



## Housing rights in Ireland.

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### Housing Rights in Ireland PADRAIC KENNA

#### Introduction

Ireland has been the world leader in house price inflation since 1996, and has reached the highest level of home ownership among the OECD countries.<sup>1</sup> Irish government housing policy has given the market a primary role in the production and allocation of new housing. Yet, Ireland has ratified a number of international instruments and Covenants which guarantee rights to housing. There are some important dichotomies in Irish housing law and policy, which result in groups of people who are excluded from the housing market being unable to draw on the benefits of these international human rights standards and norms. Indeed, rights-based approaches are largely absent in housing at all levels, and instead discretion, partnership and consultation appear to be displacing what little language of rights which still exists. Some NGOs are trying to place housing rights on the political agenda, but there is a steep hill to climb in creating awareness of the extent and nature of rights to housing, as well as creating a coherent social movement to advance this approach.

#### The place of Housing Rights in the Constitution of Ireland

Although the founders of the Republic in 1916 promised to cherish all of the children equally, there is no specific right to housing in the 1937 Irish Constitution, *Bunreacht na hEireann*. There are a number of unenumerated rights contained in Article 40.3., which have been interpreted to grant a number of personal rights to individuals, arising from the “Christian and democratic nature” of the Constitution.<sup>2</sup> However, the conflict between the rights of property owners and the rights of citizens to adequate housing and other social benefits, has largely been decided in favour of property owners, except in very limited circumstances.<sup>3</sup> Article 40.3. of the 1937 Constitution outlining “personal rights” states:

40.3.1. The State guarantees in it, laws to respect and as far as practical by its laws, to defend and vindicate the personal rights of the citizen.

40.3.2. The State shall, in particular, by its laws protect as best it may

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<sup>1</sup> *The Economist*. March 30<sup>th</sup> – April 5<sup>th</sup> 2002., p. 66.

<sup>2</sup> See Kenny, J. *Ryan v. Attorney General* [1965] IR. 294. High Court, although this decision has now been questioned by the Supreme Court in *TD v. Minister for Education and Others*. Supreme Court, 17/12/2001.

<sup>3</sup> See *Blake v. Attorney General* [1982] IR 117; Also *In Re: Employment Equality Bill 1996*, [1997] 2 IR; Also *In Re: Article 26 and the Planning and Development Bill 1999*, [2000] 2 IR 321; [2001] 1 ILRM.

from unjust attack, and in the case of injustice done, vindicate the life, person, good name, property rights of every citizen.

*The latent personal rights of the citizen protected under Article 40.3.1. of the Constitution, have been held to include rights to bodily integrity, the right to earn a livelihood, the right to individual privacy, the right to maintenance and others.<sup>4</sup> It is here that we might hope to find a personal right to shelter or housing. However, in the landmark case of Ryan v. Attorney General,<sup>5</sup> which opened up a wide interpretation of these unenumerated rights contained in that Article, there was no specific mention of a right to housing. Kenny J. held that :*

*“The personal rights which may be invoked to invalidate legislation are not confined to those specified in Article 40, but include all those rights which result from the Christian and democratic nature of the State.”*

The judge cited the papal encyclical *Pacem in Terris* (1963), as authority for this interpretation of the law of Ireland and paragraph 11 of the encyclical also stated in part that:

*“every man [sic] has the right to life to bodily integrity, and to the means which are necessary and suitable for the proper development of life. These means are primarily food, clothing, shelter, rest, medical care and finally the necessary services.”<sup>6</sup>*

There have been a few further references to these rights in relation to homeless people and Travellers (Gypsies). Notably, Costello J. in a High Court *ex-tempore* judgement in 1994,<sup>7</sup> held that:

*“The Plaintiffs have a constitutional right to bodily integrity which is being infringed by the conditions under which they are living. I accept that the provisions of the Housing Act 1988 must be construed in the light of a constitutional duty towards the plaintiffs and the factual position they find themselves.”*

However, in December 2001, the Supreme Court appeared to roll back the flow of judicial development of human rights from such natural law interpretations of the Constitution, and the expansion of such unenumerated rights. In the case of *TD v. Minister of Education and others*,<sup>8</sup> involving a claim for constitutional protection of the rights of homeless children in the areas of education and care. However, the Supreme Court decided in this appeal that:

*“ No such right is expressly recognised by the Constitution and, to the extent that it exist, it must be as one of the unenumerated personal rights guaranteed under Article 40.3.1. of the Constitution in accordance with the construction*

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<sup>4</sup> See *Report of the Constitutional Review Group*, p. 246.

<sup>5</sup> [1965] IR. 294.

<sup>6</sup> Irish Commission for Justice and Peace, *Re-righting the Constitution*, (1998), p. 49.

<sup>7</sup> *O’ Brien and Others v. Wicklow UDC and Wicklow County Council*. Unreported High Court. 10/6/1994.

<sup>8</sup> Supreme Court. December 17<sup>th</sup> 2001.

*of that article adopted by the High Court and this court in Ryan v. Attorney General [1965] IR. 294.”*

Chief Justice Keane, delivering the Supreme Court judgement then questioned the decision in *Ryan v Attorney General*, and expressed the fear of continuing the tradition of innovative judicial legal development of such rights.

*Whether the formulation adopted by Kenny J. is an altogether satisfactory guide to the identification of such rights is at least debatable. Secondly, there was no discussion in that judgement of this court as to whether the duty of declaring the unenumerated rights, assuming them to exist, should be the function of the Courts rather than the Oireachtas.*

In this landmark decision,<sup>9</sup> the scope of the protection of the Constitution to unenumerated rights have been limited to those which have been “*unequivocally established by precedent, as for example in the right to travel and the right to privacy, some degree of judicial restraint is called for in identifying new rights of this nature.*” This decision appears to have limited the development of constitutional rights in Ireland to established precedents only, and these do not include any specific rights to housing. Indeed, there appears to be a political reaction among the judiciary to the development of such rights, which may indeed, reflect the approach of the current government. This was expressed by Keane, C.J.

*“I would have the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently referred to as “socio-economic” rights, to be unenumerated rights guaranteed by Article 40.”*

There is, however, an explicit acceptance of the need for direct provision of services to certain sections of the population, as set out in Article 45.4.1. of the Irish Constitution, but this does not encompass shelter or housing for homeless people.

*“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.”<sup>10</sup>*

In the case of *Amanda Hamilton*<sup>11</sup> the granting of a warrant for possession under Section 13 of the Housing Act 1970,<sup>12</sup> was challenged as being incompatible with the duties of the authority to house homeless people, which the plaintiff would become, once evicted. The Court held that constitutional right to bodily integrity was not a matter for the District Court to consider in such a hearing. It also held that there

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<sup>9</sup> For an examination of the cases which led to this Supreme Court appeal see Morgan. D.G. (2001) *A Judgement too far? Judicial Activism and the Constitution*. Cork: Cork University Press.

<sup>10</sup> *Bunracht na hEireann, The Irish Constitution*. Article 45.4.1.

<sup>11</sup> *Dublin Corporation v. Amanda Hamilton* [1999] 2 IR 486.

<sup>12</sup> Mandatory order to be given arising from Section 62 Housing Act 1966, See *The State (O'Rourke) v. Kelly and The Attorney General*. [1983] I.R. 58.

was no automatic entitlement to legal aid in such proceedings,<sup>13</sup> but a hearing must take place before a Judge in order to make the order for possession.<sup>14</sup>

### **The Drafting of the Constitution**

The drafting of the Irish Constitution, and its approval in 1937, has been seen as the point of departure for Irish political systems and legal rights from the hitherto British tradition. The Constitution marked a very different approach in the area of citizens' rights from the common law tradition. It contains little emphasis on rights of the individual, except in Article 40, and "*the social clauses of the constitution blended prevailing Catholic concepts with popular attitudes rooted in the social structure.*"<sup>15</sup> The Constitution, approved by a majority of votes in referendum, refers regularly to the common good without, however, defining this concept.

