



NUI Galway
OÉ Gaillimh



**Submission to The Housing
Commission's
Conference on a Referendum on
Housing in Ireland**

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Rights and Policy**

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10 May 2022

About the Housing Commission

The Housing Commission has been tasked by the Government to examine issues such as tenure, standards, sustainability and quality-of-life issues in the provision of housing, all of which have long-term impacts on communities. This will include efficient functioning of the markets for construction and provision. The Commission will also bring forward proposals on the wording for a referendum on housing.

About the Conference on a Referendum on Housing in Ireland

The conference forms part of the fact finding and orientation stage of the Housing Commission's work, serving as a listening exercise to examine the complex constitutional questions arising and the various proposals that have been made around the potential wording for an amendment to the Constitution and to assist the commission in its task to advise the government, in an independent and objective manner, regarding the critical factors for consideration and to make recommendations as to the appropriate wording to be put to the people.

About the author

Professor Padraic Kenna lectures at NUI Galway in land law, housing law and policy, international commercial property law and housing rights. He is a graduate of University of Warwick, and completed his PhD at NUI Galway on international housing rights and their application to national housing systems. Professor Kenna publishes widely, and his book *Housing Law, Rights and Policy* (Dublin: Clarus Press) is seen as a key text. He has worked with many housing and advocacy NGOs including FEANTSA – where he was involved in setting up the Expert Group on Housing Rights and Housing Rights Watch.

Padraic also acts as Director of the Centre for Housing Law, Rights and Policy, engaging in housing law, rights and policy research at national and European level – publishing reports on mortgage repossessions, housing rights in the context of EU multi-lateral governance, and other areas.

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1. Introduction

As part of the deliberations of the Housing Commission Conference on a Referendum on Housing, I have been invited by the Housing Commission to examine the four iconic Irish housing cases of *O'Reilly v Limerick Corporation*,¹ *O'Brien v Wicklow UDC*,² *O'Donnell v South Dublin County Council*³ and *Fagan v Dublin City Council*.⁴ Drawing on these cases it is possible to comment on the extent to which Irish courts have engaged with the idea of a right to housing in their constitutional jurisprudence thus far. The jurisprudence in the cases also provides guidance on how Irish courts might approach an express constitutional right to housing in the future.

These four cases reveal how Irish courts have approached a right to housing – which although not expressly set out as such in the Constitution - *Bunreacht na hEireann*, was discerned as arising from a natural law interpretation of the constitutional rights to bodily integrity – a comparatively low base line – but nevertheless providing an opportunity for constitutional law review.⁵

The cases involve judicial scrutiny of the application of housing related statutes, applying these constitutional norms, where an applicant claimed a breach of constitutional rights. In the four cases examined, the Local Authority legislative competence arose from the Housing Acts of 1966 and 1988, and the Housing (Miscellaneous Provisions) Act 2009. One case involved interpreting Local Authority housing obligations through the lens of the European Convention on Human Rights Act 2003, as well as the Irish Constitution.

This Submission begins with examination of the engagement of the courts with housing rights – which may be assumed to emanate from the legislation at issue, and its interpretation through the constitutional norms of the time. Secondly, it considers how the courts might approach an express constitutional right to housing in the future, based on precedent, and within the Irish common legal tradition. This part also explores some supporting materials on housing and home generally, international housing rights jurisprudence, the potential costs of implementing a constitutional right to housing in Ireland, and contemporary distributive justice issues. The Submission concludes with some observations on the way Irish courts have addressed issues of separation of powers and non-interference in the decisions of Executive bodies in resource allocation.

Shifting the constitutional basis of its review criteria from “unenumerated rights” and “bodily integrity”, derived from a natural law interpretation of the Constitution, to a specific Article approved in a referendum, linked to modern

¹ *O'Reilly v Limerick Corporation* [1989] ILRM 181 at 194.

² *O'Brien v Wicklow UDC*, ex tempore (10 June 1994) High Court.

³ [2015] IESC 28.

⁴ [2019] IESC 96.

⁵ This development of “unenumerated rights” arising from Article 40.3.2. began with *Ryan v Attorney General* [1965] IR194.

international jurisprudence, would signify a major and historical step, while at the same time preserving the common law tradition, and the separation of powers doctrine.

2. Extent of Irish courts' engagement with housing rights in four significant cases

a. O'Reilly v Limerick Corporation [1989] ILRM 181

This case involved members of the Traveller community residing in caravans on unofficial sites in Limerick in conditions of considerable poverty and deprivation. They requested the court to grant a mandatory injunction requiring the Corporation to provide sites with hard surfaces for their caravans, toilet facilities, running water and a regular refuse collection. The Corporation denied they had a duty to provide anything more than “dwellings” under section 55 of the Housing Act 1966.⁶ While the Corporation building programme could include “projects to provide housing accommodation for particular categories of persons” and should be reviewed from time to time, serviced sites for Travellers caravans were not specifically included.

While Costello J. granted declaratory orders that the building programme should be revised and include such serviced sites, a mandatory order was not made, as it was not assumed that the Corporation would neglect to perform the statutory duty thus declared. In any case, he held that the granting of a mandatory order would contravene separation of powers arrangements regarding public spending, as well as curial supervision of allocation of State resources for particular households.

The applicants also sought damages arising from a breach of their unremunerated personal constitutional rights of bodily integrity under Article 40.3.2.⁷ This provides that: “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”⁸ Reviewing the exercise of statutory powers under this constitutional principle, Costello J. distinguished between constitutional rights which are seen as “negative” rights – where the court is asked to protect against wrongful interference, and a “positive” obligation requiring the State to provide certain physical resources and services.⁹

He introduced a significant classification of two types of justice - distributive justice and commutative justice into this part of Irish law – an approach since

⁶ Section 55 required the Corporation to prepare and adopt a building programme having regard to the housing needs in its functional area. For a detailed overview of all housing law in Ireland see Kenna, P. (2011) *Housing Law, Rights and Policy* (Dublin: Clarus Press).

⁷ Whyte, G. (2015) *Social Inclusion and the Legal System: Public Interest Law in Ireland*, (2nd ed.) (Dublin: IPA);

⁸ In *Ryan v Attorney General* [1965] IR 194, Kenny J. held that Article 40.3.2 enumerated a number of particular rights, such as the right to bodily integrity, based on the “Christian and democratic nature of the State”.

⁹ [1989] ILRM 181 at 192.

widely cited in Supreme Court decisions on State obligations in relation to socio-economic constitutional rights.¹⁰

There is an important distinction to be made between the relationship which arises in dealings between individuals (a term which includes dealings between individuals and servants of the State and public authorities) and the relationship which arises between the individual and those in authority in a political community (which for convenience I will call the Government) when goods held in common for the benefit of the entire community (which would nowadays include wealth raised by taxation) fall to be distributed and allocated. Different obligations injustice arise from these different relationships. Distributive justice is concerned with the distribution and allocation of common goods and common burdens. But it cannot be said that any of the goods held in common (or any part of the wealth raised by taxation) belong exclusively to any member of the political community.¹¹

This will define how the courts approach allocation decisions on State expenditure.

An obligation in distributive justice is placed on those administering the common stock of goods, the common resource and the wealth held in common which has been raised by taxation, to distribute them and the common wealth fairly and to determine what is due to each individual. But that distribution can only be made by reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due.¹²

The decision is also significant for its exposition of the principles in the Irish Constitution on separation of powers.

The powers of Government of the State are to be exercised by the organs of State established by it. The sole and exclusive power of making laws for the State is vested in the Oireachtas; the executive power of the State is exercised by or on the authority of the Government; and justice is to be administered in courts established by law. In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to Dáil Eireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation. Approval for plans for expenditure and the raising of taxes, is given in the first instance by Dáil Eireann and later by the Oireachtas by the enactment of the annual Appropriation Act and the annual Finance Act. This means that questions relating to raising common funds by taxation and the mode of distribution of common funds are determined by the Oireachtas, although laws enacted by the

¹⁰ See particularly the judgment of Hardiman J. in *TD v Ireland* [2001] 4 IR 259.

