those wary of including a prohibition on class discrimination, it could be argued that there are already limitations at the enforcement level in relation to other forms of anti-discrimination legislation, and therefore an additional ground of prohibition would either not be effective or would be of little effect. Such limitations include Weber's analysis of the limitations of the common law, arguing that progress may be hindered by litigation's expense and the judiciary's social background, [54] arguments which, sadly, are equally relevant today, and because they are equally applicable to the other forms of prohibited discrimination ought not to be used as a ground for denying other groups an equal opportunity not to be discriminated against because of their status and identity.

Denying the inclusion of a prohibition of class discrimination on this ground is to ignore the potential of interactions between lawyers, civil society, including trade unions, as well as political policy makers in drafting a prohibition on class discrimination which would provide an avenue so that enforcement problems highlighted by existing anti-discrimination law could be either minimised or eradicated. A legislative prohibition on class discrimination would buttress the existing grounds of discrimination, moving towards synthesis rather than conflict. The aim would be to increase the protection of human dignity whilst not deprioritising disadvantage.

Conclusion

Jurisprudence concerning the right to adequate housing, and the majority of socio-economic rights cases are brought by members of social classes with fewer resources.

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[53] This has been considered in Van Bueren QC *Class and Law* op cit.

[54] See generally, Weber, Max (1978) *Economy and Society*, 2 Vols. Berkeley: University of California Press.

Litigation concerning the right to adequate housing is rarely brought by wealthier homeowners and, where brought, the cases rarely succeed.[55]

It is arguable that the very slow response of the human rights community in perceiving the fire in Grenfell Tower as a fundamental human rights issue was because it concerned the loss of life in social housing affecting a diverse range of people, including working class.[56] Class has played into the demotion of the value of socio-economic rights by successive governments. In addition, perceptions concerning the social capital of Grenfell Tower played into the way the residents' concerns and factual information were weighed so little in the balance, and this added to the paucity of concern about human rights violations, resulting in tragedy. In this regard the ethos, public consultation and education, which should have accompanied the Human Rights Act, failed to create an understanding that adequate housing is also a fundamental human right. This failure of understanding also continued into the Inquiry into Grenfell Tower Part One,[57] with its refusal to grant standing to the United Kingdom's principal independent human rights and equality body, the Equality and Human Rights Commission.

The European Convention on Human Rights was never intended to provide a tool for members of the community from classes with fewer resources seeking to apply its provisions to inadequate housing, unless the conditions amount to extreme situations. Indeed the general requirement of victimhood i.e. ex post facto, would make arguments used under article 2 difficult to succeed. This leaves a gaping hole in the protection of housing entitlements where the state's administrative and regulatory framework is ineffective, because the United Kingdom has not incorporated the principal umbrella treaty, the International Covenant on Economic, Social and Cultural Rights, nor has it ratified the petitioning mechanisms of the International Covenant and the European Social Charter. People from lower income classes in Grenfell Tower were exposed to greater levels of risk because of their lower social status, and they lacked an effective remedy.

It is part of the inherent and dynamic nature of a legal right to equality, that, as forms of arbitrary and unjustifiable discrimination become more visible, so the right to equality ought to expand to remain relevant and effective by embracing all of its diverse forms, including class discrimination. Although much pride has been derived from the creation of a broad range of prohibited forms of discrimination, the fire in Grenfell Tower exposed the limitations of a failure to enshrine in United Kingdom domestic law an indivisible approach to human rights by omitting socio-economic

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[55] See for example in South Africa, in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening),* (CCT 55/00) [2001] (29 May 2001) there was an unsuccessful attempt by property owners to stop the opening of a refuge for the homeless victims of a flood.

[56] See the early article in The Times, The Grenfell Disaster and the Right to Life, Van Bueren QC https://www.thetimes.co.uk/article/grenfell-disaster-the-uk-is-in-violation-of-the-right-to-life-kknpj68gxJune 22 2017

[57] https://www.grenfelltowerinquiry.org.uk. The Inquiry is chaired by Sir Martin Moore-Bick.

rights. This failure was compounded by the failures of an approach, which omits a prohibition of class discrimination.[58]

[58] See further Van Bueren, *Class and Law* op cit.