

**Establishing a Right to Housing in Irish
Law:
A Research Report Conducted by Trinity
FLAC in Association with the Mercy Law
Resource Centre**



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INTRODUCTION

Homelessness, in all its forms, has been ignored by Irish society for decades and the problem is only getting worse. Reports from the last month alone (November 2014) have highlighted the extent of the problem: the number of people sleeping rough is the highest since records began; nearly 700 children are now using emergency accommodation; and Jonathan Corrie is but one of too many who have lost their lives on the streets.

Much of the discussion about housing rights is dominated by government concerns of cost, and misguided questions from the public demanding greater self-reliance from the homeless. The debate has not been framed correctly, because a house is not just a physical structure, or another cost that the government must pay: a house provides a safe haven; a place of physical and psychological security from the outside world; a house makes for a home. In failing to address the problem of homelessness, the vulnerable are not just deprived of safety, comfort, warmth and good health, but also their dignity, autonomy, and inherent humanity.

The purpose of this research project is to consider housing as a basic human right and to examine how a right to housing could be established with legal certainty in Irish law. Section (A) will examine the current law in relation to housing rights, in an Irish, European and international context. Section (B) will consider the housing laws and policies of other jurisdictions, with a view to making recommendations regarding the Irish regime. Section (C) will explore the potential impact of establishing a right to housing in Ireland.

A. CURRENT LAW

Background: Property Development and Politicisation of Housing in Ireland

1. Introduction

Property development is the manner in which the built environment is created and redeveloped. This process has changed over time in Ireland, leading to communities having diminished influence upon the provision and planning of property, especially that of social housing.

During the Celtic Tiger, 20 houses were built for every 1,000 citizens, yet less than 10% of those houses were designated for social housing. Between 2007 and 2011, there was a 90% decrease in housing output from local authorities.

2. Historical background to Irish Housing Sector

The development of the Irish housing sector has been shaped by the economic doctrine of neoliberalism. Neoliberalism enshrines market mechanisms, considering the market to be the best regulator of human affairs and a maximiser of human happiness. It is intended to allow for open, competitive and unregulated markets, liberated and unfettered by any form of state interference. Attempts at emulating neoliberalism have included: the deregulation of activities by the Government (especially in the property development and provision sectors in Ireland); the privatisation of formerly public utilities and entities; and a general withdrawal by the State from the provision of social services (such as housing). The State's role under the doctrine is to guarantee private property rights, to attract and service the interests of capital, and to ensure that the market functions smoothly without state intervention. Such a policy naturally privileges those able and willing to pay, favouring policies that cater to wealthy interests at the expense of the most vulnerable in society who are unable to pay.

During the economic depression of the 1980s, there was high unemployment (especially in urban areas and the construction sector), emigration, fiscal crises and budget deficits. A solution emerged with the "Programme for National Recovery" in 1986. As part of this, there

was an imposition by the Central Government of entrepreneurialist planning “operation codes” or best practices onto Local Authorities. This infusion of entrepreneurialism promoted active collaboration with private property developers, as profits could be maximised by planners acting in a newly facilitative role. This led to the transfer of control of property and housing provision in Ireland from the public sector to the private sector.

3. Public Sector Housing Provision in Ireland

The purpose of social housing is to handle the fallout of the market, to accommodate those who are unable to pay for their own housing, and to act as a “safety net” for those who are unable to obtain adequate housing in the private sector. In Ireland, public sector housing has become a “residualised” sector, with public housing estate residents having an average income that is 60% that of the Irish national average. Tenants are often low-skilled, have low levels of education, and tend to comprise of single-parent households or pensioners, with 80% of Local Authority tenants dependent upon social security payments. Social housing is characterised by a high security of tenure, often being inherited, having paternalistic systems of supervision, highly restricted levels of mobility and a wide heterogeneity in the quality and style of stock. In 2013, there were 89,872 households in need who were not placed in social housing across Ireland, 62% of whom were unemployed and in receipt of social welfare payments.

4. How Housing Provision Works in Ireland

In order for development to commence, the archetypal interests must each be satisfied. Developments need space, financing, constructors and a consumer to purchase the property. First, land must be acquired simply for the purposes of construction. Landowners can release and withhold land as they wish, according to their own economic interests, which can lead to a limit on available land. Secondly, commercial capital must be secured to finance the cost of purchasing secured land and construction. Thirdly, developers must secure building and construction contractors to actually build the properties. Finally, the developer must be able to sell or rent the property to an investor or a tenant in order to make a profit on their development. All of these conditions must be satisfied in order for development to take place. Development in Ireland follows a lengthy process whereby the developer and a law agent acquire land from a landowner via an agreement at full developmental value conforming to planning standards. Property developers, as the key actors in the Irish property sector, will not undertake any ventures unless they can make a profit due to high risks involved in development. Therefore, housing supply is determined not by the social need, but rather by the economic demand. According to the Department of the Environment’s Housing Agency, housing need in Ireland as of March 2011 was over 50,000 households, a 71.3% increase since 2008.

It is this element of demand, and not need, determining housing supply that leads to the disastrous “Boom and Bust” developmental cycles. As land is in a relatively fixed supply, a rising demand leads to increasing rents and an increased demand for properties. When development is initially slow, more developers are encouraged to develop, and yields decrease as prices are bid under the expectation of future growth. However, public planners are unable to reject development due to demand, evidenced by the market leading to an overprovision of housing and an “overheating” of the market whereby the value of developments collapse, rents stabilise and developments still in the pipeline are either abandoned or postponed due to high costs.

Local Authorities provide social housing through joint venture Public-Private Partnerships (PPPS) whereby the Government sells land at current use price, a significant discount to its full development value price, to private developers who agree to allocate a certain proportion

of the units they construct as social housing. Public and governmental influence in the provision of social housing is greatly reduced through these joint venture PPPs and by “special-purpose agencies” such as the Dublin Dockland Development Authority, or the Ballymun Regeneration Ltd and other fast-tracked developments. Public access to these bodies is restricted as the information is “commercially sensitive.”

In Ireland today, provision for homeless people is left largely to voluntary and charitable organisations, with contracts for funding with local government and health authorities. This has resulted in a close relationship between the State and providers, and has not led to any significant rights-based approaches for homeless people.

In this context, the development of rights for homeless people (other than minor customer service rights), involving the right to a full array of support, health and other services needed from the state or its proxy agency, is critical.

In Constitutional terms, the “common good” and principles of “social justice” are becoming interpreted by courts as requiring only a minor curtailment of the excesses of the market. Indeed, the international human rights “minimum core obligation” approach has narrowed the problem of distributive justice to that of assessing the distribution of socially guaranteed minimum levels of certain goods and benefits among individual groups within a country.

In Ireland, rights-based approaches are often displaced by the dominant discourse around social partnership and participative approaches to state programmes. Housing rights are also superficially dismissed as demands for universal State housing provision (something which housing rights rarely entail). Rights discourses are largely absent in housing policy or legal development, and what little language of rights exists is mostly confined to questions about social welfare entitlements. There appears to be a failure to engage with rights-based approaches generally, for fear of having to broaden the focus of political and policy debate. Thus, an examination of Irish housing law and policy from a rights perspective has much to offer in unlocking new paradigms which are universal, comparative, people-centred, and challenging.

Irish Law

1. The Constitution

In this section, the possibility for a right to housing to be established under the Irish Constitution will be examined with reference to Article 45, the unenumerated rights doctrine and the concept of corollary rights. At the outset, it should be noted that a limited number of individual rights are expressly included in the Constitution, including the right to free primary education¹ and the right to form unions². However, the Constitution does not clearly impose a general obligation on the State to provide housing. The only explicit constitutional protection of a right to housing appears in Article 42.5, which provides for a right to adequate shelter for children.

(a) Article 45

In referring to the Directive Principles of Social Policy, Article 45 of the Constitution sets out a rather aspirational vision for Irish social policy. It is “intended for the general guidance of the Oireachtas” and is not directly enforceable in the courts. The State pledges itself to “safeguard with especial care the economic interests of the weaker sections of the community, and where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged.”³ The extent to which Article 45 envisages the courts having a role in protecting socio-economic rights is unclear. The Article itself certainly indicates a

1 Article 42.4.

2 Article 40.6.1°(iii).

3 Article 45.4.1°.

constitutional commitment to the pursuit of social justice,⁴ yet the opening statement of Article 45 clearly envisages that policy relating to socio-economic rights is the sole domain of the Oireachtas, and that the application of principles of social policy in the making of laws are to be recognised by the courts. It could be argued that Article 45 alludes to pre-interpretive values that could guide the court in implying socio-economic rights into the Constitution.

(b) The Unenumerated Rights Doctrine

In the case of *Ryan v Attorney General*, the unenumerated rights doctrine was born which allowed the courts to bolster individual constitutional rights for many years. The doctrine permits the recognition of enforceable personal rights under Article 40.3.1^o, even where they have no clear textual basis in the Constitution. These include a right to bodily integrity, a right to travel, and a right to privacy. The courts grounded these rights in, *inter alia*, the “Christian and democratic nature of the State”, the human personality and the natural law. It is submitted that the right to housing could be considered to be an unenumerated right within the meaning of Article 40.3.1^o, for several reasons. First, the doctrine is inherently flexible, as demonstrated by the range of rights derived from it. Secondly, natural law and Christian principles, upon which the doctrine is based, consistently demonstrate a concern for the wellbeing of people. Thirdly, the right could be successfully grounded in the concept of the human personality. In *McGee v Attorney General*, it was said that a right can exist under Article 40.3.1^o if it inheres within the human personality or is “fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution.” There is a strong basis for the argument that having access to housing is fundamental to humanity, given the severe consequences of homelessness and the fact that much of the discourse around the right is framed in terms of human dignity. While academics have criticised the doctrine⁵, it has undoubtedly contributed towards the strengthening of individual rights in the Constitution. Unfortunately, the doctrine’s relevance has been severely limited in recent years, and the current consensus is that there is no need to enumerate wholly new rights, with the highest courts having called for the doctrine’s restraint.⁶ Rights are currently identified when they are implicit in the Constitution, or as corollaries of rights that have already been enumerated under Article 40.3. It is possible that a right to shelter might be implicit in the Constitution, but no court has recognised an unenumerated right to housing. However, in the case of *Dublin Corporation v Amanda Hamilton*, the court came close to addressing the issue. In that case, Section 13 of the Housing Act 1970 was challenged as being incompatible with the duties of the local authority to house homeless people. The plaintiff was at risk of becoming homeless, if evicted. The Court held that a constitutional right to bodily integrity was not a matter for the District Court to consider in such a hearing. This case disposes of the matter in terms of the remit of the District Court and frames the case in terms of bodily integrity, so the potential to recognise a right to housing did not arise.

Generally, the courts have stopped short of recognising personal rights that have far-reaching resource implications for the political branches of government, and a socio-economic right to housing falls squarely into that bracket. While it could certainly be strongly argued that the right to housing is an unenumerated right under the Constitution, it remains unlikely to be recognised by the courts in this fashion in the near future.

4 One that is reflected in both the Preamble of the 1937 Constitution and in the notion of human dignity.

5 On the grounds of (a) lack of certainty in the sources of the rights enumerated; and (b) the scope for undemocratic judicial discretion in identifying the rights.

6 *TD v Minister for Education*, per Keane CJ.

(c) Corollary Rights

In a number of cases, the courts have held that rights implicit in other constitutional provisions fall to be protected by article 40.3. In *Macauley v Minister for Posts and Telegraphs*, it was held that Article 34.1, providing that justice shall be administered in courts, implies a right of access to the courts.

The concept of corollary rights serves two purposes well. First, it allows for the meaningful vindication of explicit rights, as in *Macauley*. Secondly, it can be used to define the scope of rights, as in *Fleming v Ireland*, where the right to die a natural death was viewed as a corollary of the right to life, whereas the right to assisted suicide was not.

Arguably, the right to housing could be conceived of as a corollary to several express rights:

(i) Right to life: It could be argued that shelter is a basic need, the provision of which is essential to human survival and therefore inherent in the right to life. Difficulties arise in making this argument when one is forced to consider what a right to housing would substantively involve. For example, there is a strong basis for arguing that a physical roof over one's head may be essential to life, but the extent to which other amenities such as running water and electricity are necessary is unclear. Therefore, defining a right to housing as a corollary to the right to life may not lead to the substantial protection of vulnerable citizens.

(ii) The constitutional guarantee of equality: The 1916 Proclamation of the Republic promised that the Republic shall guarantee "equal rights and equal opportunities to all its citizens, and declares its resolve to pursue the happiness and prosperity of the whole nation and of all its parts, cherishing all the children of the nation equally." While it could be argued that the Constitution was informed by this sentiment, unfortunately, substantive equality has not come to the fore in constitutional interpretation. The prevailing view is that the Constitution favours an Aristotelian conception of equality. It has been argued that this outlook fails to provide opportunities to those who face insurmountable hurdles based on class, race, gender etc.

However, it could be argued that there are certain minimum standards that must be satisfied in order to respect human dignity (standards which include adequate housing) and that all people should have those standards met. Defining a right to housing as a corollary of this guarantee could lead to stronger protection of the person than would be the case were it implied under the right to life. However, there may be a lack of the requisite textual certainty to convincingly argue that it is a corollary right.

(iii) The right to dignity: The right to dignity is an established unenumerated right, recognised by the superior courts on numerous occasions without specifying its substance in any meaningful way. That the right to dignity exists is particularly significant in that one of the primary academic and legal foundations of the right to housing is that it is an extension of the right to dignity. A good example of this is Yacob J's emphatic pronouncement in *Grootsboom*, "[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Constitution's Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential." This position is echoed in the Preamble to the constitution, numerous international instruments and ECHR decisions.

However, as the right to dignity is an unenumerated right, rather than an explicit right, and as the concept of dignity remains fiercely underdeveloped by the Irish courts, it is unlikely that the right to housing could be established with reference to the right to dignity.

(iv) The right to person: The right to person is perhaps the least well-known and most neglected right in the Constitution. It is the ambiguous, oft ignored neighbour of property, life

and good name in Article 40.3.2°. In *The State (Burke) v Lennon*, Gavan Duffy J said that a law providing for internment without trial “does unjustly attack the person” of the prisoner, while in *Re D and Midland Health Board*, the Supreme Court relied on, *inter alia*, the right to the protection of the person in holding that the High Court’s wardship jurisdiction in lunacy matters was not limited to persons of unsound mind. More recently, in a string of High Court decisions, Hogan J has revived the right to person and his remarks indicate that this concept covers the physical, mental and emotional wellbeing of the individual. Thus, there is an increasingly strong constitutional basis for the right to housing, as homelessness can severely damage the physical, mental and emotional wellbeing of an individual.

In sum, this section would surmise that there is potentially an unproven constitutionally enshrined right to housing, existing as a corollary right to one or more express provisions of the Constitution. It should be noted that this should serve as little comfort to litigants, due to the uncertainty of the right’s existence and the costly litigation that would be required to assert the right. One might feel somewhat confident in saying that, aside from the protection of children, there is no constitutional protection of the right to housing at Irish law; but the possibility for its recognition remains.