The Directive Principles of Social Policy set out under Article 45 clearly establish that the Constitution did not endorse a "*rights based approach*" to welfare, and such areas as housing provision. These principles of social policy were intended for the general guidance of the *Oireachtas* in the making of laws, and lack legal force outside *the Oireachtas*, ie. cannot be used to interpret legislation in the courts. Article 45.1 set these out:

*"The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of national life."*

There was, however, an explicit acceptance of the need for direct provision of services to certain sections of the population, but no mention of shelter or housing for homeless people.

*"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."*<sup>16</sup>

The legacy of rights under the Irish Constitution are of a minimalist nature for individuals, as opposed to the owners of accumulated property and capital. *The Report of the Constitutional Review Group*<sup>17</sup> pointed out that 89% of people in Ireland own some form of property or assets, with home ownership accounting for most of this. Just over 10% of households own no wealth of any kind.<sup>18</sup> At the other end of the spectrum, it has been shown that just 1% of households own 60% of all private non-farming wealth. Indeed, some members of the Constitutional Review Group were of the view that while our Constitution protected rights to ownership of basic possessions such as homes and personal goods, it also protected major differentials in the ownership of productive forces in Ireland.<sup>19</sup>

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<sup>13</sup> *Byrne v. Judge Scally and Dublin Corporation*, Unreported. High Court. 12/10/2000.

<sup>14</sup> *Kerry County Council v. McCarthy*, Unreported, Supreme Court, 28/4/1997.

<sup>15</sup> Lee, *Ireland 1912-1985*, (1989), p. 206.

<sup>16</sup> *Ibid.*, Article 45.4.1.

<sup>17</sup> *Report of the Constitutional Review Group*, (1996).

<sup>18</sup> *Ibid.*, p. 357.

<sup>19</sup> *Ibid.*

## **The major Arguments (for and against) Concerning Placement of Rights to Housing within the Constitution**

The positing of a right to housing, alongside other “socio-economic” rights was considered by the Constitutional Review Group in the 1990s. This was examined in the context of possible constitutional change which would enhance such rights, but would involve a concurrent alteration in the inalienable property rights of others, such as compulsory acquisition and controls on land use, taxation on property, rent controls and other “interference” with the rights of private property by the State to guarantee these socio-economic rights. The *Report of the Constitutional Review Group* pointed out that:

*“both Article 40.3 and Article 43 are particularly open to subjective appraisal, with phrases such as ‘unjust attack’, ‘principles of social justice’, and ‘reconciling’ the exercise of property rights with ‘the exigencies of the common good.’”<sup>20</sup>*

The Review Group felt that these provisions should be recast in a way which would provide a more structured and objective method of judicial analysis. There was an acceptance that few would argue that the State had powers to delimit private property rights in a modern society, in the interests of redistribution of wealth, consumer and environmental protection, and so forth. The difficulties arose in relation to the proportionality of these measures, and the Group identified that the potential arbitrariness of the actions on private property which were the problem in the seven existing cases at the time. A majority of the Review Group proposed that a new formulation of property rights be set out, accompanied by a clause which would allow the *Oireachtas* to qualify the exercise of such rights in the public interest and for reasons of social justice. This would apply where there were clear objective reasons for doing so, and where the legislation is proportionate to the aim sought to be achieved.<sup>21</sup> Indeed, this is exactly how the *Dail* (Parliament) approached the Planning and Development Act 2000, which gave Local Authorities powers to purchase at preplanning value up to 20% of new private development sites for housing.

The major argument for placing a right to housing within the Constitution is that it would offer a means of empowerment to those excluded from the dominant housing market, and grant access to a minimum unit of social housing as a human right. Remarkably, this is denied to many people in Ireland, including Travellers, people with disabilities, homeless people and others. However, beyond this minimalist approach, the incorporation of international legal norms into Irish law, particularly in relation to housing, would offer a new paradigm with which to assess housing law and policy. It would also challenge the hegemonic position of housing-related law in Ireland, in its unequivocal base for property rights and the market, and counter the view of housing purely as a commodity. Such a development would introduce a human rights dimension into many aspects of the relations which underpin the market ideal and its associated legal theory and practice. The questions of latent discrimination in the role and functioning of the housing market could be evaluated through the sets of indicators arising from the international human rights framework. The rights-based specific indicators<sup>22</sup> of legal security of tenure, affordability, availability of services, materials, infrastructure, access to community, absence of

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<sup>20</sup> *Report of the Constitutional Review Group*, (1996), p. 358.

<sup>21</sup> *Ibid.*, p. 361.

<sup>22</sup> See General Comments No. 4 & 7.

crime, harassment or intimidation, opportunities for personal and community development, accessibility (for disabled, elderly, children, minorities etc.), the cultural adequacy of housing (particularly for Travellers), and other areas could become the benchmarks within which the activities and outcomes of housing policy could be examined and measured. Indeed, the question of how resources are allocated in society, and how they ensure that the most vulnerable are given priority in line with international human rights instruments comes into play. The establishment of remedies for breaches of rights to housing would become an issue of debate, and could indeed, add to the substance of policy debates in the country.

By incorporating a right to housing, in its broad sense as set out in General Comments Nos. 4 and 7, the reservoir of conceptual approaches to housing policy in Ireland would be greatly enhanced. This would allow housing law and policy to move beyond the current theoretical impasse of competing theories of market versus public provision of housing. The application of the right to housing, not just in relation to access to a basic unit of State or social housing, but to the whole myriad of social, legal and financial relations which underpin the housing market and dominate the housing system could be analysed on a new level. Currently, the debate on rights to housing in Ireland has largely been confined to access to housing for homeless people, and this broader standard of housing rights would widen the debate to those excluded from the housing purchase and rental market on grounds, of income, disability, age, ethnic origin, gender, race and weak consumer power, as well as the fairness, transparency and adequacy of arrangements for the provision, allocation and management of social housing.

The development of this rights-based approach would act to empower those groups and individuals excluded from adequate housing both individually and collectively. It would allow international comparisons of the methods used by States to implement these rights and would end the conceptual marginalisation of socio-economic rights in Ireland, restoring a human dimension to housing law and policy.

Finally, it would allow Irish citizens to invoke internationally recognised rights at a local level, - a right which is denied to the most vulnerable and disadvantaged Irish citizens at present. The placement of rights to housing in the Irish Constitution would bring into play the relevance of the political order, the protection of citizens rights and the extent that State will guarantee such protection in a world of powerful global capital and political influences. It would provide a balance to the predominant ideology in Irish housing policy, a “*neo-liberalist ideology [which] harnesses a set of assertions and assumptions deployed to justify the priority of market principles over human rights, in particular favouring unrestrained market operations over economic and social human rights.*”<sup>23</sup>

The main arguments in Ireland against placing economic, social and cultural rights within the Constitution were relayed to the UN Committee on Economic, Social and Cultural Rights in May 2002.<sup>24</sup> Such incorporation was posited against the separation of powers doctrine:

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<sup>23</sup> Eide et al. *Economic, Social and Cultural Rights. A Textbook*, (2001), p. 558.