¹¹ [1989] ILRM 181 at 194.

¹² *Ibid.*

Oireachtas may give wide discretionary powers to public authorities and public officials (including Ministers) as to their distribution in individual cases.¹³

Apart from the fact that members of the judiciary have no special qualification to undertake such a function, the manner in which justice is administered in the courts, that is on a case-by-case basis, make them a wholly inappropriate institution for the fulfilment of the suggested role.¹⁴ Costello J. concluded with the oft-cited phrase that:

I am sure that the concept of justice which is to be found in the Constitution embraces the concept that the nation's wealth should be justly distributed (that is the concept of distributive justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts.¹⁵

Costello J. stated that these considerations applied to both the “unenumerated rights” provisions, and rights based on the textual analysis of a specific constitutional Article.

b. O'Brien v Wicklow UDC [Unrep. H.C. 10 June 1989]

This case marked a significant development in relation to the constitutional review of Local Authority housing provision.¹⁶ Since *O' Reilly v Limerick Corporation*, section 13 of the Housing Act 1988 had been enacted:

A housing authority may provide, improve, manage and control sites for caravans used by persons to whom this section applies, and may carry out works incidental to such provision, improvement, management or control, including the provision of services for such sites.¹⁷

Already in *University of Limerick v Ryan*¹⁸ Barron J. had held that section 13 imposed a duty to provide halting sites, instead of conventional dwellings for Travellers - an incremental step. In *O'Brien v Wicklow Urban District Council*,¹⁹ Costello J, taking into account of the updated legislation and case law, was now prepared to interpret the statutory obligations set out the 1988 Act as linked to the “unenumerated rights” in Article 40.3.2. of the Constitution.

I accept the argument that the plaintiffs have a right to bodily integrity which is being infringed by the conditions under which they are living. I accept that the provisions of the Housing Act, 1988 must be construed in the light of a constitutional duty towards the plaintiffs and the factual

¹³ Ibid, p. 194/5.

¹⁴ Ibid, p. 195.

¹⁵ Ibid.

¹⁶ Whyte, G. (2015) *Social Inclusion and the Legal System: Public Interest Law in Ireland*, (2nd ed.) (Dublin: IPA);

¹⁷ Section 13(2) Housing Act 1988.

¹⁸ *University of Limerick v Ryan* (Unreported High Court, 21st February 1991).

¹⁹ *O'Brien v Wicklow UDC*, ex tempore (10 June 1994) High Court.

position in which the plaintiffs find themselves. The Supreme Court has held in the course of a number of judgments and particularly in the judgment of Mr. Justice Walsh in the *East Donegal Co-operative* case that the Acts of the Oireachtas must be read in the light of the Constitution. If statutory powers are given to assist in the realisation of constitutionally protected rights by a Local Authority and if the powers are given to relieve from the effects of deprivation of such constitutionally protected rights and if there are no reasons why such statutory powers should not be exercised then I must interpret such powers as being mandatory.²⁰

Costello J. ordered the provision of three halting sites and two temporary sites, although the Housing Authority would determine the priority in allocations to these. Thus, section 13 of the 1988 Act came to be construed in the light of a constitutional duty arising from enumerated constitutional rights to bodily integrity. The decision shows that while a court can order specific provision be made, it will not adjudicate in the priority waiting list, or queuing system, for individual allocations.

c. O'Donnell v South Dublin County Council [2015] IESC 28

The powers of the court to make a mandatory order obliging a Local Authority to expend resources were again considered in this case. The O'Donnell family consisted of two adults and seven children. Mrs Mary O'Donnell, the first named applicant, was a full-time carer for her seven children. Mr Patrick O'Donnell, her husband, the second named applicant, was unemployed, and in receipt of disability allowance. At the time of the High Court case, in 2006, the applicants, who were members of the Travelling community, were living in a two-bedroom adapted caravan/mobile home which the County Council had provided to the family. Ellen O'Donnell, the fourth-named applicant, was aged 15 years, and as a result of cerebral palsy, was constrained to use a wheelchair. She was educationally disadvantaged. Some measure of her situation can be gleaned from the fact that she did not have access to a toilet until she reached the age of 13 years.²¹

The applicants had previously been provided with two caravans by the Council, along with a wheelchair ramp, but had exchanged one for the husband's mother's caravan, which was now unsuitable for living. The Applicants brought judicial review proceedings claiming that the Council had acted in breach of duty in failing to provide the family with new caravan accommodation. They sought an order of *mandamus* directing the provision of such accommodation.

The Supreme Court was asked to redefine the term "dwelling" in section 56(1) Housing Act 1966, so as to include a caravan, in line with the Local Authority obligations under the ECHR Act 2003. However, the Court rejected

²⁰ *O'Brien v Wicklow UDC*, ex tempore (10 June 1994) High Court, p.4.

²¹ [2015] IESC 28 para 7.

this claim, on the basis that to include caravans or mobile homes “would be to impermissibly legislate”. The Supreme Court reiterated the approach in *University of Limerick v Ryan*²² where Barron J. had interpreted the duty in section 13 of the 1998 Act (now replaced by Section 29 of the Housing (Traveller Accommodation) Act 1998) – that “the natural and ordinary meaning of the word *may provide* implies a duty, not a discretion which in the absence of a countervailing reason or principle is to be interpreted as giving rise to a right”.²³

However, MacMenamin J., giving judgment for the Supreme Court, held that the family were not entitled to be provided with a caravan by the Council, as the relevant statutory duty (section 13 of the Housing Act 1988) extended only to the provision of halting sites, and he was not satisfied that this duty could be extended, by reference to section 56 of the Housing Act and section 2 of the ECHR Act 2003, to include a duty to provide caravan accommodation. However, since it was accepted by the Council that the caravan in which the family lived was unfit for human habitation, they came within the definition of homeless persons for the purpose of section 2 of the Housing Act 1988.

The Court then considered the power of the Council to provide emergency accommodation for homeless persons under section 10 of the 1988 Act. MacMenamin J. observed that while the section was couched in permissive terms, there were circumstances in which the Constitution would require a court to interpret them as mandatory:

If, in an exceptional case such as this, statutory powers are given to assist in the realisation of constitutionally protected rights or values, and if powers are given to relieve from the effects of deprivation of such constitutionally protected rights, and if there are no reasons, constitutional or otherwise, why such statutory powers should not be exercised, then I think such powers may be seen as being mandatory. In so finding I do no more than reiterate a statement of interpretation in cases of this exceptional category expressed by Costello J in the High Court, in *O'Brien v Wicklow Urban District Council* (Unreported, High Court, 10th June, 1994).²⁴

MacMenamin J concluded that while the Council had carried out its duty with respect to the family as a whole, having regard to Mr and Mrs O'Donnell's repeated refusals of previous offers of accommodation, it had failed in its duty towards their disabled daughter Ellen O'Donnell. He went on to point out that:

... insofar as Ellen O'Donnell is concerned, this is not only a case about parental choices, rights and duties (though these arise), but also about the duty of the Council, when faced with clear evidence of inhuman and degrading conditions, to ensure that it carried out its statutory duty. This was to vindicate, insofar as was practicable, in the words of Article 40.3 of

²² *University of Limerick v Ryan* (Unreported High Court, 21st February 1991).

²³ [2015] IESC 28 para 47.