(d) Case Law

(i) Introduction

Despite the constitutional scope for a favourable attitude towards socio-economic rights, the judicial consensus to date has been that such rights are best protected in the political sphere and not in the courtroom. The courts have been reluctant to imply socio-economic rights into the constitution via Article 40.3.

(ii) Important Cases

O’Reilly v Limerick Corporation

In *O’Reilly v Limerick Corporation*,⁷ a group of travellers sought, *inter alia*, damages from the State for the breach of an alleged constitutional right, after the State failed to provide them with access to halting sites. They claimed that they had a constitutional right to be provided with a certain minimum standard of basic material conditions to foster or protect their dignity as human persons, which was enumerated under Article 40.3.

In the High Court, Costello J refused to recognise the claimed right and introduced the distinction between distributive and commutative justice into Irish law. After classifying the claim as a matter of distributive justice, he signalled that distributive justice was the exclusive concern of the executive. He reasoned that it is for the political branches of government to determine the requirements of the common good, assess priorities and allocate benefits and burdens accordingly. The courts are not suited to assessing the financial implications of distributing national resources. The remit of the court is limited to issues of commutative justice, which concerns that which is due from one individual to another, as this can be readily ascertained by the courts. Under his interpretation of the separation of powers doctrine, the matter fell outside the court’s jurisdiction and so ought to “be advanced in Leinster House rather than the Four Courts.”⁸

O’Brien v Wicklow Urban District Council

Interestingly, Costello J seemed to resile from his views in *O’Reilly* six years later. In *O’Brien*⁹, a case concerning travellers, he stated in an *ex tempore* judgment that the constitutional right to bodily integrity was infringed by the conditions in which the O’Brien family were forced to live. He acknowledged “[e]ven, however, if the view which I am now

7 [1989] ILRM 181.

8 [1989] ILRM 181, at 195.

9 *O’Brien v Wicklow UDC, ex tempore* (10 June 1994) HC.

expressing represents a change of views on my part, then I accept that my views have changed.”¹⁰

Sinnott v Minister for Education

However, *O’Brien* was largely ignored when *O’Reilly* was endorsed by the Supreme Court in two cases that confirmed the judicial stance on the separation of powers, distributive justice and judicial deference. In both cases, there is a clear reluctance to embrace socio-economic rights. It was reasoned that because the legislature is democratically elected and the executive is accountable to the legislature, it is legitimate for the allocation of resources to be decided by those organs of government, and those organs of government alone. Hardiman J in particular appeared committed to the idea that questions of policy on matters of social and economic justice are outside the domain of the courts.¹¹

In *Sinnott v Minister for Education*¹², the plaintiff was a young man with autism. He challenged the failure of the State to provide him with a specific type of education that was suited to his needs. The question was whether the courts had the power to grant a mandatory order to enforce the plaintiff’s constitutional rights.

The High Court answered the question in the plaintiff’s favour, and granted a mandatory order against the executive, specifying in some detail how primary education should be provided for the plaintiff. On appeal, a Supreme Court majority reversed that decision. It was found that the plaintiff’s right to free primary education expired when he reached the age of majority, so there was no need to consider whether the courts had the power to enforce such a right. Nonetheless, Hardiman J addressed the issue, albeit *obiter*, presaging many of his later comments in *TD*. He held that the courts had no jurisdiction to issue a mandatory injunction as this would involve the courts in the formulation of educational policy in relation to persons with learning disabilities, a matter properly reserved to the political branches of government. Invoking Costello J’s earlier decision in *O’Reilly*, Hardiman J stressed that the separation of powers was crucial to his decision: democracy required that no one branch of government be paramount, and this dreaded consequence would inevitably occur if the courts strayed into the realm of executive and legislative responsibility. Hardiman J did not deny the first instance judge the right to criticise the executive for its failings. His objection was limited to the nature of the remedy that the judge issued.

TD v Minister for Education

As in *Sinnott*, the central issue in *TD v Minister for Education*¹³ was the nature of the remedy invoked. The Supreme Court was faced with an appeal from a High Court judge who had issued an injunction against the Minister, ordering him to take all steps necessary to facilitate the building and opening of specific care residences for troubled children. The State contested not the right being invoked (a child’s right to positive state intervention where her parents have failed), but the remedy the High Court had ordered.

By a 4:1 majority, the Supreme Court held that a mandatory order directing the executive to fulfil its constitutional obligations could only be granted in exceptional circumstances, where there had been “a conscious and deliberate decision by [the executive] to act in breach of its constitutional obligations to other parties accompanied by bad faith or recklessness.”¹⁴ The particular facts of the case did not meet this threshold.

¹⁰ *Ibid*, at 4.

¹¹ Adrian Hardiman, “The Role of the Supreme Court in our Democracy”, in Joe Mulholland ed, *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill Summer School, 2004).

¹² [2001] 2 IR 545.

¹³ [2001] 4 IR 259.

¹⁴ [2001] 4 IR 259, at p.337, *per Murray J*.

The role of the courts, as Murray J pointed out, was to review the executive power, not exercise it. To dictate such policy would amount to “judicial hegemony” and the democratic accountability of the Executive to Parliament would be undermined. According to Keane CJ, the High Court’s issuing of a declaration was understandable, but it had exceeded its remit by issuing an injunction as well. This offended the principle of the separation of powers and meant that the High Court was fettering the ability of the executive to respond to a difficult social problem where the Executive might need a “flexible and open minded approach.”

Furthermore, senior members of the Court signalled that they would be reluctant to rely on the Constitution to protect implied socio-economic rights. Murphy J said:

With the exception of Article 42 of the Constitution, under the heading ‘Education’, there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio economic benefit for any of its citizens however needy or deserving.¹⁵

Keane CJ expressed, *obiter*, 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.”¹⁶

Re Health (Amendment) (No 2) Bill 2004

Disheartening as the above jurisprudence may be for those who advocate for socio-economic rights, the *Health Amendment Bill* case¹⁷ seems to suggest that there may be some residual role left for the courts in the enforcement of socio-economic rights.

For almost three decades, medical card holders were unlawfully charged for services in public nursing homes. The impugned Bill purported to retrospectively validate those charges, and provide a lawful basis for them in the future. With regard to the prospective provisions of the Bill, counsel argued that citizens who could not look after themselves independently had an implied constitutional right to care and maintenance by the State, derived from the constitutional rights to life and bodily integrity protected by Article 40.3. Thus, it was contended that it was unconstitutional to charge for such care. It was also argued that the charges actually provided for by the Bill unduly restricted the constitutional right of access to the relevant services of persons of limited means.

While the Supreme Court dismissed these arguments, it did not rule out the possibility that a judicially enforceable right to care and maintenance by the State (including an obligation on the State to provide shelter and maintenance) could be implied into the Constitution. This was left open to be considered in another case:

[i]n a discrete case in particular circumstances an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.¹⁸

This dictum alludes to the “exceptional case” situation, left open by *Sinnott* and *TD*, whereby the courts could intervene to secure the protection of a socio-economic right, even if such

15 [2001] 4 IR 259, at 316.

16 [2001] 4 IR 259, at 282.

17 [2005] IESC 7.

18 *Ibid*, at 21.

protection involved some interference with the decisions of the Oireachtas or the executive as to the allocation of resources.

The court primarily focused on whether imposing a charge could amount to an illegitimate interference with such a putative right to care and maintenance. It found that the charges proposed did not unduly restrict access to the relevant services by those of limited means to such an extent that it infringed this claimed right. The court noted that the Minister had discretion to impose charges ranging from a nominal charge to a sum being no more than 80% of the maximum old-age (non-contributory) pension. Furthermore, the court reasoned, it could not be “an inherent characteristic of any right to such services that they be provided free regardless of the means of those receiving them.”¹⁹ The fact that the court only upheld the proposed charges after satisfying itself that the regime would not unduly deny access to these services, suggests that legislation that *did* deny access to such services might have been regarded as unconstitutional.

Later, the court reasoned:

[T]he doctrine of the separation of powers, involving as it does respect for the powers of the various organs of State and specifically the power of the Oireachtas to make decisions on the allocation of resources, cannot in itself be a justification for the failure of the State to protect or vindicate a constitutional right.²⁰

Thus, the organs of government cannot hide behind the doctrine of separation of powers in order to justify a failure to protect constitutional rights. However, as Doyle has argued, this does not necessarily mean that the courts are given an extensive role under that doctrine to enforce such rights as against the legislature or executive.²¹

In this case, the court was prepared to assume that persons of limited means might enjoy a constitutional right to care and maintenance by the State. While the case does little to detract from the dicta in *Sinnott* and *TD*, which continue to represent the definitive statement of the restricted circumstances in which courts have the power to issue mandatory orders for the enforcement of constitutional rights, it does signal a departure from the attitude taken by Keane CJ and Murphy J in *TD*: judges who “appear to take a rather absolutist position in rejecting judicial recognition of implied socio-economic rights.”²²

(iii) Critical Analysis and Commentary

The aforementioned cases demonstrate that the views of the Supreme Court are inimical to an extensive judicial role in the protection of the interests of disadvantaged groups. It is likely that attempts to directly rely on socio-economic rights in a constitutional context will continue to receive a frosty reception in the Irish courts. Unfortunately, it seems that the courts can no longer be relied upon to protect personal interests that are not explicitly referred to in the Constitution or legislation.

The current approach of the judiciary can be, and has been, heavily criticised, as it is the judiciary’s obligation to vindicate all rights, whether textual or unspecified, when they are

19 *Ibid*, at paragraph 37.

20 *Ibid*, at 23.

21 Doyle and Whyte, "The Separation of Powers and Constitutional Egalitarianism after the Health (Amendment) (No.2) Bill Reference" in O'Dell, (ed), *Older People in Modern Ireland: Essays on Law and Policy* (First Law, 2005), at 393.

22 Whyte, “Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement”, Draft paper, Law School, Trinity College Dublin, presented at the IHRC Conference on Economic, Social and Cultural Rights, 9 December 2005.

breached. The enforceability of socio-economic rights is extremely curtailed by the current approach to the separation of powers. It must be acknowledged that socio-economic rights will always be subject to interests of the common good and questions of proportionality, but this intrinsic trait should not render the rights unenforceable. Naturally, deference on issues of institutional competence is highly warranted, but where a cognisable right is violated, the courts should intervene by means of a mandatory order where a declaratory order has failed to secure the result needed by the plaintiff.

Greater judicial activism is necessary in order to oblige the political organs of government to address issues that have long been unaddressed. From the Preamble, judges derive the right to develop the constitution in accordance with justice, prudence and charity as society develops. The supposed basis of our democracy is a system of checks and balances, whereby the court can supervise the actions of the legislature and the executive. The people voted for a constitutional dispensation that gave judges such power, and it is not being exercised appropriately.²³

Unfortunately, there has never been enough political will to protect the range of rights Ireland has committed to protect under international law, which includes a right to housing. For several reasons, most of which relate to class and systematic discrimination, disadvantaged groups are unable to effectively influence political decision-making. As a result, our political system largely ignores the needs of disadvantaged minorities. The call for justiciable socio-economic rights arises directly out of this failure to respond to the plight of marginalised groups. As Whyte points out, “[a] judicial refusal to recognise implied socio-economic rights is particularly problematic, given that the demand for the recognition of such rights is invariably rooted in political neglect of the needs of marginalised groups.”²⁴ He defends the proposition that it is constitutionally and politically legitimate for Irish courts to protect the implied socio-economic rights of marginalised individuals and groups when it is clear that such rights have been egregiously neglected by our political system. For Whyte, the real value of litigation in this area is that it functions as a corrective mechanism for the political system – obliging the system to address issues of social exclusion which otherwise go ignored.²⁵

(d) Conclusion

The possibility of enshrining a right to housing in the Irish Constitution raises complex issues relating not only to the separation of powers and the proper role of the courts, but also to the practicalities of formally recognising such a right. How would the right be defined and delimited? How would it be enforced? Ireland is not alone in this struggle for answers, and many jurisdictions with a similar approach to the separation of powers have successfully addressed these issues. Unfortunately, there seems to be a lack of enthusiasm for recognising a right to housing under the Constitution. For the sake of certainty, if the right is to be recognised by the Constitution, a referendum on the matter should be held.

It is notable that in February 2014, the Constitutional Convention voted to afford greater constitutional protection to Economic, Social and Cultural (ESC) rights.²⁶ Arguing in favour of enshrining such rights into the Constitution, Colm O’Gorman said:

23 Whyte, “The Role of the Supreme Court in our Democracy” in Mulholland (ed), *Political Choice and Democratic Freedom in Ireland: Forty Leading Irish Thinkers* (2004), at 12.

24 Whyte, “Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement”, Draft paper, Law School, Trinity College Dublin, presented at the IHRC Conference on Economic, Social and Cultural Rights, 9 December 2005.

25 *Ibid.*

26 85% of members voted for greater constitutional protection of economic, social and cultural rights.

What we are advocating is neither radical, not revolutionary. We are in a moment of change. We are emerging from some of our darkest economic days, while looking to the centenary of our birth. We must consider how we might do things differently. How we ensure that our country serves its entire people, and makes decisions in our collective interest. Placing ESC rights in our constitution will not cure all our ills. But it will require that government design systems that prioritise good, evidence based decisions, in the interest of all our people.

An overwhelming 84% of members voted in favour of having a right to housing specifically enumerated in the Constitution. The Government has yet to decide if this recommendation will be put to referendum. If a right to shelter was to be enshrined in the Constitution, it is arguable that the judicial remedies for the infringement of such a right could be limited to declaratory orders unless the judiciary dramatically changes its current approach to the separation of powers.

2. Legislation

(a) Introduction

Over the last fifty years, what meagre legislative action has been taken to address homelessness has, at best, merely maintained levels of homelessness, and at worst, neglected problems to the extent that homelessness has worsened while the illusion of legislative protection has been maintained.

At present, legislative protection for housing rights in Ireland does not establish a free-standing right to housing. The current legislative framework only offers a number of situational protections.

(b) The Legislative Definition of Homelessness

The supporting Act of the Irish housing allocation scheme is the Housing Act 1988, the substance of which has changed little since its enactment. The current definition of homelessness is derived from this Act, and a person is to be regarded as homeless if:

- a. there is no accommodation available, which in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of, or
- b. he is living in a hospital, county home, night shelter or other such institution and is so living because he has no accommodation of the kind referred to in paragraph (a) and he is, in the opinion of the Authority, unable to provide accommodation from his own resources.

This definition is satisfactory for the purposes of distinguishing between people who truly need state assistance for state housing, and those who could find either affordable property or property they could reasonably be expected to occupy.