<sup>24</sup> UN doc. HR/CESCR/NONE/2002/3. *Replies by the Government of Ireland to the list of issues (E/C.12/Q/IRE/2) taken up in connection with the consideration of the Second periodic report of Ireland concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Political Rights (E/1990/6/Add.29).*

*“The Minister for Justice, Equality and Law Reform on behalf of the Government and referring to the Report of the Constitution Review Group stated that honouring economic, social, and cultural rights is the ultimate prerogative of democratically elected and accountable politicians whether in the Executive or the Legislature. A transfer of these powers to an unelected judiciary would disturb the delicate checks and balances between the three independent pillars of the State.”*<sup>25</sup>

Quoting a recent Supreme Court judgement, the report stated that:

*‘If the courts expand their powers beyond their constitutional remit, this expansion will necessarily be at the expense of the other organs of government...if citizens are taught to look to the courts for remedies for matters within the legislative or executive remit, they will progressively seek further remedies there, and progressively cease to look to the political arm of government.’*<sup>26</sup>

It is remarkable that the Irish Government has confined this important debate on the incorporation of internationally recognized economic, social and cultural rights, largely to a consideration of the doctrine of the separation of powers, when other democratic States with similar legal systems have incorporated such rights.

A second and unique argument against incorporating such rights is that they are unnecessary in Ireland in the context of “social partnership.” In response to questions from the CESCR in 1999, as to whether the State would integrate the rights-based approach into its anti-poverty strategy (NAPS),<sup>27</sup> the reply was revealing.

*“The National Anti-Poverty strategy at national level is developed and its implementation monitored in the context of the Partnership process under which consensus on economic and social policies, and the measures and resources to give effect to these policies, is achieved between Government, the social partners and the voluntary and community sector (mainly NGOs)...The latest Agreement under this process is the Programme for Prosperity and Fairness which runs from February 2000 to November 2003.”*

Rights-based approaches in relation to poverty issues are clearly seen as secondary to the Irish interpretation of the doctrine of separation of powers and to the corporatist approach of national socio-economic planning.

### **Movements for Obtaining Rights to Housing in Ireland**

From Independence there has been no major mass movement for housing rights, *per se*, and indeed, all governments sought to expand the output of social housing. There was a major production of local authority housing for rent from the 1930s, but the policy of sales to tenants has resulted in a very small stock of social housing in

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<sup>25</sup> *Ibid.*, p. 46.

<sup>26</sup> *Ibid.*

<sup>27</sup> UN doc. E/C.12/Q/IRE/2. *List of issues to be taken up in connection with the consideration of the second periodic report of Ireland.*



Ireland, where one quarter of current owner-occupied houses began life as public housing.<sup>28</sup> In the 1960s, the Dublin Housing Action Committee campaigned vigorously in relation to poor housing conditions and forced a major increase in social housing provision. In the rented sector there were campaigns in the late 1960s and early 1970s, including a rent strike in 1972. However, these campaigns did not translate into any Constitutional changes. Indeed, housing campaigners have seldom sought radical constitutional or legal change, choosing instead to rely on political pressure to effect policy change, but were always faced with political and State policies which were private property-friendly.

The 1980s case of *Blake v. Attorney General*<sup>29</sup> examined the constitutionality of legislation which sought to provide a system of rent control on certain premises, conferring security of tenure and assignment rights to some tenants. However, the legislation<sup>30</sup> was regarded as lacking proportionality, and was unjustified, arbitrary and unfair.

In the 1980's, Senator Brendan Ryan, with the assistance of Brian Harvey, who worked with a leading housing NGO at the time, introduced the Housing (Homeless Persons) Bill, which placed a statutory obligation on Local Authorities to provide housing for homeless people. The Bill highlighted the situation regarding the States' lack of responsibility towards homeless people, and marked a radical new approach to universal housing provision for Ireland, but this was rejected by the Irish State at the time.

The Minister for the Environment, while sympathetic to the reasons for the Bill, stated that his preferred approach was "*to frame a comprehensive and effective policy to alleviate the plight of the homeless.*"<sup>31</sup> But the approach of this Bill which sought to place a statutory duty on Local Authorities to house homeless people was described as "*so fundamentally different in its approach from the existing legislation on the provision and letting of housing by Local Authorities that I am fully satisfied that both pieces of legislation could not exist comfortably side by side on the Statute Book without giving rise to severe practical and legal difficulties.*"<sup>32</sup>

The Minister at that time would not entertain such a duty, and indeed, the same approach is evident today in relation to the promotion of rights to housing:-

*"...it would impose a duty on Local Authorities that could not be discharged within the resources likely to be available to them. To do so would bring the law into disrepute, probably leading to expensive litigation seeking to secure the performance by Local Authorities of the duty imposed on them, and be most unfair to families who have been deservedly placed on waiting lists."*<sup>33</sup>

It is interesting that the question of available resources and enforcement of rights was used to deny a right to access to in a country which is among the nations of the OECD.

Finally, in 1988 a Housing Act was passed in response to the campaign, but which avoided a specific right to housing, and reduced the duty to house to a mere discretionary power. Section 10 of the Act states:-

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<sup>28</sup> Fahey et al., *Social Housing in Ireland*, (1999).

<sup>29</sup> [1982] IR. 117.

<sup>30</sup> Rent Restrictions Act 1960.

<sup>31</sup> *Seanad Eireann Debates*. 9<sup>th</sup> November 1983. p.461.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 472.

*A housing authority may, subject to such regulations as may be made by the Minister under this section –*

- (a) make arrangements, including financial arrangements, with a body approved of by the Minister .....for the provision by that body of accommodation for a homeless person,*
- (b) provide a homeless person with such assistance, including financial assistance, as the authority consider appropriate, or*
- (c) rent accommodation, arrange lodgings or contribute to the cost of such accommodation or lodgings for a homeless person.*

Significantly, the definition of homelessness was not clearly defined. The Bill had proposed that clear definitions of what constituted homelessness be set out in law. But the subsequent Housing Act, 1988 took the power to define homelessness out of the legal arena, and placed it in the hands of Local Authority officers. This provision at one sweep ensured that a “*rights-based approach*” could not be developed under the Act. Section 2 of the Act provides the current definition.

*A person shall be regarded by a housing authority as being homeless for the purposes of this Act 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.*

The guidelines for the assessments of housing need and homelessness in 2002,<sup>34</sup> state that those living in Bed and Breakfast accommodation, long-term sheltered housing, night time emergency shelters, domestic violence refuges, hospitals and county homes because they have no other accommodation are to be considered as homeless. Thus the *Housing Act (1988)*, albeit weaker than the proposed legislation, came about only after several years of campaigning by a small number of campaigners, the support of the religious orders and a few non-governmental organisations... ”*to end the exclusion of homeless people from the national housing system. Until the 1980s, homeless people were at best a marginal concern to the Irish administrative and political system. Homeless people were seen as dropouts, vagrants, tramps, anti-social people, for the most part unwanted elderly men. They were cared for by a range of charities which crossed the spectrum of nineteenth century Protestant philanthropic societies to Catholic religious orders. In the twentieth century they were joined by radical campaigning groups and organisations which not only housed and cared for them, but argued that society as a whole had a responsibility for them and should ensure that they had the same rights as other citizens.*”<sup>35</sup>

<sup>34</sup> Department of the Environment and Local Government Circular N2/02. (February 2002).

<sup>35</sup> Harvey, "The Use of Legislation to Address a Social Problem. The Example of the Housing Act 1988," (1995) *Administration*, Vol. 4, No.1, pp. 76-85.

The *Housing Act (1988)* remains the single most important piece of legislation in terms of statutory responsibility for homeless people. Some saw this as a “*fundamental shift in ideology on the part of Local Authorities,*”<sup>36</sup> although more than ten years later it is apparent that its effectiveness is limited in many ways. But for the first time the provision of homes for homeless people were seen as part of the housing system. The Act placed a responsibility on each Local Authority to assess need, provide housing directly or with other agencies, and make payments to cover the costs of homelessness provision. Section 9 of the 1988 Act obliges Local Authorities to carry out an assessment of housing need and homelessness at less than 3 year intervals. The assessment must also define the nature of the housing need expressed. Assessments of housing need and homelessness have been carried out by Local Authorities in 1989, 1991, 1993, 1996, 1999 and 2002, with evidence of increasing numbers of homeless people.