²⁴ *Ibid* at para 65.

the Constitution, the rights of one young woman with incapacities to whom, by virtue of the evidence, the Council owed a discrete and special duty under Article 40 of the Constitution. That statutory duty is to be informed with due regard to Ellen O'Donnell's capacity as a human person (Article 40.1 Constitution of Ireland).²⁵

The Court held that the “truly exceptional nature” of Ellen's situation “gave rise to the duty to interpret and apply ‘may’ as ‘must’”. Again, Article 40 of the Constitution was marshalled to enable the court to adjudicate on the exercise of a statutory power in housing.

d. Fagan v Dublin City Council [2019] IESC 96

The applicant applied for social housing support for himself and his three children (where he had joint custody), under Section 20(1) of the Housing (Miscellaneous Provisions) Act 2009. Section 20(1)(c) of the Act defined a ‘household’ as including “two or more person who do not live together but who, in the opinion of the housing authority concerned, have a reasonable requirement to live together”.

The Council refused to accept that the applicant's circumstances met the eligibility criteria set out in Section 20(1)(c), and offered Housing Assistance Payment (HAP) to meet his needs as a single person living alone. Part of the Council's response was based on the availability of resources and Section 69(1) of the Local Government Act 2001, which states that a Local Authority in performing functions conferred on it by statute “shall have regard to the resources, wherever originating, that are available, or likely to be available to it for the purpose of such performance and the need to secure the most beneficial, effective and efficient use if such resources”.²⁶

In this case, the Supreme Court held that the Council was not entitled to take into account resource implications in determining whether or not two or more persons had a “reasonable requirement to live together”, in line with section 20(1) of the 2009 Act. The two steps of determining eligibility and allocating housing had to be treated separately.²⁷ The Court then addressed the issue of resources:

In a situation where there is insufficient housing stock to meet the demands of qualifying households, and where there are children with no accommodation or who have a greater need than the appellants, it is accepted that in allocating housing to qualified households it is not only

²⁵ [2015] IESC 28 at para 70.

²⁶ *Ibid*, at para 37. See also *Brady v Cavan County Council* [1999] IESC 49. In *FIDH v Ireland* the Irish State responses to the European Committee on Social Rights held out a notion of Local Authorities as somewhat autonomous bodies – separate from Ministerial control.

²⁷ O'Connell, C. Focus of Ireland: Homelessness in the Courts *Fagan v Dublin City Council* [2019] IESC 96, *Hibernian Law Journal* 2020, 19(1), 110–129. Similarly, in *Mulhare v Cork CC* [2017] IEHC 288, Baker, J. refused to intervene in the Local Authority housing allocation system, even in a situation of “exceptional or compassionate grounds” to direct provision of housing in a particular area to facilitate the applicant with cerebral palsy as it would amount to an impermissible interference by the court in the allocation of resources by a statutory body.

permissible but just that the Council should prioritise those households with the greatest need so as to ensure that there is not an underutilisation of bedroom accommodation, as would likely be the case if a house with a separate bedroom for the children was to be allocated to the applicants at this point in time.²⁸

While there may be solid separation of powers reasons for not adjudicating on the allocation or queuing process of the Local Authority, the argument on resources does not fully address the contemporary situation. In fact, the housing 'stock' being allocated here is usually a voucher to access private rented accommodation under a Housing Assistance Payment (HAP) scheme,²⁹ rather than one of the 140,000 Local Authority homes. Local Authorities are reimbursed by the Department of Housing for HAP costs, and this is just one option, aside from a direct allocation of a Local Authority or Approved Housing Body tenancy, where spending has increased over the years.³⁰ State spending on HAP has received much criticism as it does not result in any new State housing stock being created.

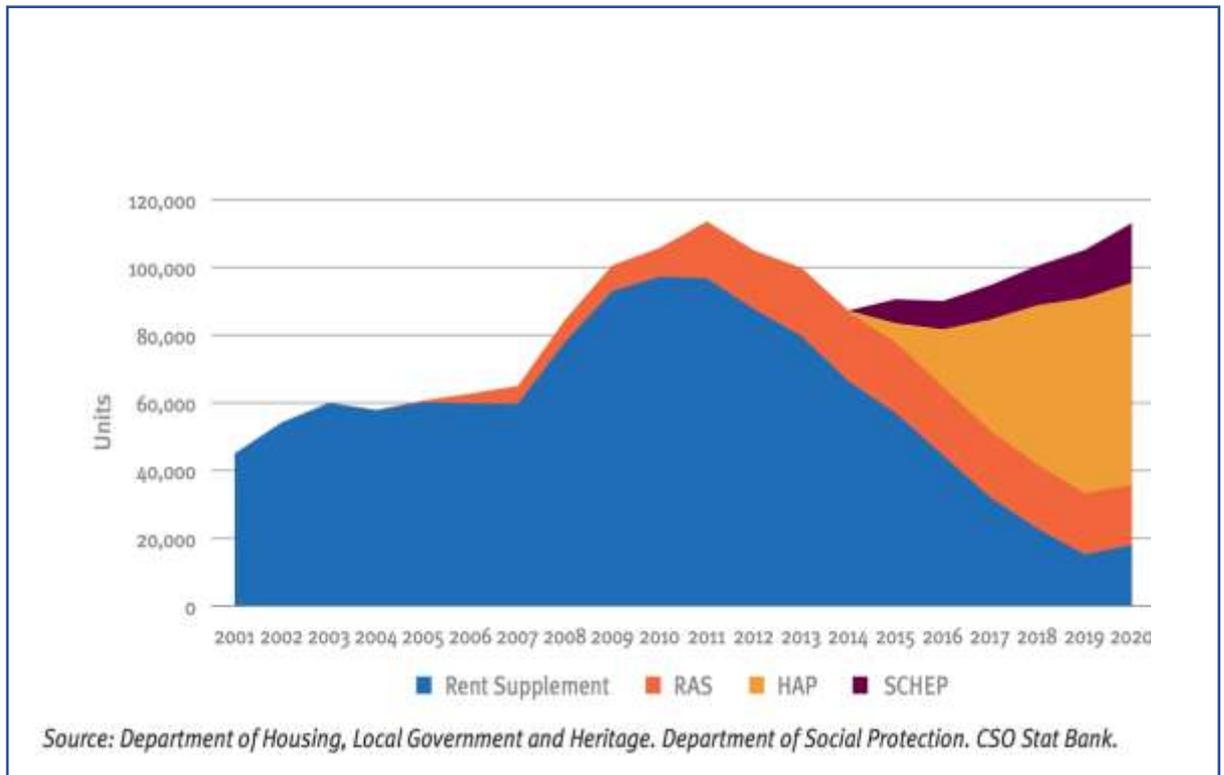
The Chart below shows the range of measures which qualify as 'social housing support'. The model of the overstretched Local Authority with too few properties to meet all applications is but one part of the equation. The dramatic increase in HAP as a form of social housing support, making up some 60,000 tenancies also raises significant housing rights issues, as there is little security of tenure. Tenants can be evicted (with no defence) on any of the six grounds permitted in the Residential Tenancies Act 2004.

²⁸ [2019] IESC 96 at para 42.

²⁹ Housing Assistance Payment. This form of social housing support involves the payment by a Local Authority of rent for a dwelling to a landlord on behalf of a qualified household in accordance with Part 4 of the Housing (Miscellaneous Provisions) Act 2014. Those in receipt of HAP now amount to some 60,000 households.

³⁰ Section 19 of the Housing (MP) Act 2009 defines "social housing support" as (a) dwellings provided by a housing authority under the Housing Acts 1966 to 2009 or provided under Part V of the Planning and Development Act 2000, other than affordable housing; (b) dwellings provided by an approved body; (bb) providing housing assistance under Part 4 of the Housing (Miscellaneous Provisions) Act 2014; (c) the sale of a dwelling under section 90 of the Principal Act or Part 3 or 4, or the sale of a house under Part 3 of the Housing (Miscellaneous Provisions) Act 2014; (d) entering into and maintaining rental accommodation availability agreements; (e) the provision of sites for caravans referred to in section 13 of the Act of 1988 and any accommodation provided to travellers under the Housing (Traveller Accommodation) Act 1998; (f) the provision of sites for building purposes under section 57 of the Principal [1966] Act.