Unfortunately, a purposive interpretation of the Act reveals that by its enactment, the Oireachtas did not set out to end homelessness in Ireland. For example, Section 8 of the Act provides guidelines for local authorities regarding how they must take account of housing requirements, but it does not oblige them to meet these requirements. Thus, the definition of homelessness is a largely hollow instrument.

(c) Statutory Rights and Legislative Mechanisms

There is no *per se* statutory right to housing, but rather, there is a web of statutory rights offering housing protection and access to social housing support. A particularly useful

explanation of the Irish legal position is that given by the Irish government to the United Nations Centre for Human Settlements in a 2001 submission: “[Irish statutes and regulations] do not confer any statutory right to housing. However, the range and extent of measures implemented under the Housing Acts demonstrate the State’s long standing commitment to ensuring that housing needs, especially social housing needs are adequately addressed. Over the years public resources have been provided to finance the social housing programme and to subvent housing, particularly for low-income groups. While this falls short of an explicit legal or constitutional right to housing, real progress has been made over the years in terms of standards and access to accommodation.” Instead of declaring that the right to housing is protected by Irish legislation, it would perhaps be more apt to say that some housing rights exist as part of the broader schemes of social welfare and property rights. For example, the right to apply to the local authority to be assessed for housing support will be contingent upon the greater social welfare policy of the state. *Ergo*, should that policy change and if need of social assistance is defined differently, a person could find themselves falling within or outside of the bracket.

Rights relating to housing which are specifically provided for in statute include:

Social Housing Support

- a. One has a right to apply to their local authority for social housing assistance (Section 5 of the Social Housing Assessment Regulations 2011).
- b. One has a right to be assessed for social housing assistance once they have applied (Section 20 of the 2009 Housing (Miscellaneous Provisions) Act).
- c. One can apply to be housed in a specific area within the remit of their Local Authority (Section 8 of the Social Housing Assessment Regulations 2011)
- d. One can change the area they are applying to be housed in or are housed in, subject to certain conditions (Section 9 of the Social Housing Assessment Regulations 2011).
- e. One has the right to certain information from public bodies and other organisations (Data Protection Acts).
- f. One has the right to fair procedures, appeals and redress in their pursuit of social housing assistance stemming from the various related provisions in the Housing Acts that have to be interpreted in line with Article 42.5 of the Irish constitution.
- g. One has the right not to be discriminated against based on gender, marital status, family status, sexual orientation, religion, age, disability, race or membership of the Traveller Community (Equality Acts).

Party Specific Rights

- h. Recipients of social housing are entitled to:
 - i. A reasonable standard of housing protected by repairs and maintenance (The Housing Standards Regulations 1993-2009).
 - ii. The right to apply for an excluding order if you are the victim of anti-social behaviour (Section 3 of the Housing (Miscellaneous Provisions) Act 1997).
 - iii. The right to appeal a notice to quit (Section 62 of the Housing Act 1966).
 - iv. The right to eventually purchase your home subject to certain conditions (Part 4 of the Housing (Miscellaneous Provisions) Act 2009).
- i. Children

- i. Persons under the age of eighteen have a right to adequate shelter (Child Care Act 1991).
- j. Members of the Traveller Community
 - i. Travellers have a right to traveller specific accommodation (Housing (Traveller Accommodation) Act).

Property Rights

- k. A number of housing related rights are linked to property rights via legislation
 - i. Examples include spousal property rights (Family Home Protection Act 1975 etc.) or rights around Compulsory Purchase Orders (Planning and Development Act 2000).

Thus, the variety of financial supports offered by the State to those in need of housing include provision for social housing and affordable housing, and applications can be made for state grants to build or improve housing. Prospective occupants can also obtain a loan to assist them with rent payments, which will be provided for in whole or in part by the state until the occupant is in a position to repay it, or they will be required to pay a means-adjusted charge for the duration of their stay. These mechanisms are to be applauded. Theoretically, the combined scheme addresses many of the circumstances under which people fall into homelessness, and provides them with a means to re-establish themselves. Significantly, the current scheme respects the dignity and autonomy of those who are capable of repaying the State by providing them with a means to do so. In the interests of financial stability and sustainability, it is recommended that these mechanisms be retained in supporting a stronger right to housing.

Current legislation also provides for temporary accommodation and outlines a priority list for housing, which are both problematic in several respects.

(i) Temporary Accommodation

Section 56 of the Housing Act 1966 provides:

“A housing authority may erect, acquire, purchase, convert or reconstruct, lease, or otherwise provide dwellings (including houses, flats, maisonettes and hostels) and such dwellings may be temporary or permanent.”

This section indicates State acceptance, and even State approval, of temporary accommodation being used to provide housing to those in need. The absence of a positive legislative duty on the State to provide housing is thus compounded by the State’s use of a temporary solution to an oft permanent problem.

(ii) Priority

In every iteration of housing acts over the years, integral to the functionality of the legislation has been the concept of a priority list. Section 11 of the 1988 Act requires housing authorities to “make a scheme determining the order of priority to be accorded in the letting of dwellings.” While the housing authority has discretion to determine the order of priority, Section 9 provides some guidance as to classes of persons who will need housing and who the housing authority must have regard for. These include persons who are:

- (a) homeless
- (b) members of the travelling community
- (c) living in accommodation that is unfit for human habitation or is materially unsuitable for their adequate housing
- (d) living in overcrowded accommodation
- (e) sharing accommodation with another person or persons and who, in the opinion of the housing authority, have a reasonable requirement for separate accommodation.

- (f) young persons leaving institutional care or without family accommodation
- (g) in need of accommodation for medical or compassionate reasons
- (h) elderly
- (i) disabled or handicapped)
- (j) in the opinion of the housing authority, not reasonably able to meet the cost of the accommodation which they are occupying or to obtain alternative accommodation.

It is understandable, given the limited nature of state resources, that a priority list be employed as the fairest way to allocate limited housing. However, the established use of a priority scheme is too comfortably entrenched in our legislative framework, and it has further weakened political will to be ambitious in providing for more affordable social housing so that all those in need may be housed without reference to a priority list. The very fact that a priority list exists is inimical to the proposal that an absolute right to housing exists in Irish law. Thus, if legislation were enacted to provide for a right to housing, this means of housing allocation would have to be seriously reconsidered. It is contended that a right to housing should be enshrined in legislation, as the creation of a clear legal obligation to house those in need of housing, accompanied by the threat of legal sanction in the case of non-compliance, would be the most effective and simple way to ensure action is taken to address homelessness.

(d) Problems with the Status Quo

As it stands, the incomplete web of legislative and statutory rights related to housing gives rise to a number of problems. These problems can be classified under three traits of the current legislative framework: selectivity, supposed altruism, and mutability and subsidiarity.

(i) Selectivity

When a right to housing is framed in terms of social assistance, the right is limited according to the principles under which social assistance schemes operate. First, only a limited number of people, at any point in time, can and should receive social assistance, and this class of people will be defined with reference to current legislation and policies. This means that the right to housing is necessarily contingent on circumstance and the financial resources of the State: it is conditional rather than absolute. Current legislation does not specify a residual minimum of the right which must be provided for, so an absolute right to housing cannot be founded under the existing framework.

(ii) Altruism

Establishing housing rights in terms of social assistance wrongly suggests that providing for the right is an act of altruism or charity. Thus, pressure on the State to provide for stronger rights is restrained by this narrative: if something is only reserved for the 'needy,' people have to cross that threshold in order to qualify.

(c) Mutability and Subsidiarity

Currently, the definition of housing rights is contingent on political policy in a manner that the definition of absolute rights, such as life, is not. The right to housing, as currently conceived by legislation, has no intrinsic meaning and it can be altered to suit the strategies of the current government.

(d) Conclusion

The current legislative framework provides for housing assistance in some circumstances, but it is to be heavily criticised for its inherent lack of ambition and its tendency to make housing assistance contingent on policy. If a right to housing were to be established under Irish legislation, multiple facets of the current scheme would have to be overhauled and provision for an absolute right to housing would need to be enacted.

3. Case Law

(a) Introduction

Irish jurisprudence has not increased the protection of housing rights beyond that which is already provided for in the Constitution and legislation. However, it has delineated housing rights in rather useful and interesting ways, often with reference to the European Convention on Human Rights. The following section shall examine the leading Irish case law on housing rights.

(b) Important Cases

(i) Carton v Dublin Corporation

This case does not establish a housing right, but it did clarify the circumstances in which a court can intervene in matters of social housing: “a court can only interfere with the decision of the respondents if that decision flew in the face of reason or was defective on grounds of failure to observe the rules of natural justice or was illegal or was ultra vires.” This indicates that social housing rights are not absolute and that the opportunity for courts to vindicate such rights is limited to exceptional circumstances.

(ii) Byrne v Judge Scally and Dublin Corporation

This case established that there was no automatic entitlement to legal aid in possession proceedings due to their straightforward nature. However, this finding raised the implication that in more complex cases related to housing there may be a right to legal aid.

(iii) Kerry County Council v McCarthy

This case established a right to be heard before a judge in housing possession cases.

(iv) County Meath VEC v Joyce

Local authorities have a duty (implying a corollary right) to perform their functions under the Housing Acts in a “rational and reasonable manner” and to provide accommodation for persons defined as homeless. This establishes not a right to housing, but a right to housing under certain fact matrices.

(v) Burke v Dublin Corporation and Siney v Dublin Corporation

These two cases established the right for recipients of social housing to obtain habitable social housing, and such need not be expressly agreed.

(vi) Kinsella v Dún Laoghaire Rathdown County Council

Hogan J clarified that recipients of social housing in one local area have the right to apply to another local authority for such housing and that there was no mandate at law to prevent them from doing so.

(vii) Dunleavy v Dun Laoghaire Rathdown County Council

This case extended the doctrine of legitimate expectation/ promissory estoppel to the disposal and sale of housing by local authorities. This expanded the definition of the right to fair procedures enjoyed by tenants in respect of social housing.

(viii) Lattimore v DCC

The judgment in *Lattimore* identified the right to an independent proportionality assessment of an interference with one’s ECHR Article 8 rights to respect for private and family life. This is an explicit endorsement of the decision in *Webster v Dún Laoghaire Rathdown County Council*. The current legislative system does not allow for such an independent inquiry so, as per *Meadows v Minister for Justice, Equality and Law Reform*, that duty falls to the Court. Accordingly, the Court conducted an inquiry into whether a proportionality assessment had taken place.

(ix) Donegan v DCC and DCC v Gallagher

The Supreme Court recognised that under Article 8 of the ECHR, local authority tenants have a right to procedural protection against illegitimate eviction.

(x) DCC v Gallagher

O’Neill J held Section 62 of the Housing Act to be incompatible with the ECHR in response to a case stated by the District Court. In this case, the Council had rejected Mr Gallagher’s claim to succeed to his mother’s tenancy of a local authority house. There was a factual

dispute about his entitlement, however, and O’Neill J noted that there was no provision for the court to hear and determine the facts of the case. He held that the possibility of applying for judicial review was not an adequate remedy and said that Mr Gallagher’s rights under Article 6 of the Convention (the right to a fair trial) had been breached, but he appears to have limited the declaration of incompatibility to Article 8 of the Convention. This further implies a nuanced right to fair procedures in housing disputes in respect of social housing.

European and International Law

1. European Convention on Human Rights

(a) Introduction

In its original inception, the European Convention on Human Rights (ECHR) was merely intended to outline broad civil and political rights, rather than socio-economic rights, which were considered to be at the discretion of individual Member States. However, there has been a growing acceptance that the document can have an impact on socio-economic rights, as the following extract from the 1979 case of *Airey v Ireland* shows succinctly:

Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature... there is no water-tight division separating that sphere from the field covered by the Convention.

Indeed Padraic Kenna, Ireland’s foremost advocate for a right to housing, has noted:

... [V]arious ECHR provisions may protect socio-economic rights, including the right to housing and other related interests. On many occasions the European Court of Human Rights has emphasised that the ECHR is a "living instrument" which must be interpreted in the light of present-day conditions

It should be noted from the outset that there is no express right to housing to be found in the ECHR or in the jurisprudence of the European Court of Human Rights (ECtHR). Rather, there is a growing body of law aimed at maintaining minimum levels of housing security for people in general, through the use of a number of different articles in the ECHR. Primarily, these include: Article 2 (the right to life), Article 3 (the prohibition of torture and inhuman or degrading treatment), Article 5 (the right to liberty and security), Article 8 (the right to respect for private and family life and home). Article 1 states, “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.” As Ireland is a contracting party to the ECHR, it is therefore bound by this Article to guarantee all rights and freedoms listed.

(b) Article 8

Of all the rights provided for by the ECHR, Article 8 is perhaps the most relevant to housing rights. Article 8 of the European Convention on Human Rights states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except that such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

While Article 8 does not create a right to housing *per se*, it establishes a right to respect for a person's home. Furthermore, it limits the ability of public authorities to interfere with that right. As a result, Article 8 is considered to be a protective right where a person has a home. However, "home" is not defined by the ECHR and therefore may be distinguished from a legal interest in land. The term "home" has an undoubtedly broad definition and the French equivalent, domicile, has even wider connotations.²⁷ The case of *Gillow v United Kingdom* is considered to be the leading case on the scope of the definition and it led to the ECHR establishing a clear test defining the characteristics of a home. First, there must be "sufficient continuing links" between the applicant and their presumed home. Lengths of absence or the establishment of another home can diminish the sufficiency of these links. Conversely, these links can be strengthened by periods of habitation, ownership, presence of personal belongings, intention to take up permanent residence, and emotional ties.²⁸ If the absence from the home is as a result of the actions of the respondent State, the sufficiency of the link is not as easily broken.²⁹ For example, in *Zayou v Turkey*, the ECtHR held that an involuntary absence that lasted for more than 28 years did not sever the links between the applicants and their home as the absence was due to the occupation of Northern Cyprus by Turkey.³⁰ In *Moreno Gomez v Spain*, the ECHR developed the concept of home much further, stating that the home is "the physically defined area, where private and family life develops."³¹ Furthermore, an illegally occupied residence may qualify as a home, particularly when the illegality is created by the respondent State.³² Unfortunately, much of the case law concerning the definition of home necessarily precludes those who are homeless, as they cannot establish a home to which they already have links. However, this aspect of Article 8 might provide some protection to those who are at risk of homelessness. Indeed, the ECHR has provided ample opportunity to challenge an alleged infringement of housing rights and this has been supported by much case law. In the case of *Connors v The United Kingdom*,³³ it was held that a summary eviction procedure, used by a local authority to evict a member of the travelling community, was incompatible with Article 8. Subsequently, the ECtHR held that this principle was not limited to cases concerning travellers. The ECtHR reasoned as follows:

The Court is unable to accept the Government's argument that the reasoning in *Connors* was to be confined only to cases involving the eviction of Roma or cases where the applicant sought to challenge the law itself rather than its application in his particular case. 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

27 *Niemietz v. Germany*, 16 December 1992; Series A No. A251-B.