In recent times a leading role in the advancement of socio-economic rights, including housing has been taken by the disability agencies such as Forum for People with Disabilities in Ireland, NAMHI and others, who are campaigning for constitutional recognition of the rights of people excluded from the system.

### **National Legislation and Rights to Housing**

While the main corpus of property,<sup>37</sup> landlord and tenant and land law in Ireland reflects the dominant socio-economic basis of private property relations, there are few references to rights to housing within the specific housing legislation in Ireland, although security of tenure is effectively provided to social housing tenants. Rather, there is an approach which allows a great margin of administrative discretion, but without any actual or enforceable rights to housing.

The response to this question on rights to housing within national legislation in Ireland to the UN Committee on Economic, Social and Cultural Rights, demonstrates the State’s approach to the right to housing.

*“Although not enshrined in the legislation as a right, an affordable dwelling suited to every household’s needs was the keystone of Ireland’s housing policy, for which purpose the Government had increased its social housing expenditure.”*<sup>38</sup>

In 2001, the State pointed out to another UN organisation that the Irish Housing Acts and instruments:-

*“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*

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<sup>36</sup> O’ Sullivan, E. (1996) *Homelessness and Social Policy in the Republic of Ireland*. Dublin. Trinity College. p. 18.

<sup>37</sup> Wylie, J.C.W. (1996) *Irish Conveyancing Law, 2<sup>nd</sup> ed.*; (1997) *Irish Land Law, 3<sup>rd</sup> ed.*; *Landlord and Tenant Law, 2<sup>nd</sup> ed.* Dublin: Butterworths; Linehan, D.M. (1989) *Irish Land and Conveyancing Law*. Cork: Legis Publications; Lyall, A. (2000) *Land Law in Ireland 2<sup>nd</sup> ed.* Dublin: Round Hall Sweet and Maxwell; Brennan, G. & Casey, N. (eds.), (2000) *Conveyancing*. London: Blackstone Press/Law Society of Ireland; Brennan, G. (ed.), (2000) *Landlord and Tenant*. London: Blackstone Press/Law Society of Ireland.

<sup>38</sup> UN doc. E/C.12/1999/SR.16. *Summary Record of the 14th meeting. Ireland*. 07/05/99. para. 10.

*significant 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.*<sup>39</sup>

The *Housing Acts, 1966-1998* are the principal legislation governing public housing in Ireland, but the Irish State regularly points out that “*this legislation does not confer any statutory right to housing.*”<sup>40</sup> The main housing consolidation statute in Ireland is the *Housing Act (1966)*, which repealed or amended some sixty existing statutes. The Act:

*“was a major legislative measure aimed at tackling, in a planned manner, the persistent problems of bad and inadequate housing – not only in the large centres of population but throughout the country”*<sup>41</sup>

The *Housing Act (1966)*, at Part 2 sets out the financial provisions allowing payment of housing administrative costs, housing loans and grants for construction, repair and reconstruction of houses and flats, and assistance to research bodies.<sup>42</sup> It provides for the contribution by the Minister to certain annual loan charges of Local Authorities. Part 3 of the Act covers the provision and management of dwellings by housing authorities,<sup>43</sup> including housing assessments and building programmes. Part 4 covers the definitions, procedures and arrangements in relation to overcrowded and unfit houses. Part 5 sets out the procedures for compulsory purchase of land by housing authorities, and Part 6 deals with the disposal of land and buildings. Part 7 relates to the exercise and default of functions under the Act. Part 8 of the 1966 Act covers miscellaneous items such as the condition that houses let will be fit for human habitation,<sup>44</sup> power to provide prizes or other incentives for the maintenance of houses,<sup>45</sup> prohibition on persons with an interest in houses or land from voting as members of the housing authority or certain committees,<sup>46</sup> and powers of officers to enter land.<sup>47</sup> A Local Authority can be liable for damages in contract and in tort, and the Local Authority must take reasonable care in providing housing under the 1966 Act.<sup>48</sup> The *Housing Act (1966)*, also provided a speedy procedure for recovery of possession of local authority dwellings.<sup>49</sup>

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<sup>39</sup> Government of Ireland, *National Habitat Report for Ireland*. (June 2001). UNCHS Habitat Conference, Istanbul+5, New York, (2001).

<sup>40</sup> *Ibid.*, para. 497.

<sup>41</sup> O’Higgins J. in *McNamee v. Buncrana UDC*. [1983] IR 213.

<sup>42</sup> Repealed by Housing (Miscellaneous Provisions) Act, 1979.

<sup>43</sup> Some parts have been updated by the Housing Act, 1988 and Housing (Miscellaneous Provisions) Act, 1992.

<sup>44</sup> See *Siney v. Dublin Corporation*. [1980] I.R. 400. (fitness at letting). Also *Burke and others v. Dublin Corporation*. [1990] 1 IR. 18; IR 400. (continuing obligation). *Howard v. Dublin Corporation* [1996] 2 IR 235. (does not continue to apply to tenant purchasers). See also *Heeney v. Dublin Corporation*, Unreported Supreme Court 17/8/1998, (requirement to maintain a lift service in high rise flats at Ballymun).

<sup>45</sup> Housing Act, 1960, Section 113.

<sup>46</sup> Section 115.

<sup>47</sup> Section 117.

<sup>48</sup> *Siney v. Dublin Corporation*. Supreme Court [1980] I.R. 400.

<sup>49</sup> Section 62. See *The State (O Rourke) v. Kelly and The Attorney General*. [1983] IR. 58.

The *Housing Act (1966)* at Section 53 contained the duty to make an assessment of housing need at least once in every five years or at such intervals, being less than five years, as the Minister may direct from time to time, to inspect the houses in their functional area and to ascertain—

*(a) to what extent there exist in the area houses which are in any respect unfit or unsuitable for human habitation,*  
*(b) any overcrowding existing in the area, and*  
*(c) such other matters as the Minister may specify from time to time, and having regard to the information obtained by the inspection, and such other information as may be relevant, to assess, as respects the area, the adequacy of the supply of housing and the prospective future demand for housing and to cause a report thereon to be prepared.*<sup>50</sup>

There were updated powers for Local Authorities to erect, acquire, purchase, convert, construct or lease properties to provide dwellings.<sup>51</sup> There was a new duty on housing authorities to make a scheme of priorities for letting their housing accommodation, and the making of this scheme was a reserved function, i.e., it required the approval of Councillors.<sup>52</sup> The powers of the court to interfere with the refusal of a local authority to provide housing to a particular person where it would be contrary to good estate management was considered in *Carton v Dublin Corporation*.<sup>53</sup> Here the application was seen as a ploy to re-house another family member who had been evicted before, and the “*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.*”<sup>54</sup>

The *Housing Act (1966)* allows a Local Authority to make a closing or demolition order where it is of the opinion that a house is unfit for human habitation. The matters to which a housing authority are to have regard, in considering whether a house is unfit for human habitation are: Stability; Resistance to spread of fire; Safety of staircases and common passages including yards and open spaces; Resistance to moisture; Resistance to transmission of heat; Resistance to transmission of sound; Resistance to infestation; Water supply, sanitary arrangements and drainage; Air space and ventilation; Natural and artificial light; Facilities for preparing, storing and cooking food; Compliance with building bye-laws and the Building Regulations.

Where a house is unfit, a local authority may issue a repairs notice requiring the owner to make the house fit for habitation. If the cost is too great the local authority, after consultation with the owner, may make a closing order or a demolition order.<sup>55</sup> If the repairs notice or demolition order have not been complied with the owner is guilty of an offence, and the local authority may enter the land and do anything “required to be done” in the orders, and the costs can be recouped from the owner.<sup>56</sup>

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<sup>50</sup> Housing Act 1966. Section 53.