Chart 1. Total current funded tenancies at year-end 2001-2020 (including Rent Supplement)³¹



³¹ Houses of the Oireachtas, Parliamentary Budget Office (2022) *Housing Ireland: Trends in Spending and Outputs of Social and State Supported Housing 2001–2020*. p. 25. Available at: https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2022/2022-03https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2022/2022-03-02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housing-2001-2020_en.pdf02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housing-2001-2020_en.pdf. Rent Supplement is a rent support payment; RAS = Rental Accommodation Scheme; HAP = Housing Assistance Payment; SCHEP = Social Housing Current Expenditure Programme – funding measures used by Local Authorities and Approved Housing Bodies to secure dwellings for use as temporary social housing (long and short term) – properties can either be privately owned or owned by Approved Housing Bodies.

3. Whether these cases may shed any light on how the courts would approach an express constitutional right to housing in the future

The cases examined all raise important questions on the application of the constitutional right to bodily integrity as an interpretative guide for judicial review of executive action, doctrine of the separation of powers, and the potential for court proceedings to order the executive (Minister and Local Authorities) or the legislature (Oireachtas) to re-order the level of public spending on housing.³² The courts in almost all cases marginally or incrementally widened the scope of the statutory obligations, to include previously excluded groups (albeit on an exceptional basis). However, in all cases the courts were very keen to stress that the waiting list, or queuing system, for addressing individual allocations of resources – halting-sites, caravans or subsidised rented housing, would not be scrutinised by the courts. Indeed, the courts in this and many other cases have strenuously reiterated that decisions on levels of public expenditure are to be made by the legislature and not by the courts. This powerful non-interventionist role, symbolised in the *TD* judgments of Keane CJ. and Hardiman J., ensures that Irish courts maintain political neutrality.³³ While some view this as a failure to vindicate (unenumerated) socio-economic rights, it might well be seen as a position which encourages and facilitates change through the democratic and political system. The level and extent of State services and market interventions should be decided through political democracy, rather than litigation.

a. Housing and home generally

Shelter is a primary human need - essential for basic human survival. All societies arrange for the shelter of their inhabitants, and this communal activity is even seen as a core of political development, housing policy and, for some, the principles of property law.³⁴ Indeed, this dichotomy of treating

³² There is no space to review the various approaches to constitutional interpretation here, but to highlight the decline of the natural law approach, and the reluctance to discern any further such unenumerated rights in the Constitution following the decision in *TD v Ireland* [2001] 4 IR 259, at 282, where Keane CJ stated that he had the “gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as ‘socio-economic rights’ to be unenumerated rights guaranteed by Article 40.” See Hogan, G., Whyte, G., Kenny, D. & Walsh, R. (2018) *Kelly: The Irish Constitution* (5th ed.) (London: Bloomsbury). There is of course, a requirement for a harmonious approach to constitutional interpretation which also includes EU Treaty law, given the primacy of EU law, in the event of a constitutional right to housing being adopted.

³³ See particularly the judgment of Hardiman J. in *TD v Ireland* [2001] 4 IR 259.

³⁴ Sir William Blackstone Commentaries on the Laws of England (1765–1769), Book 2 Chapter 1. Of Property, in General. “Hence a property was soon established in every man's house and

housing as a socio-economic right in law (requiring public provision for those eligible), while at the same time treating similar housing as property, where it enters a realm of civil and political rights of life, liberty and property, constitutes a housing conundrum.³⁵

Today, homelessness is regarded as a violation of human rights and human dignity. Homeless people and applicants for social housing are the most marginalised, socially excluded and poorest people in society. Beyond mere shelter, housing as a “home” provides space for nurture, privacy, personal development, family life and personal space. Lorna Fox O’Mahony has described it as a building plus an “x- factor”, representing the social, psychological, and cultural values that a physical structure acquires through use as a home.³⁶ Article 8 European Convention on Human Rights (ECHR) regards the right to respect for home as including rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.³⁷ International human rights instruments establish the right to live in a home in peace, security and dignity, with security of tenure, availability of services, affordability, habitability, accessibility, appropriate location and cultural adequacy.³⁸ Fineman suggests that human vulnerability is universal, constant and inherent in the human condition, and the “vulnerable subject” should be the focus of State law, policy and human rights, rather than the liberal legalist autonomous independent subject.³⁹

But housing has also become integrated into wider property ownership, and within the realms of property ‘markets’, and investment, it is sold, mortgaged and leased. This facilitates globalised investment in housing, often boosting rents and house prices, creating inequality and segregation. Today, the concept of housing as a ‘market’ or investment largely informs policymaking,

home-stall; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established.”

³⁵ See comments of Hogan J. in *Clare CC and Bernard and Helen McDonagh and IHREC Supreme Court* [2022 IESC 2 at para 1. “...the fact remains that the legal system has not found it altogether easy to accommodate the distinct cultural traditions of the travelling community – such as nomadism and living in large family groups – within its traditional ambit of protecting and enforcing property rights, enforcing laws restraining trespass and legislation designed to give effect to legitimate planning, zoning and environmental concerns.” However, this was the first case to recognise Travellers caravans as “dwellings” under the Constitution.

³⁶ Fox O’Mahony, L. ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ *Journal of Law and Society*, Vol. 29, No. 4, December 2002, pp. 580–610.

³⁷ *Connors v UK*, ECtHR (Application no. 66746/01) [27/4/2004] para 82; *Yordanova and Others v Bulgaria* (Application No. 25446/06) [2012] para 118.

³⁸ UN Doc. E/C.12/1771/4, UNCESCR. General Comment No. 4. The Human Right to Adequate Housing, Geneva; Kenna, P. (2022) Right to Housing, *Elgar Encyclopaedia of Human Rights* (Cheltenham, Edward Elgar); OHCHR and UN-Habitat, The Right to Adequate Housing, UNHabitat Fact Sheet, No. 21/Rev. 1 (2009).
https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf

³⁹ See Fineman, MA, “The Vulnerable Subject: Anchoring Equality in the Human Condition”, 20 *Yale Journal of Law and Feminism*, 3 2008–2009, 1–17.

and integrating any right to housing into contemporary complex housing systems is a challenge.⁴⁰ There is also the powerful international “property lobby”⁴¹ which exercises enormous political influence, even to the extent of redefining how rights over housing and land are codified within legal systems, at international and also national level.⁴²

e. Housing rights jurisprudence

Any express Irish constitutional right to housing would be expected to be compatible with the international human rights treaty obligations already accepted by the Irish State. Currently, these are non-justiciable in Irish courts,⁴³ (except those in the EU Charter of Fundamental Rights in the context of an EU law issue), with the result that Irish courts must fall back on natural law interpretations of the Constitution when seeking to apply any semblance of housing rights in review of State actions. In these cases, where applicants are approaching the courts as a last resort to assist in solving their housing problems, courts have sought to apply these very limited Irish constitutional protections.

Of course, Ireland has adopted the UN *Universal Declaration on Human Rights* (1948) which refers to housing rights as part of the right to an adequate standard of living.⁴⁴ In 1989, Ireland also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966),⁴⁵ which obliges Ireland to respect, protect and fulfil these rights.⁴⁶ Some obligations, known

⁴⁰ Kenna, P. (2010) 'Can housing rights be applied to modern housing systems?'. IJLBE, 2 (2):103–117; Kenna, P. (2020) *Integrating EU Charter Housing Rights into EU Economic Governance and Supervision*.
<http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Briefing-3-Integration-EUhttp://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Briefing-3-Integration-EU-Charter-Housing-Rights-into-EU-Economic-Governance-and-Financial-Supervision--pdfCharter-Housing-Rights-into-EU-Economic-Governance-and-Financial-Supervision--.pdf>

⁴¹ Colenutt, B. (2020) *The Property Lobby*, (Bristol: Policy Press).