28 Kucs, Sedlova, and Pierhurovica, "The Right to Housing: International, European and National Perspectives".

29 Antoine Buyse, "Strings Attached: the Concept of "Home" in the Case Law of the European Court of Human Rights", *European Human Rights Law Review* No. 3 (2006), p. 298.

30 *Zavou v. Turkey*, No.16654/90, ECHR, 26 September, 2002

31 *Moreno Gómez v. Spain*, No. 4143/02, para. 53, ECHR 2004-X

32 Antoine Buyse: "Strings Attached...", cit. p. 300.

33 [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61795#{"itemid":\["001-61795"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61795#{).

Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.³⁴

The protection of the home was further strengthened in *Bjedov v Croatia*, where the applicant was granted the right to purchase her rented accommodation on the basis of her rights under Article 8.

Padraic Kenna has noted that the First Protocol of the ECHR could greatly add to the interpretation of Article 8, as it could increase pressure on states to give assistance to people evicted from the properties they occupy. The First Protocol reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Kenna has observed that ECHR law is beginning to suggest:

... the eviction from shelter of [unlawfully residing] persons should be limited, as it would place the persons concerned in a situation of extreme helplessness, which is contrary to the respect for their human dignity. And even when an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the persons concerned.

The case of *Yardanova v Bulgaria* would support this analysis, as it indicates that a removal order can only be justified if there is a “pressing social need” and if it is “proportional to the aims pursued.” The UN Human Rights Council (UNHRC) has also held under the International Covenant on Civil and Political Rights (ICCPR):

the state party would violate the authors’ rights under Article 17 of the Covenant if it enforced the eviction order [...], without providing the authors with adequate alternative accommodation

Kenna has commented that this effectively means that the UNHRC has recognised a right to be rehoused as part and parcel of the respect for one’s home. In addition to staying evictions, this interpretation has also led to positive obligations being imposed on states e.g. an obligation to re-connect a water supply to a housing block.

Unfortunately, many international and Irish decisions which rely on Article 8 are made in favour of families, and successful cases where the applicant is a single person are few and far between. This would indicate that the family protection element of the Article takes precedence in its application.

Furthermore, the element of privacy mentioned in the Article has remained largely unexplored. Article 8 provides strong protection for the right to a private life, but only as it currently exists for the applicant. The Article does not seem to envision a situation where pursuing a private life is impossible by virtue of the fact that the applicant is homeless: the Article purports to maintain the status quo, rather than improve it.

The decision of the English Court of Appeal in *Anufrijeva v Southwark LBC* supports this analysis and indicates that courts will be reluctant to interpret Article 8 as imposing a positive obligation on Member States to provide housing:

34 *McCann v The United Kingdom* [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86233#{"itemid":\["001-86233"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86233#{).

A deterioration in quality of life could result in infringement of Article 8 and this was particularly true where it impacted on the claimant's home. There was, however, a difference between protecting the quality of life that a claimant enjoyed in his existing home and providing him with a home where he could enjoy a particular quality of life.

It is likely that an Irish court would use this case as persuasive authority for the proposition that there is no obligation on the State to provide housing in order to protect the right to private life under Article 8.

(c) Article 2

Article 2 protects the right to life. The case of *Oneriyildiz v Turkey* involved a successful action against the State where unofficial slum housing was destroyed by a methane explosion, causing the deaths of nine people. In finding for the applicant, the court held that where lives were lost in circumstances engaging the responsibility of the state, Article 2 entailed a duty for the state to ensure an adequate response. In other words, where the authorities knew or ought to have known that there was a real risk to the lives of persons due to their living situation, the state had a duty of care towards those people. Echoing some of our earlier analysis of the potential for the right to housing to be established as a corollary to the right to life, it is clear that homelessness puts lives at risk and that the State's failure to address homelessness could amount to a breach of the right to life. Based on the *Oneriyildiz* case, it could be argued that where the State knows, or at least ought to reasonably know that the high levels of homelessness in Dublin have led to needless deaths, the State has a positive duty to protect those lives by providing housing.

(d) Article 3

Article 3 prohibits torture and provides, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Oxford Dictionary defines "humiliating" as "making someone feel ashamed and foolish by injuring their dignity and pride", and "degrading" as "causing a loss of self-respect." While a dictionary definition may not provide sufficient legal grounds for a right to housing, it does allow for a more purposive interpretation of the ECHR and the intentions of the Treaty signers. The personal accounts of numerous homeless people in Ireland have indicated that they have found, and continue to find, their struggles to be both humiliating and degrading. This experience is shaped by several factors, including the stigma the general public associates with homelessness, and the struggles they face in attempting to acquire local authority housing.

While the application of this Article has usually arisen in cases of police torture or detention, the Article itself is broad in its ambit, with no exceptions or limitations. This implies that the Article could be applied in a number of situations, including those related to the homeless and their need for adequate housing. Indeed, such broad interpretation of Article 3 is becoming more and more apparent in the jurisprudence of the ECtHR and decisions concerning the ECHR.

The UK has expanded Article 3 to encompass actions by public authorities that cause significant hardship or deprivation, or force people to live in grossly substandard conditions that endanger their health. Notable cases include *Bernard v Enfield Borough Council*, where the Council had provided a disabled mother with accommodation totally unsuitable for her condition, and the case of *Limbuella v Home Secretary*, where UK government policy barred unsuccessful asylum applicants from accessing health and welfare services.

In *Gafgen v Germany*, it was noted that both the case law of the ECHR and the definition of torture in Article 1 of the United Nations Convention against Torture, to which the former has regard, recognised that torture includes both physical pain and mental suffering.

The ECtHR has also considered the application of Article 3 in a case concerning a forced eviction. In *Selcuk v Turkey*, the Court considered a situation in which sponsored troops burned a village to the ground in order to prevent enemies of the state using it as a base. The Court held that such a forceful eviction could amount to inhuman or degrading treatment. There appears to be a growing consensus in international human rights jurisprudence that an eviction from property is lawful only if there is alternative accommodation available to the dispossessed.

Generally, this Article may be of growing importance to those who are at risk of homelessness, but the degrading treatment faced by those who are already homeless has not been explored in relation to this Article.

(e) Article 5: Right to Liberty and Security

Article 5 provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure proscribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court in order to secure the fulfilment of any obligation prescribed by law...

It is submitted that a right to housing is essential to guarantee oneself a state of being free from danger or threat: of being secure. However, there is no jurisprudence in Ireland or in the ECtHR interpreting Article 5 in this way. There could be scope for broadening the definition of security as its meaning is yet to be analysed by the ECtHR.

(f) Conclusion

There is certainly a growing body of ECtHR jurisprudence that could strengthen existing housing rights. However, it remains unlikely that a positive State obligation to provide housing will be inferred from the ECHR. Additionally, a successful claimant would be merely entitled to a declaration of incompatibility (providing no practical remedy) and a discretionary *ex gratia* Government payment.

2. EU Charter of Fundamental Rights

(a) Introduction

The Charter recognises a range of personal, civil, political, economic and social rights for EU citizens and residents, and the Lisbon Treaty enshrined its status in EU law. The Charter does not specify a right to housing, but several Articles could be used to establish a right to housing under EU law.

(b) Article 34(3)

Article 34(3) provides for a right to housing assistance:

In order to combat social exclusion and poverty, the union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

It should be noted that the right referred to in the Article is one of “social and housing assistance”, rather than an absolute right to adequate housing, and the declaration is limited by “national laws and practices.” Judicial interpretation of the provision has been limited to the case of *Kamberaj v Social Housing Institute of the Autonomous Province of Bolzano*. In

that case, it was held that a housing allowance could not be reduced in a way that discriminated against non-EU nationals.

(c) Article 1

Article 1 provides in very clear language, “human dignity is inviolable. It must be respected and protected.”

Significantly, the European Parliament Draft Report on the Situation as Regards Fundamental Rights in The EU, stated, “although essential to human dignity, this right [to housing] is not yet explicitly recognised in Article 34 [of the Charter], which mentions housing assistance. It emerges from almost all the reports on the subject by NGOs that the lack of housing is a major factor in exclusion.”

This finding indicates that the European Parliament is desirous of greater housing rights protection under the Charter. This should encourage the European Court of Justice (ECJ) to consider the spirit and intention of the Charter, and find indirect protection within it for a right to housing. However, such a case is yet to come before the Court and fourteen years have passed since that draft report with minimal action taken since then.

(d) Conclusion

Unless the Courts decide to adopt a much more purposive interpretation of the Charter, it is unlikely that a right to housing will be implied into EU law on this basis in the near future.

3. The Treaty on the European Union

The following Articles are pertinent to any discussion of the right to housing:

(i) Article 2

“The Union is founded on the values of *respect for human dignity*, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

(ii) Article 6

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

(iii) Article 49

“Any European state which respects the principles set out in Article 6(1) may apply to become a member of the Union.”

These articles are important because:

- They explicitly state that the Charter has the same legal status as the Treaties

- They make it clear that compliance with the Charter and respect for the values it enshrines, and those enshrined in Article 2 TEU, is not optional; it is a condition of membership of the EU. To do otherwise would amount to a breach of Treaty obligations

This point is further strengthened by the fact that Articles 7 TEU and 354 TFEU equip the institutions with the means of ensuring that all Member States respect these values.

Article 7 TEU establishes a prevention mechanism in the event of a risk of a breach of these common values by a Member State, and a penalty mechanism in the event of an actual breach. Article 354 TFEU provides further detail on the procedure under Article 7 TEU.

There is further scope for finding the existence of a right to housing in the Charter, which refers to a right to “housing assistance” in Article 34(3).

It is unlikely that the Treaties will be interpreted in such an expansive manner, but the broad provisions are encouraging.

(iv) Analysis of the Treaty on the European Union

Neither the Charter nor the Treaties explicitly provide for a right to housing. Arguably, the existence of such a right could be inferred from the Treaties indirectly. If this is the case, the failure of a Member State to respect the right to housing would be a breach of its Treaty obligations.

The right could be indirectly inferred from the text of the Charter and from the references in the Treaty to fundamental human rights.

Article 2 TEU states that one of the core values of the EU is “respect for human dignity”. In relation to various international conventions and cases etc., the right to dignity has been found to entail a right to adequate housing.³⁵

4. Council of Europe

(a) Introduction

The Council of Europe is an international organisation which was set up to protect human rights and protect democracy in Europe. It is comprised of 47 member states, 28 of which (including Ireland) are also EU Member States. It must be emphasised that the Council of Europe is entirely distinct from the EU and it cannot make binding laws.

The work of the Council of Europe serves a useful purpose in providing for another standard of comparison against which Ireland’s rights protection can be assessed. In terms of housing rights, we merely have an incomplete “Right to Housing” policy with a meagre guarantee of housing via state support, rather than an established right to housing. In comparison, Portugal, Spain, the Netherlands, Belgium, Sweden, Finland and Greece, have incorporated the right to housing into their constitutions.

The following sections will consider Ireland’s obligations under the Revised European Social Charter and case law under the collective complaints mechanism.

(b) European Social Charter and the Revised Charter

The European Social Charter is a Treaty of the Council of Europe, initially adopted in 1961 and since revised in 1996 (RESC). The following section will consider Articles of the RESC which are relevant to establishing a right to housing.

(i) Article E

Article E is a general non-discrimination clause, specifying “the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race,

³⁵ Numerous international agreements, decisions, and reports etc. clearly link the two as interdependent and interrelated- see for example, European Parliament Draft Report on the situation as regards fundamental rights in the EU (2000), (2231/2000 (INI) p96, UN Fact Sheet No. 21/Rev 1 “The UNCESCR has underlined that the right to adequate housing... should be seen as the right to live somewhere in security, peace, and dignity”, etc.

colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”

(ii) Article 11

Article 11 provides:

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health.
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

As noted in earlier analysis in this report, those who are subjected to homelessness face severe health risks that can only be addressed by providing housing.

(iii) Article 16

Article 16 provides, “with a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.”

This Article is significant in that it specifically requires contracting members to provide for family housing. However, the obligation is not binding on the State, and at best, the needs of homeless single persons are neglected.

(iv) Article 17

Article 17 provides:

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1.
 - a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
 - b. to protect children and young persons against negligence, violence or exploitation;
 - c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family’s support;
2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

As noted earlier in this report, the Irish Constitution accords with this Article by readily providing for housing to children.

(v) Article 30

Article 30 provides:

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

- a. to take measures within the framework of an overall and coordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;
- b. to review these measures with a view to their adaptation if necessary.

In 2002, the Irish National Anti-Poverty Strategy stated:

Citizenship rights encompass not only the core civil and political rights and obligations but also social, economic and cultural rights and obligations that underpin equality of opportunity and policies on access to education, employment, housing, health and social services.

Unfortunately, the Irish legislature and judiciary have largely ignored all citizenship rights that are of a social, economic, or cultural nature, and it would appear that Ireland is failing to meet the requisite standard outlined in Article 30.

(vi) Article 31

Article 31 is naturally the most pertinent to our report, as it provides:

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

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

It is telling that Ireland has ratified the majority of the Articles of the RESC, but the State is yet to ratify Article 31.

(vii) Case Law under the Collective Complaints Procedure

The Committee of European Social Rights was established under the RESC to supervise and monitor State Parties as they endeavour to meet their obligations under the RESC. The monitoring process is based on the submission of national reports. Complaints of violations can be lodged with the Committee by a select number of organisations, trade unions, the European Trade Union Confederation, and some European NGOs. The Committee assesses these alleged violations with reference to law and policy in the respondent state before issuing findings and recommendations.

While the decisions of the Committee must be respected, they are not directly enforceable in the domestic legal system. Their decisions are merely declaratory; setting out the law and the measures which national authorities are required to take. In the majority of cases, the State Parties accept the Committee's findings and make the necessary changes to secure compliance. However, were a State to renege on its obligations under the RESC and ignore a decision of the Committee, there would appear to be no effective sanction beyond censure. Regardless, an examination of the decisions of the Committee will provide us with further insights into the RESC's application.

Autism-Europe v France

The Committee held that when State Parties are implementing the RESC, they must not merely take legal action but also practical action to give full effect to the rights recognised in the RESC. The concept of "practical action" is considered with reference to a reasonable

timeframe, making measurable progress, and financing in a manner consistent with the maximum use of available resources.

FEANTSA v France

The Committee agreed that the actual wording of Article 31 cannot be interpreted as imposing on states an obligation of “results”. However, building on *Autism-Europe*, the rights recognised in the Charter must take a practical and effective, rather than theoretical, form.³⁶

This places an obligation on State Parties to:

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

ATD v France 33/2006

The claimant alleged that France had violated its obligations under Article 30, which is the right to protection from poverty and social exclusion. ATD claimed that lack of housing has consequences for families and their access to rights; that failure on behalf of the state to enforce a family’s right to housing has serious, multiple and mutually reinforcing consequences in terms of growing exclusion.

The Committee concluded that there was a violation of Articles 31, 16 and 30 taken in conjunction with Article E.