<sup>51</sup> Section 56.

<sup>52</sup> Section 60.

<sup>53</sup> [1993] ILRM 467.

<sup>54</sup> *Ibid.*, at 468.

<sup>55</sup> Sections 66-68.

<sup>56</sup> Sections 69-70.

The *Building Control Act (1990)* establishes the statutory basis for the Building Regulations which are published and updated by the Minister in relation to standards, design, materials and other matters. The Regulations are issued as Statutory Instruments.<sup>57</sup> The enforcement of the Building Regulations is undertaken by building control authorities, which are normally the Local Authorities.

The *Housing (Miscellaneous Provisions) Act (1992)* put in place for the first time some additional safeguards for tenants in the private rented sector. There are a range of new measures in relation to private rented housing including provisions in relation to notice to quit,<sup>58</sup> rent books,<sup>59</sup> standards<sup>60</sup> and registration.<sup>61</sup>

The *Housing (Miscellaneous Provisions) Act, (1997)* introduced the concept of “anti-social behaviour”, into housing law in relation to drug dealing and production, and:

*“any behaviour which causes or is likely to cause any significant or persistent danger, injury, damage, loss or fear to any person living, working, or otherwise lawfully in or in the vicinity of a house provided by the housing authority under the Housing Acts 1966 to 1997, or a housing estate in which the house is situated (or a site), and without prejudice to the foregoing, includes violence, threats, intimidation, coercion, harassment or serious obstruction of any person.”*<sup>62</sup>

Social housing landlords or a tenant may apply to the District Court for an “excluding order” against a person who is engaged in such anti-social behaviour.<sup>63</sup> Illegal occupiers of housing authority property who are engaged in anti-social behaviour can be directed to leave the property by a member of the *Garda Síochána* (police) immediately, under penalty of £1,500 or 12 months imprisonment or both.<sup>64</sup> Section 14 absolves the State from any obligation to house a person where it considers that the person is, or has been, engaged in anti-social behaviour, or where it feels that letting a house to that person would affect the neighbourhood.

The *Freedom of Information Act, (1997)* grants a right of access to particular publicly held records,<sup>65</sup> and requires the publication of information in relation to the operation of public bodies.<sup>66</sup> There is also a statutory right to be given reasons for administrative decisions, including housing related decisions.<sup>67</sup>

The *Housing (Traveller Accommodation) Act (1998)* places a duty on Local Authorities to “adopt as respects their functional area an accommodation programme....and shall specify in that accommodation programme the accommodation needs of Travellers and the provision of accommodation required to address these needs,” for a 5 year period.<sup>68</sup> While these Plans have been in force for many years just over 100 units have been provided, while some 1,200 traveller

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<sup>57</sup> *Building Regulations. 1991 SI No. 306* updates.

<sup>58</sup> Section 16.

<sup>59</sup> Section 17.

<sup>60</sup> Section 18.

<sup>61</sup> Section 20.

<sup>62</sup> *Housing (Miscellaneous Provisions) Act 1997. Section 1.*

<sup>63</sup> Section 3.

<sup>64</sup> Section 20.

<sup>65</sup> *Freedom of Information Act, 1997 Section 6.*

<sup>66</sup> Section 7.

<sup>67</sup> Section 18.

<sup>68</sup> *Housing (Traveller Accommodation) Act (1998). Section 7.*

households live on the side of the road. One of the difficulties of the Strategic and Action Plan approaches is that they do not grant rights to those who require the services, but instead create an administrative response which is unchallengeable by those for whom it intended to provide assistance, in the event of non-performance.

The *Equal Status Act (2000)* prohibits discrimination in the disposal of premises and the provision of accommodation,<sup>69</sup> on grounds of age, gender, marital status, family status, sexual orientation, religious belief, disability, race or membership of the Travelling community. There are, however, a number of exceptions in relation to; "small" premises, ie. where the premises comprises residential accommodation for more than one household;<sup>70</sup> where the premises are reserved for the use of a person in a particular category of persons for a religious purpose, or as a refuge, nursing home, retirement home, home for persons with a disability, or hostel for homeless persons or for a similar purpose;<sup>71</sup> and where purpose built social housing for particular special needs is being let.<sup>72</sup>

There are a number of Family Law provisions which have a relevance for rights to housing. The *Family Law Act (1995)* allows the Court to make an order "as it thinks proper" in relation to sale or partition of property.<sup>73</sup> The contributions of a wife can lead to a stake in the property. Under Section 9, property adjustment orders can be made in relation to Judicial Separations and these take into account the contribution of a "homemaker," often the wife of the partnership. Under the provisions of the *Family Law (Divorce) Act (1996)*, divorce and property adjustment orders can be granted by the Court. The *Domestic Violence Act (1986)* allows the Court to issue Barring Orders, suspending the right to possession of one party to a marriage to the family home. The order can be obtained even if couple is unmarried, provided they have lived together for six months. Under the *Housing (Miscellaneous Provisions) Act, (1997)* an exclusion order can be obtained by a local authority tenant against a joint tenant or other person living in the property, whom the tenant believes is engaging in anti-social behaviour.

### **Housing Policy Approaches - Stepping Aside from Rights?**

An examination of recent housing policy developments in Ireland raises the question as to whether the proliferation of non-statutory Strategies, Action Plans, and Agencies expresses a commitment to developing rights to housing.

There are identified groups of people in Ireland whose housing needs are not being met by the current system, and for whom the right to housing is particularly important. Reports have demonstrated the unmet housing needs of people forced to live in long stay psychiatric hospitals,<sup>74</sup> people with intellectual disabilities,<sup>75</sup> Travellers,<sup>76</sup> homeless people,<sup>77</sup> people with disabilities,<sup>78</sup> people on low incomes<sup>79</sup>

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<sup>69</sup> *Equal Status Act (2000)*, Section 6(1)(C)

<sup>70</sup> *Ibid.*, Section 6 (4)(a) & (b)

<sup>71</sup> *Ibid.*, Section 6 (5)

<sup>72</sup> *Ibid.*, Section 6 (6)

<sup>73</sup> *Family Law Act (1995)*, Section 36.

<sup>74</sup> Dept. of Health and Children. (1999 & 2000) *Reports of the Inspector of Mental Hospitals*. Dublin: The Stationery Office.

<sup>75</sup> Ryan, A. *Walls of Silence*, (1999). See also *Irish Times*, Saturday August 19<sup>th</sup>. 2000. p. 8. Also Health Research Board. (2001) *National Intellectual Disability Database. Annual Report 2000*. Dublin: HRB.

<sup>76</sup> Government of Ireland, (1995) *Report of the Task Force on the Travelling Community*. Dublin: The Stationery Office. See also *National Traveller Accommodation Consultative Committee, Report to the*

and others. The response from the Irish State has been on the basis of administrative arrangements, usually following, consultation, participation and partnership arrangements have taken place with groups seen to represent such people in housing need. The Plans and Strategies do not always have a statutory base, and at no stage is the concept of rights included in these Strategies and Actions plans.<sup>80</sup> The editorial of the *Irish Times* described one such Strategy as suffering “*from imprecise bureaucratic language that disguises the shortfall of specific, immediate targets and absolute political commitments.*”<sup>81</sup> In some ways, therefore, it is questionable whether there is still a commitment by the Irish State to rights-based approaches, in relation the economic, social and cultural rights obligations, which the State has signed and ratified at an international level.