⁴² See Pistor, K. (2019) *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, Princeton). Pistor describes how property rights are coded at a global level – especially financial or intangible capital ownership rights. But this requires national and local courts and laws to recognise and uphold these codings, policing the boundaries of ‘private’ law, and insulating these codings from local or national political contestation.

⁴³ See *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97 reiterating that under Articles 29.6 and 15.2.1. of the Constitution, UN and Council of Europe treaties are not part of Irish domestic law, and are not binding on courts.

⁴⁴ Universal Declaration of Human Rights, UNGA Resolution 2200A (XXI) UN Doc A/810. Article 25. ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’

⁴⁵ Article 11 ICESCR (1966) UN Doc. A/6316 states: ‘The States Parties [. . .] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate [. . .] housing’..

⁴⁶ To ‘respect’ means that States must not interfere with or restrict human rights; to ‘protect’ involves passing laws and creating mechanisms to prevent violation of rights by State authorities; and to ‘fulfil’ means that States must take positive action to ensure the enjoyment of human rights. UN CESCR, General Comment No 3: The Nature of States

as “minimum core obligations” have immediate effect (on ratifying a UN human rights instrument) guaranteeing the minimum core obligation of shelter, in an equal and non-discriminatory manner.⁴⁷ Beyond the minimum core obligations the principle of “progressive realisation” of rights requires that the State gradually and fully implement the rights, as resources permit, with no unjustified regression. The priority in allocation of increasing resources, however, must be to address those most in need.⁴⁸

Further relevant UN instruments ratified by Ireland promote the right to housing include the UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979),⁴⁹ the *Convention on the Rights of the Child* (CRC) (1989),⁵⁰ the *International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990),⁵¹ the *UN Convention Relating to the Status of Refugees* (1951)⁵² and the *Convention on the Rights of Persons with Disabilities* (CRPD) (2006).⁵³ *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, (1997) states that evictions should not result in individuals being rendered homeless, and a “proportionality assessment” is required in all cases.⁵⁴

Parties’ Obligations (Art 2, Para 1 of the Covenant) 14 December 1990, UN Doc. E/1991/23. This General Comment also sets out the nature of the ‘minimum core obligations’ ... “the Committee [UNCESCR] is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations” (para10).

⁴⁷ See UN HABITAT *The Right to Adequate Housing Fact Sheet No. 21/Rev.1*. available at: https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf; Kenna, P. (2014) ‘Housing Rights after the Treaty of Lisbon – Are they Minimum Core Obligations?’ *The Cyprus Human Rights Law Review*, 3 (1): 13–35.

⁴⁸ See UN Doc. E/1992/23. Committee on Economic, Social and Cultural Rights, General Comment No. 4 on the right to adequate housing. Para 11. states: “States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.” <https://www.refworld.org/pdfid/47a7079a1.pdf>.

⁴⁹ UN Doc. CEDAW/C/TUN/3–4 [2000].

⁵⁰ UN Doc. CRC/C/GC/10 [1989].

⁵¹ UN Doc. A/RES/45/158.

⁵² UN Doc. A/RES/429.

⁵³ UN Doc. A/RES/61/106.

⁵⁴ See UN Doc. E/C.12/1997/10. The UNCESCR has held that, in eviction cases, States must establish a legal framework requiring courts to conduct proportionality assessments, even where accommodation is occupied without legal title – see UN Doc. E/C.12/66/D/37/2018.

A recent UN Monitoring Report for Ireland commented on making ICESCR rights part of domestic law.⁵⁵

The Committee [UNCESCR] reiterates its recommendation that the State party [Ireland] take all appropriate measures to ensure the direct applicability of Covenant provisions, including through incorporation of the Covenant in its domestic legal order, and enhanced training for judges, lawyers and public officials.

Ireland has also ratified the European Social Charter (ESC) of the Council of Europe in 1964 (ratified by Ireland in 1989) and makes regular report to the European Committee on Social Rights on the application of these rights. The ESC sets out a range of housing rights in Article 15 (disabled persons); Article 16 (social legal and economic protection of families)⁵⁶; Article 19 (migrant workers); Article 23 (elderly persons); Article 30 (as part of the right to protection against poverty and social exclusion); and Article 31 (on the right to housing) which Ireland has not yet adopted.⁵⁷ Article 31 states:

With a view to ensure the effective exercise of the right to housing, the Parties undertake measures designed:

- 1 to promote access to housing of an adequate standard;
- 2 to prevent/reduce homelessness with a view to its gradual elimination;
- 3 to make the price of housing accessible to those without adequate resources.

Irish State ratification of Article 31 seems to be dependent on a constitutional right to housing being adopted.⁵⁸

López Albán v. Spain [29.11.2019], and an eviction without an official or court assessment of its proportionality, constitutes a violation of the right to adequate housing – see UN Doc.

⁵⁵ UN Doc. E/C/12/IRL/CO/3 *UNCESCR Concluding Observations on the Third Periodic Report of Ireland*. p. 2. 1043830 (hr-dp.org).

⁵⁶ Ireland is currently held to be in violation of this Article in two Collective Complaints – *ERRC v. Ireland*, Complaint No. 100/2013, Decision issued on the Merits – May 2016 and *FIDH v Ireland*, Complaint No. 110/2014, Decision issued on the Merits, May 2017.

⁵⁷ The States Parties which have ratified Article 31 in full are Finland, Greece, Italy, Montenegro, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, and Turkey, with the first two parts ratified by Andorra and Ukraine, and the first part only by Latvia and Lithuania – a total of 15 countries. See <https://rm.coe.int/country-by-country-table-of-accepted-provisions/1680630742> (May 2022). See *Digest of the Case Law of the Committee of Social Rights* on the jurisprudence on all these rights: <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv/en/1680939f80>

⁵⁸ See European Committee of Social Rights (2021) *Fourth Report on Non-Accepted Provisions of the European Social Charter – Ireland*. 6. “Article 31 of the Charter [on the right to housing] could not be accepted because of existing provisions in the Irish Constitution which have not changed since the ratification of the Charter... The issue of accepting Article 31 will be re-examined if and when the constitutional position changes.” <https://rm.coe.int/4th-report-on-non-accepted-provisions-of-the-esc-by-ireland-2021/1680a3c1b4>. However, the ECSR “considers that the legislative and practical measures, including funding, taken by the Irish authorities to ensure the right to housing open the

Valuable guidance has been provided by the European Committee of Social Rights (ECSR) on the application of a right which is exceptionally complex and expensive to implement. While not imposing an obligation of “results”, the application of rights must take a practical and effective, rather than theoretical, form. To ensure that this takes place, States must:

- adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down...;
- maintain meaningful statistics on needs, resources and results;
- undertake regular reviews of the impact of the strategies adopted;
- establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;
- pay attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.⁵⁹

Respecting the doctrine of separation of powers, within a common law system, the interpretative function of any Irish constitutional right to housing might well lead to an analogous declaration by an Irish court in the future.