ERRC v Bulgaria 31/2005

The complaint related to residential segregation, substandard housing conditions, lack of security, forced eviction and other systemic violations of the right to adequate housing, leading to disproportionate treatment of the Roma community.

This case is particularly relevant in the Irish context, as Bulgaria has also not ratified Article 31, which caused the claim to be couched with reference to Article 16.

The Committee held that the “full development of family life” requires the full recognition and realisation of the right to adequate housing. Adequate housing has been defined as a dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law.³⁷

ERRC v Greece 15/2003

Significantly, the Committee acknowledged that although Articles 16 and 31 are different in personal and material scope, they partially overlap with respect to several aspects of the right to housing, and in particular, in relation to concepts of adequate housing and forced eviction. It was noted, “in order to satisfy Article 16, states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity)... Furthermore the obligation to promote and provide housing extends to security from unlawful eviction.”³⁸

FIDH v Ireland 110/2014

The RESC is to be considered in an Irish context very soon, as the International Federation for Human Rights registered their complaint on 18 July 2014 and are awaiting a response from the Committee.

36 International Commission of Jurists v Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, p32.

37 RESC, Conclusions 2003, Vol 1, European Committee of Social Rights, p363.

38 ERRC V Greece, 15/2003, decision on the merits of 8 December 2004, para 16.

The claimant is alleging that the Government of Ireland has not ensured the satisfactory application of the RESC with regard to Local Authority housing and the associated rights of several groups of people under Articles 11, 16, 17 and 30 in conjunction with Article E. They claim that the Government has failed to adopt Charter rights within the legal, policy and administrative framework of housing in Ireland. They argue that the Government has failed to discharge its obligations, as set out in *FEANTSA v France*, as the State has not adopted a timeframe, achieved measureable progress towards realising rights, maintained useful statistics or prepared regular reviews. They have noted that housing legislation and policy in Ireland does not address or even refer to the housing and associated rights in the RESC. It is also claimed that the inadequacy, inhabitability and unsuitability of some Local Authority housing violates the RESC. To support their complaint, they have included case studies of Local Authority housing in Dublin and Limerick which refer to the substandard housing conditions experienced by families and those living in or at risk of poverty and social exclusion there. FIDH recommends that defined standards for access to State provided social housing (including the required standards of management, adequacy, conditions and related issues) would greatly assist social housing providers to understand and meet their obligations in this area. They submit that the integration of human rights standards into social housing management and the regeneration of residualised estates is a critical next step in the implementation of European housing rights in Irish Law. FIDH has also examined the Regeneration Programmes of the State for Local Authority housing in Limerick and Dublin and concluded that these programmes do not respect the housing provisions and other rights set out in the RESC. The findings of the Committee in respect of this case will certainly be interesting, as it is expected that the Committee will find that Articles 11, 16, 17 and 30 have been violated. However, it must be remembered that the Committee can merely issue a recommendation, and the effectiveness of this international pressure in vindicating a right to housing in Irish law is dubious at best.

(c) The Commissioner for Human Rights

The Commissioner for Human Rights is an independent institution within the Council of Europe. In 2009, the Commissioner prepared a Recommendation on the Implementation of the Right to Housing. It was noted that a right to housing is “of central importance to the enjoyment not only of other social, economic, and cultural rights, but also to the effective enjoyment of civil and political rights.”³⁹ Furthermore, it was acknowledged that the UN International Covenant on ESC Rights, the European Convention on Human Rights and the RESC are “core international instruments for the right to housing.” It was recommended unequivocally that all contracting states to the Council of Europe should implement a right to housing. His recommendations were summarised in his report as follows:

- Member states should
- “Enact specific legislation which clarifies how the housing rights guaranteed by international law are to be made effective in a national jurisdiction without discrimination... Those countries which have not yet done so should ratify the revised European Social Charter, its Article 31 on the right to housing as well as its Additional Protocol providing for a system of collective complaints.”
 - “Establish minimum standards in all areas of housing provision for accessibility and affordability in accordance with the European standards developed by the European Committee of Social Rights and the European Court of Human Rights.”

³⁹ Recommendation of the Commissioner for Human Rights on the Implementation of the Right to Housing, CommDH (2009)5, p4.

- “Prevent and reduce homelessness through general and targeted policy measures designed to promote access to housing.”
- “Adopt and implement a national housing strategy which incorporates targets to be achieved for the realisation of housing rights to an extent consistent with the maximum use of available resources.”
- “Enable individual justiciability of the right to housing.”
- “Engage in oversight and regulation to ensure that national, regional and local authorities as well as private bodies fulfil their respective obligations in implementing the right to housing.”

(d) Conclusion

While the work of the Council of Europe is certainly compelling and its writings may have strong normative effects on contracting states, if a right to housing is to be established in Irish law with reference to the RESC, it will certainly need other supporting grounds.

4. EU Regulations and Directives

There is no EU legislation that expressly provides for a right to housing or addresses housing even generally, as it is usually seen to be a matter of discretion for Member States. The only time that housing is addressed is in the context of non-discrimination.

It is worth noting from the outset that the phrase “goods and services available to the public”, prevalent in much EU legislation, can be interpreted as including housing, even where it is not explicitly stated.

The following EU legislation deals with housing in a limited capacity:

- **Directive 2000/43/EC** implementing the principle of equal treatment between persons irrespective of racial or ethnic origin: “non-discrimination based on race or ethnic origin in relation to access to and supply of goods and services available to the public, including housing.”
- **Directive 2004/113/EC** implementing the principle of equal treatment between men and women in the access to and supply of goods and services: “non-discrimination based on gender in relation to the access to and supply of goods and services available to the public, which have been taken to include housing.”
- **Directive 2003/109** concerning the status of third-country nationals who are long-term residents: “third-country nationals who are long-term residents have the right to equal treatment in relation to the supply of goods and services which are available to the public (this includes housing) and to procedures for obtaining housing.”
- **Directive 2003/9** laying down minimum standards for the reception of asylum seekers: Article 13(1) says that MS shall ensure that “material reception conditions” are available to asylum seekers, and according to Article 2(j) these include housing (Case C-179/11).
- **Regulation 168/2007** establishing a European Union agency for fundamental rights
- **Regulation 1612/68** on the freedom of movement of workers within the Community: Article 9 states that EU workers exercising their right to freedom of movement shall enjoy the same rights and benefits in matters of housing.
- **Regulation 492/2011** on freedom of movement for workers within the Union. The regulation stipulates, “the right of freedom of movement, in order that it be exercised by objective standards, in freedom and dignity, requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing.” While this regulation imposes a positive obligation on the State to provide for equality of treatment in assessing eligibility for housing, it does not strengthen existing rights for the homeless.

Thus, while EU law does not impose a positive obligation on Member States to provide housing, the wealth of regulations and directives guaranteeing housing in relation to free movement and equal treatment would suggest that the EU recognises the importance of housing in ensuring quality of life. Padraic Kenna has noted, “although there is no direct competence in relation to housing arising from EU law, a number of developments in the Union are impacting on Irish housing law and policy....At EU level, there is still no legal basis for a common design of housing policies, and State retain competence in this field.”

5. International Instruments of the United Nations

(a) Introduction

The United Nations has been responsible for many international instruments which address the issue of housing rights. The following sections will consider the impact of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

(b) United Declaration of Human Rights

First and foremost, the right to adequate housing is guaranteed under Article 25 of the UDHR, which provides:

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.

With the adoption of the UDHR in 1948, the right to adequate housing joined the body of international, universally applicable and universally accepted human rights law. Since that time this right has been reaffirmed in a wide range of additional human rights instruments, often focusing on distinct groups within society. The UDHR is not binding on Ireland, but it is intended to have a strong persuasive effect on the laws and policies of the State.

(c) International Covenant on Economic, Social and Cultural rights

The right to housing is further enshrined in the ICESCR. This covenant, along with official comments on it produced by the Committee on Economic, Social and Cultural Rights (CESCR), is the most robust human rights instrument in the area of housing rights. Article 11(1) of the ICESCR provides:

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

Article 2.1 of the ICESCR states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

It should be noted that, in relation to safeguarding the right to adequate housing, the primary obligations on the state arising under this Article are to (a) undertake steps by all appropriate means to facilitate the enjoyment of this right, (b) to undertake these steps to the maximum of its available resources, and (c) to achieve these steps in a progressive manner.

In subsequent comments (No. 4 and No.7), the CESCR has clarified the obligations of states under this Article. They have noted that Article 11 does not impose on the State an obligation to build housing for the entire population, or that housing should be provided free of charge to the populace, or even that this right will manifest itself in the same manner in all places at all times. They have emphasised instead that it is the State's obligation to consistently strive to achieve the best possible housing environment for local people. Three general principles can be distilled from the comments of the Committee:

- The state should undertake to endeavour by all appropriate means to ensure that everyone has access to affordable and acceptable housing.
- The state should undertake a series of measures which indicate policy and legislative recognition of each of the constituent aspects of the right to housing.
- The state should protect and improve houses and neighbourhoods rather than damage or destroy them.

They further explained that adequate housing is to be understood in terms of seven key elements: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. They elaborated that housing is deemed to be affordable "when the household can pay the initial costs, the current rent and/or other costs on a long-term basis and still be able to maintain a minimum standard of living, as defined by the society in which the household is located." The recognised human right to have the highest attainable standard of health may also tie in to the right to housing. In Comment No. 14, the CESCR stated, "the right to health is closely related to and dependent upon the realisation of other human rights ... including the right ... to housing" and that "these and other rights and freedoms address integral components of the right to health."

(d) Other International Instruments

A number of other international instruments refer to the right to adequate housing, often in relation to specific groups.

(i) Housing rights and non-discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination is presently the most widely ratified of all United Nations human rights texts. Article 5 (e) of this Convention includes the obligation of States parties to:

prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of economic, social and cultural rights in particular ... the right to housing.

(ii) Housing Rights of Women

Equality of treatment is also the basis upon which all women are accorded, among other rights, the right to housing. Under article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979), States parties are specifically required to eliminate discrimination against women in rural areas and to ensure to such women the right

to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply.

(iii) The Housing Rights of Children

Both the United Nations Declaration of the Rights of the Child (1959) and the Convention on the Rights of the Child (1989) address the special housing rights of children. Article 27 of the Convention requires States parties to take appropriate measures to assist parents and others responsible for the child to implement the right to an adequate standard of living, and “in case of need [to] provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

(iv) The Housing Rights of Migrant Workers

The rights of migrant workers to equality of treatment with respect to housing is guaranteed in article 43 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990). This article provides, “migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to ... (d) access to housing, including social housing schemes, and protection against exploitation in respect of rents.”

(v) The Housing Rights of Refugees

Under the 1951 Convention relating to the Status of Refugees, the Contracting States are required to accord refugees treatment as favourable as possible, and not less favourable than that accorded to aliens generally in the same circumstances with regard to housing.

(e) Conclusion

Instruments promulgated by the UN may not be binding on the State, but consistent lobbying should remind the State of its domestic and international obligations to provide for the human right to housing.

B. COMPARATIVE ANALYSIS

Comparators

1. England

(a) Why Compare Ireland with England?

As England had a predominant role in Ireland's history for many hundreds of years, our policies and laws both grew out of the same feudal system and traditions. Due to this close historical and physical proximity to Ireland, and the fact that many of our laws are similar, it is prudent to consider how England approaches the issue of housing rights.

(b) Background

In England, social housing accounts for 17% of all households. However, this proportion is not representative of the actual number of citizens who require social housing. Because of the limited availability of social housing in England, many citizens in a low-income bracket are compelled to rent privately instead.

(c) Law and Policies

As is the case in Ireland, England does not provide for an absolute right to housing but there is a variety of laws intended to deal with the social problem of homelessness.

The Housing Act 1996 is the primary law determining eligibility for social housing in England. It permits the creation of secondary legislation which regulates eligibility for social housing allocations and homelessness services.

The 2012 Localism Act introduced changes to the Housing Act, further enabling councils to determine their own rules regarding eligibility for the housing register, subject to criteria requiring that particular groups be given a "reasonable preference." The Allocation of Housing and Homelessness (Eligibility) Regulations 2006 include those in receipt of humanitarian protection and authorised Eastern European workers in these groups. In this respect, Irish law is very similar to English law. Local authorities acknowledge the length of time applicants spend on waiting lists and the urgency of their housing need, among other priorities. Temporary accommodation is often used until settled housing becomes available, and it is often provided in the form of ordinary houses or flats through leasing arrangements with private landlords, although occasionally hostels are used.

Registered providers, often housing associations and local authorities, own and manage all social housing in England. It is open to commercial organisations to build and manage social housing but this practice has not yet come to the fore. All registered providers are funded by the government via the Homes and Communities Agency, which in turn is supervised by the Department for Communities and Local Government.

(d) Developments

English policy is now directing itself towards homelessness prevention and local authorities are required to create anti-homelessness policies. Preventative measures in use include: "enhanced" housing advice which is aimed at enabling households to gain access to, or to retain private or social rented tenancies; rent deposit schemes; family mediation which is used to prevent youth homelessness; domestic violence victim support; and tenancy sustainment. An increasing recognition of the right to housing in England has been influenced by international discourse and the prevalence of international treaties on the topic.

In 2006, the Housing Corporation produced a report outlining their “Strategy for Tackling Homelessness.” They explicitly stated that the wider purpose of providing accommodation was to tackle the issue of homelessness and to build sustainable, well-balanced communities which could inculcate social cohesion and prevent social exclusion.

The UK Housing Review also commissioned a report to identify the main reasons for homelessness in England, which included: poor support networks; relationship breakdown; loss of dwelling; mortgage arrears’ and rent arrears.

In line with growing international commentary on the interaction between poor health and homelessness, the Department of Health conducted an investigation on the matter called “Saving Lives: Our Healthier Nation.”

(e) Cases

In *R (Limbuella) v Secretary of State for the Home Department*, Lord Bingham commented on the prohibition on torture provided for by Article 3 of the ECHR:

“A general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food, or the most basic necessities of life. It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed. It seems to me one thing to say, as the ECtHR did in *Chapman*, that within the contracting states there are unfortunately many homeless people and whether to provide funds for them is a political, not judicial, issue.”

Fortunately, unlike in Ireland this strong judicial deference to the legislature has been matched by greater activism on the part of the English government.

(f) Conclusion

It is clear that many of England’s laws and policies are similar to those seen in Ireland, but it is unfortunate that we are not mirroring England’s recent progressive actions to prevent and address homelessness. Given the legal, economic and social parallels, a direct comparison with England should pressure the Irish government into adopting more ambitious measures to tackle homelessness.

2. Finland

(a) Why Compare Ireland with Finland?

As a fellow EU member, Finland’s laws and policies in relation to housing rights should be instructive.

(b) Background

The Government of the Republic of Finland pledged to halve long-term homelessness from 2007-2011, and to end long-term homelessness completely in 2015. The first objective, backed by broad political will and substantive funding, has failed. It would seem that the second objective is not on course for achievement either.