While there are no enforceable rights to housing in Ireland for vulnerable groups and those in housing need, there are a number of laws which allow Local Authorities and voluntary bodies to provide housing for these people. In addition, there are a number of Strategies and Action Plans which set out the administrative arrangements being undertaken by statutory and voluntary bodies to address homelessness, described above. The machinery of the State seeks to develop policies to resolve serious issues, such as homelessness, based on administrative responses, without statutory or legislative authority. Not only are these approaches very unresponsive to involvement of the users of those services, they seek to avoid any opportunity for an assertion of rights as a citizen availing of the services or responsibilities of the State, or even as a consumer of such services. Aside from the absence of rights to housing, there have been few cases to examine the operation of the States discretion in this area due to the restrictions in legal aid available to poor people.<sup>82</sup>

This new approach, however, makes it very difficult for voluntary agencies and NGOs who advocate for a right to housing. Their advocacy edge is blunted by being involved in the “*joint responsibility,*” consultation and partnership arrangements. In fact, some NGOs find it increasingly difficult to raise the issue of a right to housing within these new arrangements. They are now seen by many as part of the machinery of the State in solving homelessness, and are unable to effectively challenge the policies to which they have subscribed, but over which they have little control.

There are few remedies available to citizens wishing to vindicate their housing rights, such as they exist. The limitations on legal aid have resulted in few cases of judicial review of housing related administrative action, which could affect poor people seeking access to housing. The question remains as to whether this policy approach to homelessness, based not on legislation or structures offering rights to

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*Minister for Housing and Urban Renewal on the Five Year Traveller Accommodation Programmes adopted by Local Authorities in 2000* (April 2001).

<sup>77</sup> DoE&LG. *Housing Statistics Bulletin September 1999*. Dublin: The Stationery Office.

<sup>78</sup> Government of Ireland. 1995) *Report of the Working Group on Housing/Accommodation*.

*Commission on the Status of People with Disabilities*. Dublin: The Stationery Office.

<sup>79</sup> The Local Authority Housing Strategies of 2001 showed that between a quarter and a third of new households could not afford to buy a home.

<sup>80</sup> See *National Anti-Poverty Strategy* (1997), and (2002), DoE&LG. *Homelessness – An Integrated Strategy*. (2000), *Homelessness – a Preventative Strategy*, (2002), *Health Strategy*, (2001), *Action Plan on Homelessness in Dublin, 2001-2003*. (2001). *Homelessness Action Plans of Local Authorities*,

<sup>81</sup> *Irish Times* 28<sup>th</sup> February 2002. p. 17.

<sup>82</sup> See Whyte, G. (2002) *Social Inclusion and the Legal System*. Dublin: IPA,, Chapter 9.



homeless people, but through administrative arrangements, constitutes a move away from a rights-based approach.

### **International Law and Housing Rights Nationally**

Ireland has adopted the Universal Declaration of Human Rights (1948). The International Covenant on Economic, Social and Cultural Rights (ICESCR) was signed in 1973 and ratified in 1989 by Ireland. Both of these international instruments enshrine the right to housing, and particularly Article 11 of the ICESCR which sets out the obligation on the States Parties “to recognise” the right of everyone to an adequate standard of living including...adequate housing,<sup>83</sup> and which has generated General Comments Nos. 4,<sup>84</sup> and 7.<sup>85</sup> This has clarified the right to housing to include factors such as: legal security of tenure; availability of services, material and infrastructure; affordable housing; habitable housing; accessible housing; adequate location; and culturally adequate housing.

Other UN instruments ratified by Ireland with a housing rights relevance are the *Convention on the Rights of the Child* (1989),<sup>86</sup> the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), (1979),<sup>87</sup> and the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), ratified only recently in December 2000.

The Revised European Social Charter 1996<sup>88</sup> has also been adopted by Ireland. However, the Government refused to ratify Article 31 on the right to housing. The reasons given were vague:

*“The position is that Ireland cannot accept the provisions of Article 31 at this time. However, I understand that the Department of the Environment and Local Government intends to follow future interpretations to be given to the provisions of Article 31 by the Council of Europe itself with a view to their possible acceptance by Ireland at a later date...”<sup>89</sup>*

Ireland is, of course, monitored on Articles, 15, 16, 19 and 23 of the European Social Charter, which refer to the housing rights of people with disabilities, families, migrant workers and elderly persons.

The EU Charter of Fundamental Rights, was “jointly and solemnly” adopted by EU Member States at Nice in December 2000. It includes a commitment to recognise and respect “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 procedures laid down by Community law and national laws and practices”.<sup>90</sup> Other

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<sup>83</sup> See Alston & Quinn, "The Nature and Scope of States Parties Obligations under ICESCR." 9 HRQ 156-229 (1987).

<sup>84</sup> See UN Committee on Economic, Social and Cultural Rights. *General Comment No. 4. The Human Right to Adequate Housing*. Geneva: United Nations.1991. UN doc. E/1991/23.

<sup>85</sup> UN doc. E/1998/22. *Annex.IV. The Right to Adequate Housing - Forced Evictions*.

<sup>86</sup> UN doc. CRC/C/11/Add.12. *State Party Report Ireland. UN Committee on the Rights of the Child*.

<sup>87</sup> UN docs CEDAW/C/SR.440 and 441. *Examination of Irelands second and third combined periodic reports under the UN Convention on the Elimination of All Forms of Discrimination against Women. UN Committee on the Elimination of Discrimination against Women. Background and Concluding Comments*. United Nations. 21 June 1999

<sup>88</sup> *European Social Charter. (Revised)* Council of Europe Strasbourg 3/5/1996.

<sup>89</sup> *Dail Debates Official Report* 26/10/00. para 113.

<sup>90</sup> Council of the European Union. *Charter of Fundamental Rights of the European Union*. Article 34. December 2000. OJ C 364, 18.12.2000. pp. 1-22. See also Website: <http://www.fundamental.rights@consilium.eu.int/>

relevant European Union instruments include *Regulation 1612/68*,<sup>91</sup> which ensures equality of treatment in respect of housing for migrant workers eligibility for housing, and the worker's right to be joined by his family. *Council Directive 2000/43/EC*<sup>92</sup> of June 2000<sup>93</sup> promotes the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin, and specifically applies to “*access to and supply of goods and services which are available to the public, including housing.*”<sup>94</sup> Member States shall “*shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19<sup>th</sup> July 2003...*”<sup>95</sup>

Following the new European Commission *Social Policy Agenda*,<sup>96</sup> national action plans (NAPs) for combating poverty and social exclusion on the basis of the jointly adopted objectives be completed by each State.<sup>97</sup> The plans are leading to a set of European-wide indicators in many areas including housing policies, and the Commission has recognized that:

*“All Member States recognise the importance of access to decent quality housing in their NAPs as a key condition for social integration and participation in society.”*<sup>98</sup>

Rights to housing for consumers of new housing have been strengthened by *Council Directive 93/13/EEC*<sup>99</sup> on unfair contract terms and this has already led to one successful case by the Irish Consumer Association in 2001.<sup>100</sup>

*The European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) has been ratified by Ireland, and has attained greater significance following the commitments by the Irish Government in the Belfast/Good Friday Agreement. These create an obligation to provide an equivalent level of protection of human rights between the two parts of Ireland, and this means that the provisions of the Convention, as already in force in Northern Ireland under the UK Human Rights Act 1998, will be developed in the Republic. The most relevant sections of the Convention to housing issues as developed in the Convention jurisprudence and the case law arising from the UK Act<sup>101</sup> are Articles 6, 8, 13, 14, and Article 1 of Protocol No. 1. Indeed, this latter provision was considered by the

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<sup>91</sup> OJ L 257, 19.10.1968. *Regulation (EEC) No. 1612/68 of the Council of 15<sup>th</sup> October 1968 on freedom of movement for workers within the Community.* (as last amended by Regulation No. 2434/92. OJ L 245, 26.8.1992.)

<sup>92</sup> *Council Directive 2000/43/EC.* OJ L. 180/22. 19.7.2000.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.* Article 3 (1).

<sup>95</sup> *Ibid.*, Article 16.