One further source of housing rights lies in the Lisbon Treaty. While not providing stand-alone rights, some housing rights are set out in the EU Charter of Fundamental Rights (Charter)(2009),⁶⁰ which must be applied in the actions and decisions of all EU institutions and agencies, and Member States when acting within an EU law competence. The primacy of EU law would require a compatible and harmonious interpretation of any Irish constitutional right to housing with EU law.⁶¹ The origins and clarifications of the housing rights in the EU Charter are set out in the *Explanations to the Charter*.⁶² Thus, Article 7 of the EU Charter on the right to respect for home is the same as Article 8 ECHR, while Article 33(1) repeats Article 16 ESC – “The family shall enjoy legal, economic and social protection”, which has been interpreted by the ECSR as requiring an adequate supply of affordable housing.⁶³ Article 34(3) on the “right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources” is only

possibility for Ireland to accept Article 31 of the Charter. It therefore encourages the Irish authorities to consider accepting this provision in the near future”.

⁵⁹ *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*, Complaint No 39/2006, Decision on the Merits of 5 December 2007, paras 56-58.

⁶⁰ *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01. See Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds)(2nd ed.) (2021) *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Hart).

⁶¹ See Centre for Housing Law, Rights and Policy (2021) Conference on the Future of Europe – Report. <https://www.nuigalway.ie/chlrp/cofoe-housing-event/thereport/#>

⁶² *Explanations relating to the Charter of Fundamental Rights of the European Union* (OJ 2007/C 303/02).

⁶³ *Digest of the Case Law of the Committee of Social Rights* on the jurisprudence on all these rights: <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>; Kenna, P. (2020) *Briefing Paper 1: Housing and Housing Rights in the EU Charter of Fundamental Rights*, Centre for Housing Law, Rights and Policy, NUI Galway. <http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Briefing-1-Housing-andHousing-Rights-in-the-EU-Charter-of-Fundamental-Rights.pdf>

applicable in the context of EU social inclusion policies, but the interpretative function of the Charter means that it has been used to clarify State actions on housing where an EU Directive was engaged.⁶⁴ Article 36 of the Charter states that “The Union recognises and respects access to services of general economic interest (SGEI) as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.” Since social housing is regarded as an SGEI,⁶⁵ the application of any Irish constitutional right to housing which required significant social housing provision would need to resonate with this Charter right.⁶⁶ However, it has been clarified that Member States have considerable discretion when SGEIs in social housing.⁶⁷

Some elements of the right to housing, such as privacy, respect for home, non-discrimination in access, and court supervised procedures on evictions, draw on the civil and political rights of the ECHR,⁶⁸ in an oblique way – in line with the life, liberty and property norms of civil and political rights. Some valuable principles have been identified in Article 8,⁶⁹ although these are only enforceable in a vertical way, i.e.. between individuals and the State, rather than horizontally, i.e. between non-State parties.⁷⁰ The European Convention

⁶⁴ Case 571/10, *Servet Kamberaj v Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* (2012).

⁶⁵ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380) (Text with EEA relevance) 2012/21/EU, <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32012D0021&from=EN>

⁶⁶ Another valuable EU set of principles are set out in the European Union Pillar of Social Rights (EPSR)(2017) SWD(2017) 201 final, which although not justiciable now informs EU policy and governance arrangements, including the European Semester. Principle 19 of the EPSR states: *a. Access to social housing or housing assistance of good quality shall be provided for those in need; b. Vulnerable people have the right to appropriate assistance and protection against forced eviction; c. Adequate shelter and services shall be provided to the homeless in order to promote their social inclusion.*

⁶⁷ “To be an SGEI, social housing must however respond to a public need: the provision of accommodation to disadvantaged citizens or socially less advantaged groups who due to solvency constraints are unable to obtain housing at market conditions. Member States may not define a social housing SGEI so broadly that it manifestly goes beyond responding to this public need. In this context, the Commission has accepted social mixity and social cohesion as valid public policy objectives for which State aid may be granted.” Parliamentary Questions, 6 June 2017, Answer given by Ms Vestager on behalf of the European Commission, Question reference: E-001712/2017.

⁶⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005. Rome, 04/11/1959.

⁶⁹ The loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end. *McCann v United Kingdom* (App No 19009/04), (13 May 2008), para 50.

⁷⁰ See *Faulkner and McDonagh v Ireland* ECtHR (Applications Nos 30391/18 and 30416/18. [31/3/2022] at para 98. Article 8 “does not recognise, as such, a right to be provided with a home (see *Ghailan and Others v. Spain*, no. 36366/14, 53, 23 March 2021, and further

on Human Rights Act 2003 incorporates the ECHR into Irish law. One significant case found that Local Authority eviction procedures did not include a proportionality assessment and were not ECHR compliant.⁷¹ This created a hiatus in the Local Authority eviction process, and raised questions on the need for a more substantive approach to housing rights in Irish courts.⁷²

c. Potential cost of implementing a constitutional right to housing

While there is no suggestion that Irish courts would make any mandatory orders relating to levels of State expenditure in approaching a constitutional right to housing – it might become relevant in the assessing the principle of progressive realisation, or indeed discussions on the application of a right which is exceptionally complex and expensive to implement.⁷³ But is the cost of implementing a constitutional right to housing so prohibitively unquestionable?

Eligibility for ‘social housing support’ is based on the Regulations issued under the Housing (Miscellaneous Provisions) Act 2009.⁷⁴ These set out the maximum income levels, based on net income for each household type and are based on three Local Authority Area Bands, largely related to the most expensive and least expensive areas. To be eligible for social housing support, households must have an average net income from the 12 months preceding the application for social housing support (less than €35,000 in Band 1 – larger cities; €30,000 in Band 2 – larger towns; or €25,000 in Band 3 – rest of the country). Child Benefit, Carers Benefit, Mobility Allowance and Fuel Allowance are disregarded. Incomes in Ireland are classified by the Central

references therein), nor does it confer a right to live in a particular location (see *Garib v. the Netherlands* [GC], no. 43494/09, 141, 6 November 2017, and further references therein), or guarantee the right to have one’s housing problems solved by the authorities, as the scope of any positive obligation to house the homeless is limited (see *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 114, 10 March 2020).

⁷¹ *Donegan v DCC & Gallagher v. DCC* [2012] IESC 18.

⁷² “... over a period of almost a decade, staff could prevent, encourage and warn but lacked the ultimate sanction of eviction to deal with serious anti-social behaviour of its tenants... The author asks the question: Can a right to decent housing include the right to live in a home and a community free from persistent low-level intimidation?” See Report to the Dublin City Council Housing SPC Estate Management Strategy – For the Management of Anti-Social Behaviour in our Neighbourhoods 2022–2027, pp. 6/7.
<https://councilmeetings.dublincity.ie/documents/s35414/3i.%20New%20Anti%20Social%20Policy%20Draft%20Update.pdf>

⁷³ Of course, access to housing for the great majority of new households is through inheritance, renting or purchase, where the costs to the State vary depending on the levels of regulation, supervision or subsidy involved. Courts regularly assess compliance and order enforcement in such areas as fire safety, fitness for habitability and building standards – even eviction bans. See also O’Connell, R., Nolan, A., Harvey, C., Dutschke, K. & Rooney, E. (2014) *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (London: Routledge); Nolan, A., O’Connell, R. & Harvey, C. (2013) *Human Rights and Public Finance* (Oxford: Hart).

⁷⁴ See Guidance Notes on the Household Means Policy (March 2021. Circular 11 of 2021 relating to the Social Housing Assessment (Amendment) Regulations 2021 (S.I. 116 of 2021).