However, Finland is still cited on a European and Global level as having one of the strongest policies to combat homelessness.

(c) Law and Statutes

There are various statutes in Finnish law (*Suomen Laki*), which guarantee a right to housing and which seek to prevent families and individuals from falling into homelessness by facilitating the entry of certain groups, impecunious or otherwise, into the marketplace.

At Finnish Law, there are three types of occupant:

- An owner-occupant
- A tenant paying rent
- A right-to-occupancy holder

Relative to Irish law, the first two categories are analogous. However, regarding the third category, the prospective right-to-occupancy holder pays 15% of the value of the property to the owner upfront in order to gain the right. The holder retains the right by a monthly charge for the use of the property. The right can be for life and it is inheritable. The arrangement is more permanent than that of a tenant paying rent, yet the right-holder still avoids the arduous burden of becoming an owner-occupant.

Under Sections 18 and 19 of the Right-of-Occupancy Housing Act 1990, the holder can go to court to get the fairness of his residence charge evaluated and, if successful, receive a refund for the excess charge.

In 1985, The Act on Developing Housing Conditions tasked the State, under Section 1, with providing every person permanently residing in Finland the possibility of reasonable housing according to their need. It is in this statute the locus of the Finnish right to housing can be found.

Under the 1989 Housing Fund Act, Finland established a fund for improving the condition of Housing in Finland. This Act is the basis from which all related acts draw funding.

For families who wish to own their own dwelling, the State can step in to guarantee their loans should the family be heading towards arrears on mortgage payments. This may be performed (with the consent of the borrower) under the State Guarantee for Owner-Occupied Housing loans 1996 Section 4. Sections 5 and 7 stipulate that the State may guarantee up to 20% of the loan and be liable to the principal for that amount.

For those who cannot avail or do not wish to avail of conventional lending, there are state-subsidised loans available, known as ARAVA loans. Section 1 of the relevant Act stipulates this loan can be used for all types of arrangements (renting, right-to-occupancy, owning) and Section 2 stipulates that it may be for used for building, purchasing or renovating property also. Section 5 designates the Council of State as the competent authority in granting the loans and it also stipulates that the loans should be granted in accordance with social appropriateness and financial need. Section 31 of the act stipulates that in the event of default of the borrower to pay the loan, the State Treasury and the relevant local authority will shoulder the burden of the loss in equal measure.

Section 1 of the Housing Allowance Act 1975 grants funds to those who need a reduction in their own contribution to the cost of a rented or owner-occupied dwelling if it is deemed to be their permanent abode.

Under the Act on Subsidies for Improving the Housing Conditions of Special Groups 2004, special groups (defined under Section 3) are entitled to reasonable funds to improve their housing conditions. Under Section 4(1)-(2), those with exceptionally low income or those who require more support services than usual may avail of the Act.

Under Section 3(4), the long-term homeless are defined as a special group entitled to avail of the funds under the Act. Under Sections 10 and 14, the Housing Finance and Development Centre act as the competent authority for the grant administration.

It is clear, at least on a statutory level, that the Republic of Finland has established a wide-ranging series of laws aimed at providing housing, or easier access to housing, to a large number of socio-economic groups.

(d) Policies

In the early 2000s, the Finnish authorities intensified their approach to the issue of homelessness under the Finnish National Programme to Reduce Long-Term Homelessness (known as PAAVO I). At the time of the PAAVO I programme's inception, there were about 10,000 Homeless in Finland. The programme, which ran until 2005, was regarded as fairly successful, in that it stopped the growth of homelessness and for a small period actually reduced the number of long-term homeless. Approximately 1,000 dwellings were constructed annually to do this.

In 2007, under a new government, the approach was intensified again. The Group of the Wise was assembled to provide insights on homelessness. This group consisted of policy experts and those experienced in dealing with homelessness, such as the Bishop of Helsinki. The Group created an ambitious plan to halve long-term homelessness by 2011, and to end it completely by 2015. PAAVO was resurrected under a new model: the Housing First Principle.

Whereas the traditional staircase model of homelessness saw housing as the last step on a staircase (the first step being living on the street, the second a shelter, the third a halfway house etc.) Housing First begins with Housing as the very first step, a basic need that one should have regardless of lifestyle, health, income or rehabilitation. This meant that the traditional construction of dormitory type dwellings would have to end and rental accommodation governed by leases would be constructed instead.

The plan was quite radical in that it brought about the process of abandoning emergency or crisis shelters and/or converting them into long-term permanent housing. The plan was concentrated in the municipalities containing the majority of people who were homeless in the long-term.

The results of this new policy contain hope: Though Housing First failed to halve long-term homelessness in 2011, the policy did lead to a 29% decrease in long-term homelessness from 2008 to 2013. The analysis, therefore would suggest that the policy is working, just not at the rate expected.

(e) Conclusion

Although Finland has failed to meet its own ambitious targets to end homelessness, it has made astounding progress in achieving its goals by enacting highly progressive laws and establishing policies that respect the inherent dignity of all. It is contended that similar measures should be adopted in Ireland.

3. Brazil

(a) Why Compare Ireland With Brazil

Although Brazil is admittedly a much more exotic jurisdiction than England, it is an interesting comparator as it has adopted numerous different social housing schemes over the past twenty years in an attempt to alleviate the problem of homelessness.

(b) Background

As a BRIC nation, Brazil is a rapidly emerging state. Swift economic growth and intense urbanisation have left it a country in flux. The nature of living in Brazil is changing and that change has been met with political change and an ideological emergence. With their 1988 constitution, Brazil became one of the few countries to adopt explicitly justiciable, constitutionally situated socio-economic rights. However, Brazil's approach to housing rights is rather confused, as the government appears to strongly accept socio-economic rights in principle, but paradoxically, permits the widespread practice of forced evictions.

Homelessness is a significant, widespread problem in Brazil. In the city of Natal alone, with a population of approximately 800,000 people, there is a need for 40,000 more homes.

Nationally, Brazil's housing deficit is close to 8 million.

(c) Laws

(i) Constitution

Unlike Ireland, Article 6 of the Brazilian Constitution guarantees its citizens numerous socio-economic rights. A Constitutional Amendment in early 2000 incorporated the right to housing into this provision so that it now states: “Education, health, nutrition, labour, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth in this Constitution.”

Article 5.1 of the Brazilian Constitution states that every fundamental right is endowed with immediate efficacy. This means that all fundamental rights, including the right to housing, are justiciable and so may be enforced in a court of law. Courts at all levels have jurisdiction to adjudicate on matters in relation to the fundamental rights contained in the constitution.

Article 5.2 of the Constitution demonstrates the broad protection afforded to fundamental rights in Brazil. It states that the express constitutional enunciation of fundamental rights does not exclude other human rights that could be inferred from other constitutional provisions or human rights recognized in international treaties signed by Brazil. This provision attaches much greater importance to international instruments than any Irish provision does.

Article 23.4 provides: “The Union, the States, the Federal District and the Municipalities have a mutual responsibility to: promote housing construction programmes and the improvement of living and basic sanitation conditions.”

(ii) Cases

Originally, it was held that the social and economic rights contained in the Constitution were non-justiciable, as they were perceived to be aimed at the political branches and depended, for their full efficacy, on the adoption of legislation specifying the details of their implementation. Cases from the Rio de Janeiro Court of Appeal in relation to right-to-health cases in the 1990s illustrate this position.

However the judiciary has now abandoned this deferential approach. In one case, the Court issued a mandatory injunction compelling the state of Brazil to fund an individual’s costly health treatment in America, on the basis of an individual right to health.

An important judgment in this area is that of Justice Celso de Mello, in the case of *RE 410715 AgR*, decided on 22nd November 2005. In that decision, the Court acknowledged that while it is primarily the role of the legislative and executive powers to formulate and execute public policies, it is possible, in exceptional cases, for the judiciary to formulate and order the implementation of certain public policies through mandatory injunctions, especially those policies envisioned by the Constitution itself. The court justified this judicial power by stating that the political branches of Government have a duty to ensure the efficacy and integrity of constitutional rights is fulfilled and that it is the role of the judiciary to make sure that this duty is fulfilled.

The ruling in this case was extended specifically to public policies in relation to socio-economic rights in the case of *ARE 639337 AgR*, ruled in August 23rd 2011 with the judgment again delivered by Justice Celso de Mello. In ruling that the State is obliged to provide infants with pre-school education, the Supreme Federal Court reaffirmed its competency to formulate public policy in cases where a fundamental right is being adversely affected as a direct result of a failure on the part of the political powers to implement policy to promote the right in question. The Court also found that each fundamental right has a ‘minimum core’ that should be judicially protected. The core content of such rights was considered to be sufficient to compel the State to provide goods and services which would allow for the full enjoyment of basic social rights, including the right to housing.

(d) Policies

The most recent scheme to be implemented is “Minha Casa Minha Vida,” (MCMV) which means, “My House My Life.” It is a social housing initiative for low-middle income families, made available on a national basis for families who would not be able to own a home due to

low income, low personal savings and/or a poor credit history. MCMV represents one aspect of the Brazilian growth acceleration program (PAC 1&2), which focuses on investments in the fields of logistics, energy and social development. Initially, it was estimated that MCMV would attract \$1 trillion of investment between 2007 and 2014 in order to tackle decades of mediocre attempts to eliminate a shortage of 5.24m homes. Working directly with private construction companies, the homes in the Minha Casa, Minha Vida scheme are passed back to the state bank under lease-to-own agreements. The poorest families contribute as little as 5% of their monthly income. At face value, much had been achieved. In February 2012, for instance, the Brazilian government announced that 7,000 homes had been built and provided to families within 11 days, and in November 2012 it was reported that 7,620 households gave an average satisfaction score of 8.8 out of 10 for the homes in the scheme. Demand for homes in the scheme has remained very high. The Institute of Applied Economic Research has commented that MCMV has certainly helped to reduce the housing shortage, but it remains uncertain if the social housing shortage has finally and ultimately been addressed. Doubts arise about the efficacy of the scheme when one considers the high rate of arrears that have already accrued on the houses. These arrears are arguably due to the fact that much of the social housing is located in isolated areas, with little or poor access to essential public services such as education, health and transport. Undoubtedly, this social housing has led to an improvement in the living conditions of those who were previously living in favelas, but some have been so frustrated by the lack of infrastructure that they have returned to the slums. Reports indicate that unregistered homes, illegal tapping into utilities and drug dealing are all on the rise.

Some commentators have said that the cracks in the MCMV scheme are indicative of the attitude that the poor should only receive poor solutions.

As mentioned earlier, forced eviction and poor infrastructure is still prevalent in poor communities. Many evictions are carried out without prior consultation, adequate notice or compensation given to members of affected communities. An example of the tragedy that can be brought about by the poor living conditions can be found in the case of the Niteroi municipality, where more than 100 people died after part of the Morro do Bumba favela collapsed in mudslides. The favela had been built on a garbage dump and, despite many warnings of high toxicity and instability, including a study carried out by the Fluminense Federal University in 2004, no attempts had been made to mitigate risks or resettle residents. At the end of the year, survivors of the floods, including residents of the Morro do Bumba, were being housed in abandoned military barracks in extremely precarious conditions. They told Amnesty International that more than six months after being made homeless, the municipal authorities had not offered them any alternative housing and that the rent assistance they were receiving was unreliable and insufficient.

In *Corumbiara v Brazil* 2004, The Inter-American Commission on Human Rights found there to be violations of Convention Articles 4,5, 8 and 25 in respect of a violent forced eviction of 500 families of poor, homeless workers. Several squatters were killed and the campsite was destroyed. Unfortunately, the Commission did not consider whether the State had violated its international obligations in failing to provide the applicants with adequate housing.

Evidently, MCMV has not ultimately solved the problem of homelessness in Brazil, and there is much left to be done.

(e) Reports/Commentary

Do Valle has noted that this noteworthy judicial activism is confined to cases where the fundamental right in question is justiciable, and the State has strong duties to promote and protect the right. Meszaros has commented that there is a problematic distinction between the Brazilian judiciary's interpretation of the law and the formal language of the law itself. He has described their approach to legal interpretation as wrongly anachronistic in its attempt to

render the law more responsive to social realities. Texas has observed that the judiciary's attempts are overly ambitious: given the limited resources of the State, housing can only be provided to the litigating minority of individuals, at the expense of the needs of the nonlitigating majority. Ferraz has observed that this litigating minority tends to form a wealthier subclass of middle-income families, which is why they are in a stronger financial position to access the courts.

Zimmermann has noted the vivid contrast between the existence of rights and the protection of these rights in practice. Strong rights-based jurisprudence does not adequately deal with the widespread corruption and lawlessness prevalent in Brazil. In reality, the sharp income inequality in Brazil must be addressed before housing can be provided to the poorest.

(f) Conclusion

It is unlikely that judicial activism of the kind seen in Brazil will be witnessed in Ireland any time soon. However, it is clear that having justiciable socio-economic rights is but one weapon needed in the arsenal to combat homelessness. In Brazil, rights are treated in an almost cavalier manner, as an aspirational goal rather than an inviolable minimum, which is not an attitude that Ireland should adopt.

4. South Africa

(a) Why Compare Ireland With South Africa?

Like Brazil, South Africa is one of the few countries in the world to have established justiciable socio-economic rights.

(b) Background

The country has a thoroughly unique cultural context due to its struggle with apartheid and its legacy of colonialism. After the 1994 General Election in which Nelson Mandela's ANC party were victorious, the Government prioritised the formulation of a constitution that reflected the equality and diversity of a state until recently divided along racial lines. In 1996 that new constitution was completed, which included a Bill of Rights containing several justiciable socio-economic rights. These rights were established as a response to the reality of poverty, homelessness, slums, racial tension and political inexperience.

Bates has argued that South Africa's housing shortage is a direct result of the apartheid system, an aspect of which was urban planning that actively discriminated against non-whites. This separation of residential areas according to class and race led to ghettos, urban sprawl, a lack of access to basic services in many instances, and a concentration of the poor on the urban periphery. These factors led to human settlements being unsanitary, highly inefficient and unsustainable.

There is the further issue of statelessness and nationality: under the former government, black South Africans were denied a state nationality and assigned "tribal nationalities" instead.

(c) Laws and Policies

(i) Laws

In order to address the multiplicity of problems awaiting the new South African state, Section 26 of Chapter Two of the Constitution established that:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

There was heated debate about the inclusion of these rights, but their presence was strongly defended by the Ad Hoc Committee for the Campaign for Social and Economic Rights who argued that:

Socio-economic rights would give disadvantaged communities tools to protect and advance their interests in the courts. Secondly, they would assist the new democratic government to give effect to its reconstruction and development programme by, for example, mandating redistributive social programmes, thereby shielding them from being struck down on the basis of vested property rights.

These rights are further entrenched and protected in the Protection Against Illegal Eviction Act (1999), the Interim Protection of Informal Land Rights Act (1996), The Rental Housing Act (2000), and the Housing Consumer Protection Measures Act (1999).