<sup>96</sup> European Commission, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and Committee of the Regions. Social Policy Agenda.* Brussels, 28.6.2000 COM(2000) 379 final.

<sup>97</sup> European Commission, Brussels, 28.6.2000 COM(2000) 379 final. *op. cit.* p. 10.

<sup>98</sup> *Ibid.*, Section 3.1.2.2.

<sup>99</sup> OJ L 095, 21.4.1993.

<sup>100</sup> See Dorgan, P. “Safe as Houses,” *Law Society Gazette*, Jan/Feb 2002.

<sup>101</sup> See O’ Carroll, D, and Lister, S. (2001) *A Guide to the Human Rights Act 1998.* Coventry: Chartered Institute of Housing.

Irish Supreme Court in considering the constitutionality of the Planning and Development Bill 1999.<sup>102</sup>

### **Irish Reports to the UN Committee on Economic, Social and Cultural Rights**

Ireland has submitted two reports to the UN Committee on Economic, Social and Cultural Rights in 1996 and 1999.<sup>103</sup> In the second report there was little reference to housing and no reference to housing rights, despite the detailed set of questions in this area in the reporting guidelines.<sup>104</sup>

In the Concluding Observations on the second report the Committee were critical of Ireland's approach in relation to the Covenant, and the Committee noted with regret that "despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts".<sup>105</sup> The Committee was also concerned that despite its recommendation in 1999, Ireland has still not adopted a human rights-based approach to the National Anti-Poverty Strategy (NAPS).<sup>106</sup>

In relation to housing, the Committee expressed concern that (a) many new households cannot secure adequate and affordable housing; and (b) some 1,200 families of the Traveller community are living in roadside encampments without access to water and adequate sanitary facilities, and are liable to be forcibly evicted. The Committee was also concerned that a large number of persons with mental disabilities, whose state of health would allow them to live in the community, is still accommodated in psychiatric hospitals together with persons suffering from psychiatric illnesses or problems, despite efforts by the State party to transfer them to more appropriate care settings.<sup>107</sup> The Committee urged Ireland to accelerate its social housing programmes in order to reduce the waiting time for social housing. Moreover,

*"the State party should enhance its efforts to: (a) provide, as early as possible, alternative accommodation for the 1,200 traveller families who are living in roadside encampments without adequate facilities and to respect General Comments Nos 4 and 7 of this Committee; and (b) meet its target of providing all necessary traveller accommodation by 2004."*<sup>108</sup>

The Concluding Observations of the Committee on Economic, Social and Cultural Rights<sup>109</sup> in May 2002 in relation Ireland, commented that:

*"The Committee notes with regret that, despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in*

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<sup>102</sup> *In Re: Article 26 and the Planning and Development Bill 1999*, [2000] 2 IR 321; [2001] 1 ILRM.

<sup>103</sup> Government of Ireland. Department of Foreign Affairs. (2000) Second Report by Ireland on the International Covenant on Economic, Social and Cultural Rights. Dublin: The Stationery Office.

<sup>104</sup> UN doc. E/1991/23. *Revised Guidelines regarding the form and contents of reports to be submitted by states parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*.

<sup>105</sup> UN doc. E/C.12/1/Add.77. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*. 17/05/2002. para. 12.

<sup>106</sup> *Ibid.*, para. 19.

<sup>107</sup> *Ibid.*, paras. 20 & 21.

<sup>108</sup> *Ibid.*, para. 32.

<sup>109</sup> UN doc. E/C.12/1/Add.77. para. 12.

*domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts.”*

There was further criticism that Ireland was using the difficulties of the dualist system of incorporating international law into the domestic legal order that:

*“Affirming that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation (paragraph 22 of the Committee's 1999 concluding observations) and strongly recommends that the State party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as the other domestic legislation. The Committee points out that, irrespective of the system through which international law is incorporated into the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order. In this respect, the Committee would like to draw the attention of the State party to its General Comment No. 9 on the domestic application of the Covenant”.*<sup>110</sup>

### **Precedent Setting Housing Rights Jurisprudence**

The Planning and Development Bill was referred to the Supreme Court on 30 June 2000 and the Judgement was delivered on 28 August 2000 emphasising the importance of this measure.<sup>111</sup> Indeed, as had been predicted, the case did “*result in a substantial contribution to Irish jurisprudence on the protection of private property.*”<sup>112</sup> Counsel for the Attorney General submitted that the purpose of Part V of the legislation was two fold:<sup>113</sup>

1. *to enable as many people as possible to own their homes:*
2. *to ensure that, as far as possible, the least well off members of society were not required by economic necessity to live in segregated areas.*

The Court accepted that the proposals outlined in the Bill 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*”. The proposed scheme was not arbitrary, unfair or based on irrational considerations. In examination the restrictions being placed on private property by the Bill the court considered the provisions of the Article 1 of Protocol No. 1. of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR).

The Planning and Development Act 2000 inserted a range of personal rights into the legal basis of the housing market – planning and property law.<sup>114</sup> The Act places an obligation on the market to address social housing needs, and created a

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<sup>110</sup> *Ibid.*, para. 23.

<sup>111</sup> *In Re: Article 26 and the Planning and Development Bill 1999*, [2000] 2 IR 321; [2001] 1 ILRM.

<sup>112</sup> Stack, *op. cit.*, p. 83.

<sup>113</sup> *Supreme Court Judgement on Planning and Development Bill*. 28<sup>th</sup> August 2000.

<sup>114</sup> S.I. 350/2000, *Planning and Development Regulations 2000* set out minimum sizes of units to be provided in the social housing parts of schemes, eg. for one person – 35sq.m, for 2 persons- 40 sq.m. etc.

space within the Housing Strategies for new approaches to emerge. Indeed, the Cork City and County Housing Strategy actually refers to rights.

*“The Strategy is based on a shared vision which sees having a suitable place to live at an affordable price as a basic right. The reality, however, is that not everyone in Cork City and County can exercise this right and a substantial portion of our population: (a) cannot afford a house, or, (b) live in housing unsuitable for their needs.”<sup>115</sup>*

### **National Housing Strategy and the Approach by Main Political Parties to Rights to Housing.**

The objectives of Irish housing policy are set out in general terms.

*“The overall aim of Irish housing policy is to enable every household to have available an affordable dwelling of good quality, suited to its needs in a good environment and as far as possible at the tenure of its choice.”<sup>116</sup>*

There are, however, some supplementary objectives,<sup>117</sup> including: Promote a diverse and well managed rented sector; Ensure that households without sufficient resources have suitable and affordable housing available to them; Promote conservation and improvement of housing; Reduce social segregation in housing; Adequate response to needs of homeless people; and Provision of suitable housing and sites for Travellers.

However, it is worth noting that while the overall policy objective still remains, the strategies to advance this have now changed since 1995. The objective of maintaining an efficient housing market is now supreme. The Department of Environment and Local Government *Statement of Strategy 1998 – 2001*<sup>118</sup> proposed five strategies forming the essence of Irish housing policy:

- (a) *maintenance of a national housing programme and an efficient housing market*
- (b) *facilitation of home ownership through fiscal and other measures*
- (c) *development of a social housing sector*
- (d) *development of an efficient private rented sector*
- (e) *conservation and improvement of the housing stock*

At the other end of housing policy the Government-revised anti-poverty strategy *“Building an Inclusive Society”*<sup>119</sup>, has set out its objective:

*“to reduce substantially and, ideally, eliminate poverty in Ireland and to build a socially inclusive society. This Strategy sets out the overall objectives, overall targets within the key areas and the arrangements to mobilise actions.”*

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<sup>115</sup> Cork Planning Authorities. *Joint Planning Strategy*. August 2001. p. 1.

<sup>116</sup> DoE&LG., *Statement of Strategy 1998 – 2001*, (1999).