Statistics Office (CSO) into deciles (tenths) and equivalised for relevance.⁷⁵ Comparing these with the eligibility criteria in Band I shows that a single adult household in the lowest 8 incomes deciles would be eligible; a 2 adult household in the lowest 6 deciles; a one adult one child household in the lowest 5 deciles; and (as in Mr Fagan’s case), a one adult and three children household in the lowest 5 deciles, would all be eligible for social housing support. Thus, based on incomes in Ireland and the eligibility criteria established by law, at least 50% of households are potentially eligible for social housing support, should they have a housing need. Of course, all these households currently do not need social housing support, as most are already satisfactorily housed. However, it demonstrates that an extensive housing welfare system has been established in law and with State funding, on which to base any constitutional right to housing.⁷⁶

The Local Authority Summary of Assessments of Housing Need (2020)⁷⁷ showed some 61,880 applicants deemed as eligible for social housing support. The current tenure/housing occupancy of these ranged from private rented housing 28,194 (45.6%) (50% of whom were in receipt of rent supplement/subsidy); living with parents 14,825 (24%); living with friends/relatives 6,431 (10.4%); living in emergency accommodation 6,188 (10%); other 4,562 (7.4%) and owner-occupier at risk of losing homes 1,680 (2.7%).⁷⁸

Almost 40,000 have been waiting for accommodation for 2 years or more, and 16,832 have been waiting in excess of 7 years.

Between 2001 and 2020 some €29 billion was spent on social housing. Approximately €16.29 billion was spent on capital funded in housing, while €12.85 billion was spent on current funded measures (including Rent Supplement).⁷⁹ The Irish State has committed in *Housing for All* (2021)⁸⁰ to

⁷⁵ CSO Survey on Income and Living Conditions (SILC) 2020, Table 2.6. <https://www.cso.ie/en/releasesandpublications/ep/p/silc/surveyonincomeandlivingconditionssilc2020/income/silc/surveyonincomeandlivingconditionssilc2020/income/>

⁷⁶ A constitutional right to housing in Ireland might be viewed as the “capstone” of social rights, where all the necessary supporting measures are already in place. See King, J. (2019) “The Future of Social Rights” on Young K.G. *The Future of Economic and Social Rights* (Cambridge University Press), p. 317.

⁷⁷ Housing Agency – *The Summary of Social Housing Assessments 2020* brings together information provided by local authorities on households in their functional area that are qualified for social housing support, but whose social housing need is not currently being met. <https://www.housingagency.ie/sites/default/files/2021-03/SSHA-2020.pdf>

⁷⁸ Housing Agency – *The Summary of Social Housing Assessments 2020*, p. 21. Households currently living in Local Authority rented accommodation, approved housing body accommodation, accommodation provided under the Housing Assistance Payment (HAP) scheme, accommodation provided under the Rental Accommodation Scheme (RAS), accommodation provided under the Social Housing Capital Expenditure Programme (SHCEP) schemes, or any household on a transfer list are not included in the assessment reports.

⁷⁹ Houses of the Oireachtas, Parliamentary Budget Office (2022) *Housing Ireland: Trends in Spending and Outputs of Social and State Supported Housing 2001–2020*, p. 5.

⁸⁰ Department of Housing, Local Government and Heritage, “Housing for All” (Government of Ireland, 2021), <https://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new->

spend €4bn. (on average) per year in State supported housing between 2021 and 2030. The overall goal of *Housing for All* is to deliver a targeted 300,000 housing units by 2030, based on 170,000 homes for the private market; 90,000 social housing units; 36,000 affordable housing units; and 18,000 cost rental properties. Of this, €12 billion is direct exchequer capital funding (an average of €2.4 billion per annum) focussed on social and affordable housing. This is based on an ESRI assessment of future household formation between 2021-2030 of between 28,000 to 34,000 new households per annum.⁸¹

A Report by the Houses of the Oireachtas, Parliamentary Budget Office (PBO) in 2022⁸² calculates that in addition to the 61,880 households eligible for social housing support (accounting for 111,767 people), there are an additional 59,821 households in HAP tenancies – representing some estimated 152,000 people. This would suggest that some 260,000 eligible individuals currently have, or may be classed as having, an unmet or ongoing housing need, although this does not factor in any increase in refugees seeking support. Applying normative assumptions with regards to household size and required rooms, the combined outlay of capital spending to address the housing needs of approximately 260,000 people is calculated at some €29 billion.⁸³

Of course, other projected State expenditure on subsidised home ownership and the costs of providing replacement homes for all those affected by mica, are not included,⁸⁴ but this calculation addresses the key issues of the provision of social housing which might be engaged in discussions on the implementation of a constitutional right to housing.

[housinghttps://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/plan-for-ireland/](https://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/plan-for-ireland/)

- ⁸¹ See Bergin, A. & Garcia-Rodriguez, A. (2020) *Regional Demographics and Structural Housing Demand at a County Level*, (Dublin: ESRI).
<https://www.esri.ie/publications/regional-demographics-and-structural-housing-demand-at-a-county-level>. The Report states the evolution of international migration flows is a key determining element of the future population, and changes in the projected level of these flows leads to significant changes in the projections. The baseline projections of 30,000 units of new housing required per year assume a long-run net international inward migration of 15,000 per annum to 2040.
- ⁸² Houses of the Oireachtas, Parliamentary Budget Office (2022) *Housing Ireland: Trends in Spending and Outputs of Social and State Supported Housing 2001–2020*. Available at: https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2022/2022-03https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2022/2022-03-02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housing-2001-2020_en.pdf02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housinghttps://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2022/2022-03-02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housing-2001-2020_en.pdf2001-2020_en.pdf
- ⁸³ Parliamentary Budget Office (2022) *Housing Ireland: Trends in Spending and Outputs of Social and State Supported Housing 2001–2020*, p. 37.
- ⁸⁴ Government spending of €2.2bn. on rebuilding and remediating 7,500 which have been structurally damaged by mica has already been budgeted at €420,000 per home.

d. Contemporary distributive justice⁸⁵

It is important to recognise that many socio-economic rights (such as sufficient food, access to housing, rent controls and housing standards, protection of workers, some aspects of health care, etc), do not require any major State expenditure, and the supervisory role of courts is often very limited. Many socio-economic rights are met through markets, with the regulatory and consumer paradigms often more relevant than the human rights paradigm.⁸⁶ The financialisation of housing has utterly changed established housing models, even the established tenets of social housing.⁸⁷ Indeed, a contemporary application of Costello J. distributive justice as “concerned with the distribution and allocation of common goods and common burdens”⁸⁸ might well find that the allocation of regulatory burdens and standards constitutes the larger part of the model today.⁸⁹

However, Young suggests that two legal concepts have become fundamental to questions of resource allocation in the modern state: rights and queues. Rights in modern States give rise to queues, which are the basic template for allocating State resources in modern liberal capitalist democracies. As rights are increasingly recognised in areas such as housing, so too are queues used

⁸⁵ Of course, the political concept of distributive justice in housing and land in Ireland has often involved State support for citizens to become property owners – through funding for land acquisition, support for tenants and homeownership – a form of asset based welfare. See Norris, M. (2016) *Property, Family and the Irish Welfare State*, (London: Palgrave Macmillan). See also *Shirley v O’Gorman* [2006] IEHC 27. This massive State support for housing changed in the 1980s as a result of State funding costs, but also a global shift towards markets in the provision of housing.

⁸⁶ In the past decade there has been a paradigm shift in the drivers of change, away from a political or legal approach to one based on consumer freedom – a consequence of the digital revolution, which impacts on finance as well as government, as the two are intertwined. See Badré Bertrand (2018) *Can Finance Save the World?* (Oakland CA: Berrett-Koehler Publishers), 33–34. See also Kinley, D. (2018) *Necessary Evil – How to Fix Finance by Saving Human Rights* (Oxford University Press).

⁸⁷ Stephens, M. ‘How Housing Systems are Changing and Why: A Critique of Kemeny’s Theory of Housing Regimes’, *Housing, Theory and Society* 37, no. 5 (2020); 521–54; Aalbers, M. B. (2016) *The Financialization of Housing* (Oxford: Routledge).

⁸⁸ *O’Reilly v Limerick Corporation* [1989] ILRM 181 at 194.