(ii) Policies

In 1994, in attempting to address the imbalances and inequities of previous government policies, the newly elected democratic government established the Reconstruction and Development Programme (RDP). This programme set a new policy agenda for the country, based on the principles of meeting peoples basic needs on a sustainable basis. Additionally, the government also introduced the Growth, Employment and Redistribution (GEAR) macro-economic strategy, with the aim to strengthen economic growth and to increase and redistribute employment opportunities in South Africa. However, the extent to which both of these programmes have influenced policy development in South Africa is unclear.

It must be noted that the government has developed housing policy and implemented a number of programmes and subsidy mechanisms to provide access to housing, thereby fulfilling its obligation to promote and ensure the right to adequate housing for all. One of the significant housing subsidy schemes being implemented by government is the “National Housing Policy: Supporting the People’s Housing Process” (PHP). Peoples Housing Process (PHP). This policy encourages and supports individuals and communities in their efforts to fulfil their own housing needs. This is achieved by assisting citizens in accessing land and by providing them with services and technical assistance that will enable the empowerment of communities and the transfer of skills. The benefits for citizens include: lower labour costs as labour is self-employed; no added purchase cost; and optimised decision-making due to trade-off opportunities. Sustainable technical assistance and support from government, the private sector and NGOs is critical to the success of PHP.

(d) Case Law

The South African Constitutional Court has often specified action needed to meet constitutional obligations, most notably in the case of *Government of the Republic of South Africa and Others v Grootboom and Others*. After being evicted from their informal homes, which were located on private land, they applied to the High Court for an order compelling the government to furnish them with adequate shelter until they could obtain permanent accommodation. The High Court decided in the respondents’ favour and the government appealed this decision to the South African Constitutional Court. Once again, the Court ruled against the government, holding that socio-economic rights were undoubtedly justiciable by virtue of their status in the Constitution. The Court acknowledged that the question of how such rights were to be enforced was more delicate, but that the state was mandated to adopt positive action to fulfil the needs of people living in severe conditions of homelessness and/or intolerable housing. The Court further acknowledged that the question of determining the content of a minimum obligation was complex, and that the real question was whether state measures adopted to ensure the right were reasonable. The Court found that the state could not be obliged to perform more than its available resources permitted, and recognised that the

rate at which the obligation was achieved and the reasonableness of measures employed to achieve the result were governed by the availability of resources. Adequate housing was held to constitute the provision of land, services (including water, sewage removal, and the financing of these services) and a dwelling.

In the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd 1*, the South African Constitutional Court determined on issues regarding the right of access to the courts and access to land and housing. The Court found that state responsibility for access to housing and land arose in the context of an illegal occupation of privately owned land by squatters against whom an eviction order had been granted. The case connected the state's responsibility for the enforcement of court orders with its responsibility for protecting the right of access to land and housing. Effectively, the Court decided that the state could have put an end to the occupation by providing the occupiers with alternative land or housing, and that the failure to do so had breached their rights under Article 26.

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*, the Supreme Court was asked to adjudicate on the extent of the State's obligation to provide housing. The Court affirmed *Grootboom*, reiterating that the right of access to adequate housing has to be interpreted in light of its close relationship with other socio-economic rights, and that the state's obligation to provide housing depends on the context within which a citizen claims the right.

(e) Conclusion

South Africa's progress over the past 18 years has been nothing short of extraordinary, and in many ways, its story should dispense with the claims of other governments that big change in a short amount of time is impossible. It must be noted that South Africa's strong protection of socio-economic rights arises out of a very specific cultural context that could not be imported wholesale into Ireland. It would be difficult for Ireland to amend its constitution to provide for a right to housing without providing for several other socio-economic rights as well. It would perhaps be preferable for Ireland to mirror South Africa's progressive housing policies, although PHP would be less relevant in an Irish context where ghettos are far less prevalent.

5. Italy

(a) Why Compare Ireland with Italy?

In several ways, Italy is quite similar to Ireland. We have similar histories, shaped by our close relationship with the Catholic Church and our traditionally weak economies. Like Ireland, Italy has no constitutionally enshrined right to housing and no absolute right to housing established by legislation.

(b) Background

Many commentators have noted that Italy's social housing practices leave much to be desired. As Italy has been typically conservative in its social welfare policies, problems with social housing have been exacerbated.

(c) Law

In the 1980s the Government promised fair rent to tenants with the Fair Rent Act 1978 (*Equo Canone*). However, increasing house prices led the government to divert its attention to new housing programmes. The Act also allowed for tenants to be dislodged after 4 years in order to enable the landlord to sell the property.

The Italian Supreme Court of Cassation made a significant decision in the case of *EC v Italy*. The Italian government had implemented a law to declare a state of emergency regarding settlements of Roma or "nomad" communities in specific regions of Italy. In upholding an earlier ruling, the Court found the state of emergency to be unlawful and unfounded, with the implication that the government must end forced evictions of the Roma community and make social housing available to them.

(d) Policies

Legislation enacted in 2001 delegated the responsibility for public residential buildings to local government. This limited the role of the central government to assisting financing and managing the projects on a large scale.

(e) Conclusion

Italy's laws and policies on the right to housing are lacking in several respects, and Ireland should avoid emulating these schemes. However, the recent judicial activism shown by the Italian Supreme Court is to be applauded. The impact on Irish housing rights could be significant if our judiciary were equally willing to intervene in matters of socio-economic rights.

6. Portugal

(a) Why Compare Ireland with Portugal?

Portugal makes for an informative basis of comparison as the right to housing is protected in Portugal in its Constitution, through its legislation and in its domestic policies, as well as through ratification of international law standards.⁴⁰ It is of interest to examine the implications of this degree of protection and make comparisons with Ireland, considering the stark contrast in protection and recognition of this right. We can use this analysis to envisage the type of changes Ireland might face if the right to housing became a recognised and strongly enforceable right within this jurisdiction.

(b) Background

In Mediterranean countries “years of authoritarian rule left behind an influential legacy.”⁴¹ One of the key factors shaping Portuguese society was the focus on the process of democratisation that followed in the period of 1970s and 1980s, characterised by a “lack of experience, low qualifications and the radicalism of their postulates.” Takeover also coincided with a time of economic crisis which “considerably restricted the scope of reform” and had a notable impact on the capacity of the welfare system. The infancy of the democratic state of Portugal and these economic difficulties did not, however, preclude the recognition of housing rights in its Constitution and legislation, nor the adoption of international measures relating to this right. Admittedly, the practical implementation of policies and the protection of rights may have been slightly hampered by the political climate.

(c) Laws and Policies

(i) The Rights Framework

Portugal has enshrined the right to housing in Article 65 of its Constitution. Article 65.1^o “1. Everyone shall possess the right for themselves and their family to have an adequately sized dwelling that provides them with hygienic and comfortable conditions and preserves personal and family privacy.”⁴²

It goes on to proscribe that the “state shall be charged with”; “planning and implementing a housing policy,” “promoting the construction of low-cost and social housing” as well as “stimulating private construction, subject to the general interest, and access to owned or rented housing.”

This sets out a reasonably detailed description of what the right to housing entails, what obligations it imposes on the state and what individuals can expect in relation to the right

40 Focus Ireland Report: <https://www.focusireland.ie/files/publications/Info%20leaflet%20-%20What%20EU%20Countries%20have%20a%20Right%20to%20Housing.pdf>

41 Jakub Piecuch *The Evolution of the Socio-Economic System of Southern Europe During the European Union Membership of Greece, Portugal and Spain* *Oeconomia* 12 (3) 2013, 73–82

42 The Constitution of the Portuguese Republic [seventh revision, 2005]

itself. It is not limited to “citizens,” but it is directed to “everyone” and can be seen thus in the context of universal human rights. The standard is delimited by reference to “adequate” conditions: no more is required, although specific reference is made to the requirements of comfort and hygiene which are necessary preconditions of adequacy.

The Portuguese government has also adopted and is bound by international norms, including:

- European Convention on Human Rights
- European Social Charter
- Charter of Fundamental Rights of the European

According to Article 8 of the Portuguese Constitution, the rules of international law form an “integral part of Portuguese law.” Article 16 (1) holds that fundamental rights enshrined in the Constitution will not exclude rights laid down by international law and Article 16(2) states that those provisions of the constitution and of laws which concern fundamental rights “shall be interpreted and construed in accordance with the Universal Declaration of Human Rights.”

This demonstrates the significant impact of international law on domestic law on Portugal regarding fundamental rights.

(ii) Policy Implications

In an attempt to fulfil the requirements of the right to housing, a number of programmes have been implemented by the Portuguese government to provide financial support for housing, which are “indexed to household income and aimed at an audience with limited economic returns.”⁴³ There is much focus on rehousing measures, with provisions also addressing housing support through controlled cost housing⁴⁴ and rental support.

Executive Law no. 163/93, amended by Executive Law no. 271/2003 introduced the Special Rehousing Programme, which is managed by the Institute for Housing and Urban Rehabilitation. The aim of this housing policy is to rehouse those in shanty housing and to place them into adequate housing. The policy is limited in its scope as it only applies to certain persons in certain geographical areas. In order to gain access to the system, families must be verified as living in “slum-type dwellings” and must reside in the Lisbon or Oporto Metropolitan areas.

The PROHABITA programme, in place since 2004, finances access to housing. The scheme funds local entities in order to redistribute the finance the housing needs of low-income households within Portugal. The conditions for accessing housing under this scheme include the following: annual income of the family must not in total exceed three National Minimum Wages; none of the family members may own another residential property in that area or a bordering council area; and none of the other family members can be already in receipt of public financial support for housing purposes.

Approximately 12,000 residences are owned by the Institute for Housing and Urban Rehabilitation which, in response to housing needs, are rented out through a priority system of accommodation, based on the socio-economic conditions of the households applying.

The Special Regulation of Support Rehabilitation of Leased Buildings (RECRIA) program was launched in 2000. It is governed by Decree Law 329-C/2000 and managed by the Institute of Housing and Urban Rehabilitation. It is a rehabilitation programme designed to support degraded buildings, including real estate and dwellings, through the grant of public incentives.

The Solidarity Support Program of Housing Rehabilitation (SOLARH), regulated by Decree Law 39/2001, finances improvements of neglected and disused buildings, including permanent housing and vacant housing, through the medium of interest free loans. It is thus open to homeowners and local authorities.

43 Response to questions

44 Ministerial Order no. 500/97

The Portuguese government has also implemented policies specifically targeting the housing rights of minority groups. Door 65, introduced in 2007, offers subsidies to 18-30 year olds in order to facilitate access to the rental housing market.

“This programme envisages meeting the following objectives laid down in the abovementioned National Action Plan for Inclusion (PNAI) for the area of housing:

- i) Promoting rent controlled housing for young people (from 18 to 30 years);
- ii) Promoting housing benefits and mobility, making available public and private property for direct or mediated rent through housing stock;
- iii) Management and proximity: supporting the management of the public rental stock by establishing contracts with local authorities previously certified;
- iv) Supported housing (Cohousing): promoting a support instrument to entities which rent collective housing for population groups with permanent or temporary specific needs.”⁴⁵

In addition, the Housing Comfort Program for the Elderly (PCHI) is aimed at the elderly, and in conjunction with local authorities, it promotes residential and accessibility conditions. Additionally “Decree-Law no. 73/96 was adopted to allow for greater flexibility and speed in the construction of cost-controlled housing and Government supported re-housing schemes in situations where different cultural traditions require special accommodation.”⁴⁶

Further provisions have been implemented at a more localised level. In 2009, Lisbon launched a City Plan for homeless people. This policy of this intervention is a person-centred approach involving joint co-operation with all relevant stakeholders. It involved the provision of temporary, transitional shelters for homeless people.⁴⁷

(d) Case Law

*European Roma Rights Centre v Portugal*⁴⁸ was a case decided by the European Committee of Social Rights. The claimant argued, *inter alia*, that Portugal was in breach of Article 31 of the European Social Charter for failing to ensure that adequate and integrated housing solutions were provided for Roma. The three main issues of contention involved “precarious and difficult housing conditions,” “the high number of Roma families that live in segregated settings” and “the inadequacy of rehousing programmes” in relation to Roma customs and way of life.

Citing the case of *European Federation of National Organisations Working with the Homeless, FEANTSA v France*,⁴⁹ the Committee held, “the notion of an adequate house implies a dwelling which is safe from a sanitary and health point of view.” This includes “access to natural and common resources, namely safe drinking water, electricity, sanitation facilities and waste disposal.” The Committee concluded that adequate dwelling must also ensure “adequate space and [...protection] from harsh weather conditions or other threats to health. It must also be structurally secure to ensure physical safety.”

It was held that Article 31 was breached due to the continued state of the precarious living conditions and the failure to meet minimal standards.

We can see a minimum core approach emerging here where minimal standards are being set with regards to the requirements of Article 31.

(e) Reports/Commentary

45 Reply of Portugal to the Questionnaire on Housing Policies

46 *European Roma Rights Centre v Portugal* (Complaint No 61/2010)

47 http://www.habitact.eu/files/activity/policybank/_lisbon2012.pdf

48 *ERRC v Portugal* (n5)

49 Complaint No. 39/2006

There has been a notable focus “on the support for the production of housing which, in the late 1990s, included major metropolitan rehousing programmes enabling the construction of over 20,000 social dwellings between 1999 and 2005.”⁵⁰

Decree-Law No163/93, regulating the Special Rehousing Programme (PER) has obtained mixed results. It has been noted that it “has benefited a number of gypsy families since the mid 90s.”⁵¹ This has included a significant improvement of living conditions for families moving into council estates. It has been reported that “[u]nder the PER, since 1993, 29 Accession Agreements have been concluded between the Central Government and Municipalities of metropolitan areas of Lisbon and Porto, for the re-housing of 48,416 households. The present execution rate amounts to 71%.”⁵²

However, there has also been cause for concern about the inadequacy of these policies to fully address the particular situation of Roma. It has been noted that the estates “quickly fall into disrepair, without anyone ever repairing them.” They have also been criticised for the “lack of infrastructure, chiefly in the areas of education, leisure, accessibility and local job-creation firms.” Additionally there have been concerns regarding the difficulties in adapting to the cultural needs of the community and resulting “forms of ghettoisation”. Indeed there are still members of the gypsy community residing in shanty towns.

(f) Conclusion

Portugal has set a strong example of excellent housing laws and policies that could be mirrored in Ireland with varying levels of success.

50 <http://www.feantsaresearch.org/IMG/pdf/article-1.pdf>

51 Roma Ed Em Partner Report http://www.gitanos.org/romaedem/National%20reports_archivos/Documents/PORTUGAL.pdf

52 Response by Portugal

C. POTENTIAL IMPACT OF ESTABLISHING A RIGHT TO HOUSING IN IRISH LAW

1. Introduction

The potential impact of establishing a right to housing in law is entirely contingent on how that right is defined. The following sections will consider various proposed permutations of the right to housing before exploring other factors that must also be acknowledged in the event of reform.