<sup>117</sup> DoE&LG., *Social Housing. The Way Ahead*, (1995).

<sup>118</sup> DoE&LG., *Statement of Strategy 1998 – 2001*, (1999).

<sup>119</sup> Department of Social, Community and Family Affairs, (2002).

Accepting that vulnerable groups in society such as Children and Young People, Women, Older People, Travellers, People with Disabilities, Migrants and Members of Ethnic Minority Groups, will require targeted intervention, the document avoids all reference to rights. Rights to housing are not part of the policy formulation process and targets for provision are set in aspirational, non-specific and vague terms within the context of public service managerial strategies, where effective “consultation,” “participation” and “partnership” approaches ensure that advocacy groups and NGOs are effectively “managed” within the housing policy system. Significantly, there have been no instances of consideration of international housing rights obligations in the framing or development of housing policies in Ireland.

An Irish Government election took place in May 2002. The manifestoes of the main political parties all addressed housing as an issue. The majority Party *Fianna Fail*, which formed the principal Government Party, sets out a range of policy measures which it plans to advance, but makes no reference to rights in relation to housing.<sup>120</sup> The main thrust of the policy is to expand supply. The second largest Party, *Fine Gael*, published a detailed set of planned measures in its manifesto. In its policy document “*Just Housing*”, the Leader states that he believes that “access to affordable housing should be a basic right for everyone.”<sup>121</sup> The party planned to introduce legislation to clearly define the rights and responsibilities of both tenants and landlords and give security of lease to compliant tenants.

The Labour Party in its manifesto promised to bring in a right to reasonable access to housing, to be included in a constitutional amendment Bill on economic, social and cultural rights.<sup>122</sup> It also promised to establish a Housing Market Commissioner, to ensure that high standards of building quality are maintained, so that the house buyer is protected against sharp practices by builders or estate agents, and that a system of Fair Price certification is established to which a house purchaser can refer. Private sector security of tenure would be enhanced. The Progressive Democrats manifesto states that the Party believes in practical solutions for the consumer and for social justice.<sup>123</sup> Its main policy approach is to expand supply of new housing, but also to implement legislation for security of tenure in the private sector.

*Sinn Fein* unequivocally proposed that a right to housing be established in Ireland. “*Sinn Fein* believes that proper accommodation is an inalienable right and we support enshrining the right to housing in the Constitution.”<sup>124</sup> The Party also proposes the establishment of a Housing Commissioner’s Office which would protect the rights of home owners, monitor the implementation of housing and planning legislation, ensure an end to gazumping, monitor house price changes and the hidden costs of auctioneers and solicitors fees, as well as establishing a legally enforceable code of practice for house builders and vendors. The Green Party in its manifesto calls for a Constitutional referendum to ensure that the common good takes precedence over the rights associated with private property ownership.<sup>125</sup> It also proposes legislation to oblige Local Authorities to provide a network of halting sites for Travellers.

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<sup>120</sup> *Manifesto of Fianna Fail*, May 2002.

<sup>121</sup> *Fine Gael, Just Housing*, part of manifesto, May 2002.

<sup>122</sup> *Labour Party Manifesto*, May 2002.

<sup>123</sup> *Manifesto of the Progressive Democrats*, May 2002.

<sup>124</sup> *Manifesto of Sinn Fein*, May 2002.

<sup>125</sup> *Manifesto of the Green Party*, May 2002.

### **Current Trends and Likely Future Development.**

The enabling paradigm in housing policy, promulgated by the World Bank,<sup>126</sup> endorsed by UN bodies and widely accepted as an integral approach in Irish housing policy, goes “*hand in hand with the centrist agenda of a liberal democracy, trying to restrain the predatory instincts of both capitalist and State monopolies in an age where information is no longer the prerogative of the few.*”<sup>127</sup> Any analysis of the development of rights to housing must address this contemporary situation in order to discover how such rights can be advanced within this context.

There has been a substantial growth in the output of the Irish economy and the term ‘Celtic Tiger’ has come to describe a new industrial prosperity.<sup>128</sup> The development of the infrastructure and extent of housing did not keep pace with this sudden growth. However, steps are being taken to redress this imbalance, which involves the production of record levels of housing, - indeed, there are plans to provide adequate housing for all through the National Development Plan, 2000-2006 (NDP).<sup>129</sup>

The capacity of infrastructure to support and sustain a given level of economic activity has been recognised as having a major bearing on the competitiveness of industry, and it also a significant factor “*in determining the attractiveness of the country to foreign direct investment.*”<sup>130</sup> However, “*failure to address housing needs effectively would impose significant costs and constraints on Ireland’s economic growth, competitiveness and social development.*”<sup>131</sup> The challenge facing Ireland in relation to its infrastructure can be gauged from the *Global Competitiveness Report 1999* published by the World Economic Forum. The report shows that Ireland is ranked 34<sup>th</sup> internationally out of a total of 59 countries surveyed in relation to the quality of its overall infrastructure.<sup>132</sup>

But bringing home the benefits of international and European developments which advance rights to housing is not without difficulties. Clearly, the position of the judicial interpretation of the Constitution as the last word on rights is an obstacle. Indeed, it is this position which would appear to have stifled the broader debate on rights to housing. As we have seen above, there are many international instruments, and reports which inform the provisions of the right to housing, and Ireland has signed and ratified most of these, but has never incorporated them into Irish law. It has been pointed out that the dualism of our legal system acts as “*a policeman on the gateway between domestic and international law.*”<sup>133</sup> While Ireland has signed and ratified many of the international instruments which engage the rights to housing, “*because of the dualist nature of our legal order, ratification engages the external responsibility of the State only.*”

*“Ratification does not necessarily lead to incorporation. The transmission belt that should exist between international and domestic law is absent in our*

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<sup>126</sup> See Angel, S. (2000) *Housing Policy Matters – a Global Analysis*. New York: Oxford University Press.

<sup>127</sup> *Ibid.*, p. 13.

<sup>128</sup> Nolan et al. (2000) *Bust to Boom. The Irish Experience of Growth and Inequality*. Dublin: IPA.

<sup>129</sup> Government of Ireland, (2000) *National Development Plan, 2000-2006*, p. 8.

<sup>130</sup> Government of Ireland, (2001) *Ireland, Economic and Social Infrastructure Operational Programme*, p. 5.

<sup>131</sup> *Ibid.* p. 89.

<sup>132</sup> *Ibid.* p. 6.

<sup>133</sup> See National Disability Authority, (2001) *Submission to the Oireachtas Joint Committee on Justice Equality and Women’s Rights concerning the Incorporation of the ECHR into Irish Law*, p. 15.

*dualist system. The disconnect between international law and domestic law means that we are cut off from the dynamic flow of international law. Thus the time taken for the creative interpretation of treaties by the relevant treaty monitoring to enter our legal order is lengthened. There is no way for Irish citizens to get advantage of these normative developments unless they go to the extra trouble and expense of bringing cases before the relevant fora.*"<sup>134</sup>

While there is much debate and development of civil and political rights in Ireland arising from the conflict in Northern Ireland, the history of implementation of international legal norms in relation to socio-economic rights, including the right to housing in Ireland has been poor. We must question whether in this area, "*Ireland is the street angel and house devil of the international community?*"<sup>135</sup> Perhaps, the future advancement of rights to housing based on international norms, will highlight this contradiction and foster a real debate on socio-economic rights in Ireland. In the meantime, Irish citizens are denied by the State the legal protection and assistance of international legal instruments and jurisprudence in relation to these rights.

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<sup>134</sup> *Ibid.*, p. 16.

<sup>135</sup> O' Conaill, D. "The Irish constitution and the ECHR: Belt and Braces or Blinkers?" in Driscoll, D (ed) *Irish Human Rights Review 2000*, Dublin: Round Hall Sweet and Maxwell. p. 109.



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