⁸⁹ Planning and environmental regulations, construction standards (where applied), and rent controls come to mind. Of course, housing market regulatory and legislative provisions involving control on use of property do not always require compensation to be paid. The Supreme Court held in *In the matter of Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill 1999* [2000] 2 IR. that restrictions on property rights did not breach Article 40 of the Constitution where they were rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right, where they relate to concerns which, in a free and democratic society, should be regarded as pressing and substantia, impair constitutional property rights as little as possible, are proportionate to the objectives sought to be attained and are not arbitrary, unfair or based on irrational considerations. See Walsh, R. (2021) *Property Rights and Social Justice Progressive Property in Action* (Cambridge University Press: See also Hogan, H. & Keyes F. “The Housing Crisis and the Constitution”, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 16, 2020), <https://doi.org/10.2139/ssrn.3731506>.

to administer access to State provision, especially in conditions of scarcity.⁹⁰ In some ways, discussions on the right to housing often default into questions on priorities in the social housing queue, and of opportunistic breaches of this queue (queue-jumping). And yet, the queue is the veritable tip of the iceberg in the distributive and redistributive decisions that are made about the regulation of markets, provision and allocation of publicly-subsidised housing. The Irish cases examined would also support the approach of King, that by proclaiming the concept of the “social minimum”, or a claim for resources required for a minimally decent life, courts can legitimise judicial determination of socio-economic rights through an incrementalist approach, deference to the political branch of the State, and some prioritisation of resource allocation towards the most vulnerable.

Perhaps we have reached the point in Ireland where the “minimum core obligations” of the ICESCR, as defined in our housing law, policy and spending are being substantially met, albeit with significant and damaging gaps affecting particular groups, such as Travellers and those living in insecure and unaffordable accommodation.⁹¹

⁹⁰ Young, K. G. (2017) *Rights and Queues: On Distributive Contests in the Modern State*, Boston College Law School: Legal Studies Research Paper Series. Research Paper 431. This point was significant in *Fagan v DCC*.

⁹¹ General government expenditure in the EU on housing and community amenities amounted to around €82 billion or the equivalent of 0.6 % of GDP in 2020 and Ireland slightly exceeded that, although more than 50% Irish spending was on water supply. See https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_expenditure_on_housing_and_community_amenities

4. Conclusion

The overall objective of Irish housing policy is that every citizen in the State should have access to a good quality home: to purchase or rent at an affordable price; built to a high standard and in the right place; offering a high quality of life.⁹² Between 2001 and 2020 some €29bn. was spent on this objective, and a further €12bn. is committed in *Housing for All* by 2030. A recent report calculates that the total cost of meeting all existing housing need would be approximately €29bn. In this context, a constitutional right to housing would build on the existing and extensive legislative and resource commitments of the State, and consequently, the anticipated costs of implementing a constitutional right to housing are no longer a mystery.

The four cases examined here show that Irish courts have up to now relied exclusively on a natural law rights interpretation of Article 40.3.2 on the unenumerated right to bodily integrity.⁹³ Were a specific right to housing present in the Constitution their task would have been much more straightforward. Clearly, any constitutional right to housing would not undermine or contradict already accepted Irish State human rights obligations under the UN, Council of Europe and European Union Treaties, and a harmonious interpretation is assumed. Irish courts could then draw on human rights jurisprudence on respecting, protecting and fulfilling the right, declaring the content of the minimum core obligations, in their interpretation of existing housing legislation. Indeed, the level of spending and extensive State housing provision and support, possibly meeting the requirements of the minimum core obligations of the ICESCR (with some gaps in provision for particular groups).

The *O'Reilly v Limerick Corporation* case suggests that even in the case of a specific right to housing in the Constitution, the courts still would not adjudicate on the redistribution and allocation of common goods (taxation) and common burdens (regulation). However, in situations where the constitutional right was analogous to housing rights within international human rights law, declaratory orders could be made, specifying at least the minimum core obligations. In addressing the concept of progressive realisation of a right which is exceptionally complex and expensive to implement, Irish courts could draw on Council of Europe jurisprudence on how the State should take steps to implement it within a reasonable time, with measurable progress and making maximum use of resources.⁹⁴ Ireland has, of course, undertaken an obligation to take steps to progressive realise

⁹² Housing for All (September 2021) <https://www.gov.ie/en/publication/ef5ec-housing-for-allhttps://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/a-new-housing-plan-for-ireland/>

⁹³ Based on *Ryan v Attorney General* [1965] IR 294. See *M v Minister for Justice* [2018] IESC 14.

⁹⁴ *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No 39/2006, Decision on the Merits of 5 December 2007, paras 56–58.

the right to housing as set out in the ICESCR.⁹⁵ Respecting the separation of powers and the precedents of Irish courts, declaratory (rather than mandatory) orders could be made, without binding the legislature or executive to increase taxation, or allocate resources to any particular persons.⁹⁶

There is a significant popular movement for inserting a right to housing into the Irish Constitution,⁹⁷ and significant work has been carried out by civil society organisations to prepare a suitable wording.⁹⁸

While it is widely accepted in Ireland that homelessness constitutes a violation of the right to housing, and in the absence of any such express right in the Constitution – *Bunreacht na hEireann*, Irish courts have relied on a natural law interpretation of the constitutional rights to bodily integrity – itself an “unenumerated rights, discerned in 1965.”⁹⁹ The cases also provide valuable indicators on how a constitutional right to housing might be addressed by Irish courts in the future.

An explicit constitutional right to housing would be a valuable step forward from the unpredictable reliance on natural law unenumerated rights. It could move judicial oversight to a more structured, contemporary and internationally accepted standard of housing rights protection. This could encompass not just right of access, but issues of affordability, sustainability, community safety, and housing which enhances the development of people and communities. At the same, time it could preserve the highly prized independence of the Irish judiciary from the political branch (allowing elected governments sufficient legal space to decide on the overall level of resources to be made available for public benefit), respect for separation of powers,

⁹⁵ UN Doc. E/1991/23. General Comment No 3: The Nature of States Parties’ Obligations.

⁹⁶ Along the lines suggested by Denham J. in *TD v Ireland* [2001] IESC 101, at para 132. “In general the courts do not favour the making of mandatory orders against the executive. If a constitutional issue arises relevant to executive actions then the best practice is for the courts to make a finding and declare a right in a situation where the executive has indicated that it will abide by the determination of the court. In consequence a mandatory order is unnecessary, a simple declaratory order suffices. As a matter of practice it happens regularly that counsel indicate to a court that should the decision be against the executive (be it a Minister or other body) then a mandatory order would not be necessary. This is an illustration of the two institutions (the court and the executive) exercising their powers for the ultimate benefit of the State as a whole, with the interest of the State and the people as the fundamental concern.”

⁹⁷ Surveys by the Irish Equality and Human Rights Commission have shown that 82% of people in Ireland consider housing to be a basic human right, and 64% believe that the right to housing should be enshrined in our Constitution, with 24% against such a move. See <https://www.ihrec.ie/overwhelming-public-support-for-human-rights-protections-as-irelandmarks-human-rights-day/>.

⁹⁸ Mercy Law Centre, (2019) “Second Right to Housing Report: The Right to Housing in Comparative Perspective” <https://mercyllaw.ie/wp-content/uploads/2019/06/MLRCPresentation-on-Comparative-Perspective-of-Right-to-Housing-to-the-Joint-Committee-onHousing-Planning-and-Local-Government-12-June-2018.pdf>; Home for Good Coalition, “Why a Referendum”, Home for Good, (2019) <https://www.homeforgood.ie/referendum/>.

⁹⁹ *Ryan v Attorney General* [1965] IR 194.

and non-interference in executive discretion in allocation of resources to individual applicants.