2. Permutations of the Right

(a) A Positive Right or a Negative Freedom?

A positive right involves imposing an obligation on the State to act, while a negative freedom would prevent the State from creating obstacles that would interfere with the enjoyment of the right. This distinction is significant in that it shapes the extent to which State intervention can be compelled.

A negative right to housing could be defined as freedom from state action that would prevent one from accessing housing, or freedom from state action that would actively make one homeless. A negative right does not force the State to bring about any positive effect, but rather, it simply requires the State to maintain the status quo and mitigate any factors that could adversely affect it. Negatively formed rights are potentially problematic in that they can lead to a situation where there is an inevitable disconnect between the ideals behind the goals and the realisation of the right in reality. A negative right to housing would not prevent homelessness, nor improve the situation of those who are homeless. Only a positive right could ensure sufficient State action in protecting the vulnerable. For this reason, it is contended that a right to housing should be framed in a positive manner.

(b) An Absolute or a Conditional Right?

An absolute right to housing would involve the State housing all citizens in need of state housing and preventative measures to target homelessness in the first instance.

An absolute right to housing would have serious implications for the State and would represent a significant departure from the status quo of both political and social norms. The introduction of such a right would fundamentally alter the nature of state obligations.

First, in a sense, people would no longer be responsible for their own housing. Currently, social housing operates along largely charitable principles, with applicants compelled to meet certain criteria before they can receive aid. The focus would shift from whether or not a party deserved social housing assistance, to the assumption that everyone has an entitlement to social housing assistance.

Secondly, placing such a high burden on the State would require a number of political commitments. As decisions on housing rights have a strong political element, given the distributive justice involved, these political decisions would become imbued with the high moral force of law. A number of potential considerations arise in such a scenario:

(i) An absolute right to housing amounts to the absolute prioritisation of State resources towards the minimum level of compliance with this right, which might not be completely welcome in every situation. First, other, equally important services may be disrupted or impaired. Another potential problem with cementing such a polycentric decision is that other priorities may arise with a similarly pressing nature. This could result in the content of the obligation itself being watered down in order to lessen the pressure on the State, which is obviously undesirable.

(ii) In reality, the State cannot affirm with absolute certainty that it will always have the capacity to ensure that all citizens can be guaranteed housing. Borrowing from the Brazilian

example, one might argue that making such ambitious promises that are impossible to keep is not wise or welcome. Indeed, it could lead to a never-ending cycle of litigation, which would further perpetuate State difficulties.

(iii) In a related vein, such an absolute right would place the government in a new role, characterised by a new extreme of paternalism and State intervention. If the State becomes responsible providing everyone with housing, then that may entail some encroachment of other liberties in terms of privacy, choice, family *etc.* One has to consider whether this would be a welcome development, having regard to rights of human dignity and autonomy. Generally, it must be noted that the Irish legal system does not endorse, acknowledge or allow for absolute rights. One might consider them an academic fallacy, as the reality betrays the complex interplay of intra-individual and inter-individual rights in every community. It is acknowledged that an absolute right would provide a powerful and indubitably welcome effect on homelessness, but we are unlikely to see the right realised in this way in the near future. It is submitted that a conditional right to housing would offer the State and its citizens more flexibility.

A conditional right to housing would entail the State providing for the housing of its citizens insofar as it would be practicable and reasonable to do so. The level of discretion afforded to the state could vary greatly, but it is submitted that the guidelines for the practical implementation of a right, as outlined in *FEANTSA v France* under the RESC should be adopted. Framing the right in a conditional sense would require robust judicial enforcement and a reluctance to accept exceptions to the rule.

(c) Proportionality and the Content and Scope of the Right

(i) Legal Background

Under Article 34.3.2 of the Constitution, the power to determine the constitutionality of legislation and its compatibility with the rights enshrined in the Constitution is vested in the judiciary. The proportionality test was developed by the courts to determine the constitutional validity of a legislative provision where it restricted a constitutional right. In *Heaney v Ireland* [1994] 3 IR 593, Costello J stated that the test of proportionality is satisfied where:

the objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right, and must relate to concerns pressing and substantial in a free and democratic society; the means chosen must be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations.

Finally, the impugned provision or provisions must “impair the right as little as possible; and must be such that their effect on the right was proportionate to the objective.”⁵³

The proportionality test was employed in respect of restrictions to property rights in *Iarnród Eireann v Ireland* [1996] 3 IR 321, where Keane J, endorsing the proportionality test carried out by Costello J *Heaney*, stated:

“If the state elects to invade the property rights of the individual citizen, it can do so only to the extent that this is required by the exigencies of the common good. If the means used are disproportionate to the end sought, the invasion will constitute an ‘unjust attack’ within the meaning of Article 40.3.2.”⁵⁴

The proportionality test was subsequently employed in *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321. In that case, the constitutionality of

53 *Heaney v Ireland* [1994] 3 IR 593, pg. 607

54 *Iranrod Eireann v Ireland* [1996] 3 IR 321 pg. 361

legislation was challenged on the foot of a provision which enabled planning authorities to require developers to provide a portion of their land at less than market value in the interest of developing affordable housing. The Supreme Court delivered a judgment upholding the constitutionality of the provision, with Keane J stating that the provision was made in order to “meet what is considered by the Oireachtas to be a desirable social objective”.

Applying the proportionality test, the then Chief Justice reasoned that the provisions were:

“rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial. At the same time, the court is satisfied that they may impair those rights as little as possible and their effects on those rights are proportionate to the objectives sought to be attained.”⁵⁵

Doyle comments that the proportionality test is preferable to the alternative test employed by the courts to determine the constitutionality of an impugned provision, namely, whether the impugned provision amounts to an unjust attack on constitutional rights. Particularly in the context of property rights, Doyle remarks that the proportionality test is advantageous:

“Rather than the one, amorphous and quite emotive question of whether there was an unjust attack, there is a series of more particular, less emotive questions.”⁵⁶

(ii) Significance for Housing Rights

If legislation providing for a right to housing is to be enacted, it is submitted that it must be designed in a manner that will satisfy the proportionality test:

(a) “Objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right.” Legislation conferring a right to housing on Irish citizens would give rise to case unlike those mentioned previously, in that a minority would be privileged at the expense of the majority. As the legislation would be primarily right-conferring, rather than right-detracting, it is submitted that this limb of the test would be satisfied. However, if an argument were to be made that providing for a right to housing would infringe upon other rights due to the intense dissipation of public resources, it could be argued that the objective of ending homelessness is of significant importance to warrant such a minor breach. Certainly, ensuring the rights of the underprivileged is always a pressing and substantial concern in any free and democratic society.

(b) “The means chosen must be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations.” If the legislature were to provide for a right to housing, the means by which they would do so would be a great cause for debate. Would providing for a tent satisfy the right? Or would a house with four bedrooms and full facilities be required? It is submitted that the CESCR’s recommendation of providing for adequate housing should be adopted, with adequate housing defined as a dwelling which is structurally secure, safe from a sanitary and health perspective and not overcrowded, with secure tenure supported by law. It is contended that this should be the minimum set of conditions met by any housing legislation. The need to build such adequate housing, and to establish a more advanced scheme for allocating the housing, would obviously pose problems for the government, but it is contended that these means are rationally connected to the objective of ending homelessness, and not arbitrary, unfair or irrational in any way.

55 *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321, pg. 354

56 Doyle, *Oran Constitutional Law: Text, Cases and Materials* Clarus Press 2008 pg. 152

3. Other Considerations

(a) Separation of Powers

(i) Legal Background

In the Supreme Court judgment of *TD v Minister for Education*, Hardiman J, delivering the leading majority opinion of the Court, considered the importance of the roles and powers attributed to the three separate branches of government as laid out in the constitution. Hardiman J emphasised the importance of this separation of powers for the functioning of a democratic state. At page 367, the judge contended:

“The Constitution... does not attribute to any of the branches of government an overall, or residual, supervisory power over the others. It creates three equal powers, none of which is generally dominant... the Constitution provided specifically for certain mutual checks and balances. These include the power of the courts to ensure that legislation is consistent with the Constitution, the power of the legislature to remove a judge of the superior courts and the power of the executive to tender binding advice to the president as to the appointment of judges. The existence of these specific powers does not, in my view, suggest that the separation of powers is in any general sense a porous one.”⁵⁷

Hardiman J emphasised that the separation of powers was rigid, that the constitution accorded separate, but equal powers to the Judiciary, the Legislature and the Executive. The judge stated that it would both be undesirable and unconstitutional for one of the branches of government to overstep its boundaries and assume the power designated to another organ or government, even where that organ had failed to fulfil their duties as prescribed by the constitution:

“The proposition that ‘The court has to attempt to fill the vacuum which exists by reason of the failure of the legislature and the executive’ seems to me to come close to asserting a general residual power in the courts, in the event of a (judicially determined) failure by the other branches of government to discharge some constitutional duty. If this were accepted I believe it would have the effect of attributing a paramouncy to the judicial branch of government which I do not consider the Constitution vested in it.”⁵⁸

This strict view on the functioning of the courts was delivered in the context of whether the court ought to make a mandatory order. In the context of property rights, the Court considered the function of the courts in cases such as *Buckley v Attorney General* [1950] IR 67 and *AG v Southern Industrial Trust* [1961] ILTR 161. In *Buckley*, O’Byrne J asserted the judicial role in determining whether certain requirements of the common good can restrict property rights. Writing with regard to Article 43, O’Byrne J stated:

“Clause 2... recognises in the first instance, that the exercise of the rights of private property ought, in a civil society such as ours, to be regulated by the principles of social justice and, for this purpose the State may, as occasion requires, delimit by law the exercise of such rights so as to reconcile their exercise with the exigencies of the common good... it is claimed that the question of the exigencies of the common good is peculiarly a matter for the legislature and that the decision of the legislature on such a question is absolute and not subject to... being reviewed by the Courts. We are

57 *TD v Minister for Education* [2001] 4 IR 259, pg. 367

58 *Supra* at pg. 370

unable to give our assent to this far-reaching proposition... Where it is alleged that a law is repugnant to the Constitution, the jurisdiction and duty to determine such a question is expressly conferred on the High Court by Art. 34.3.2 with appeal in all such cases to this Court. This is a duty of fundamental importance which must be discharged in every case where such a question arises, however onerous that duty may be.”⁵⁹

Here, the Court rejected the contention that the requirements of social justice, and their ability to restrict property rights was uniquely a matter for the Oireachtas. This view was reiterated in *AG v Southern Industrial Trust* [1961] ILTR 161:

“The Oireachtas as the elected representatives of the people have the function of legislating so as to promote the objects laid down in the preamble and to determine social and economic policy. It is not the function of the Courts to determine these matters or to criticise or invalidate the decisions of the Oireachtas.

It is the function of the Courts, when its jurisdiction is invoked, to determine “the validity of any law having regard to the provisions of the Constitution (Article 34.4.4). The importance of this function is not to be minimised. While the Courts are not the critics or the overlords of the Oireachtas, they have the solemn duty of acting as the guardians of the rights of the people, whether the majority or minorities and in so doing to examine legislation to ascertain whether it, through error or by deliberate action, the Government or the Oireachtas has infringed the guaranteed rights.”⁶⁰

(ii) Significance for the Right to Housing

The current conception of the separation of powers is a very strict one. It is submitted that judicial activism in area of housing rights is highly unlikely, and even undesirable given the inevitable political backlash that would follow. It is submitted that the right to housing should be put beyond doubt in the form of a constitutional amendment and supporting legislation.

(b) Public Perception

A proposal to incorporate a right to housing in Irish law would dramatically alter the country’s policies and lead to a myriad of questions and concerns, not just from the general public, but from the government as a whole, as to how this could realistically be financed and applied.

Dublin, our largest city, is experiencing a severe housing shortage. Dublin is also the city where homelessness is most prevalent, where most migrants/asylum seekers arrive into the country, and where most job opportunities can be found. These realities create a situation where the right to social housing seems beset by difficulties. However, if Ireland was to introduce a right to housing, questions regarding its scope and the class of people who could avail of the right would be subjected to rigorous public scrutiny.

In light of international recommendations, it is clear that the problem of homelessness cannot be solved by merely building a plethora of basic houses in an area without a supporting infrastructure. Any measure taken would inherently involve a significant investment of public resources.

Thus, it is inevitable that if Ireland were to provide for a right to housing, there would be some public opposition and opprobrium. England has taken measures to mitigate public concern regarding the eligibility of applicants for social housing by employing medical officers to assess their vulnerability. Vulnerability was defined in

A definition of vulnerability under English Law was given in *R v Camden LBC*, in which it was stated that vulnerability entails an applicant being “less able to fend for himself than an

⁵⁹ *Buckley v Attorney General* [1950] IR 67 pg. 83

⁶⁰ *AG v Southern Industrial Trust* [1961] ILTR 161, pp. 176-177

ordinary homeless person so that injury or detriment to him will result where a less vulnerable man will be able to cope without harmful effects.” Thus, the more generous provision under English Law is still limited by the need to have some mental or physical handicap to receive aid. The desire to further limit the scope of this support in recent years indicates that the public may not be readily sensitive to the backgrounds and needs of homeless people.

For many Irish citizens, notions of self-reliance and personal responsibility would lead to distaste for the right. Many would question the scope of the right, and many would take issue with it being provided for those with alcohol and drug dependency. Under the status quo, applicants for accommodation are assessed for “readiness,” and whether they have tackled the root cause of their homelessness is considered. In line with this policy, it is likely that the right, if introduced, would have some legislative qualifications in order to appease the public. However, it should be noted that a 2012 Poll by Amnesty International found that 78% of the Irish people agreed that the Constitution should be amended to include protection for the right to housing and the right to healthcare. It would be interesting to see how far this support would stretch if the government decided to introduce a scheme for an uninhibited provision of social housing. It is strongly contended, however, that the concerns of the majority should not be allowed to further the suffering of the minority to the extent that homelessness will remain unaddressed.

CONCLUSION

On the basis of our comparative analysis with other jurisdictions, it is recommended that the government be lobbied to hold a referendum on the right to housing. It is submitted that the proposed amendment should take inspiration from Section 26 of the Constitution of South Africa, providing for a right of access to adequate housing, with the State required to take reasonable legislative and other measures within its available resources to achieve progressive realisation of this right. This amendment would need to be accompanied by robust judicial interpretation in order to effectively ensure a right to housing in Irish law. Whether or not a constitutional amendment is made, it is submitted that the State should adopt policies similar to those seen in Finland and Portugal, such as the provision of financial aid to those who wish to buy their home, and the vastly increased construction of social housing to meet demand.

There is undoubtedly room for improvement in this area of law, and it is contended that the State must treat housing as the right it truly is.

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- *Caoimhe Stafford*

Caoimhe Stafford
Legal Research Officer 2014/2015
Trinity FLAC
flac@csc.tcd.ie
<http://trinityflac.wordpress.com>

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