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PANEL 1

Right to Housing – Theoretical Foundations*

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**Materials included where permission has been received from the contributors*

Conference on a Referendum on Housing in Ireland

Right to Housing: Theoretical Foundations

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1. Introduction

Housing and home are foundational pillars of our lives. Recognising the importance of housing and home, the human need for housing and home, and the harms that result from lack of access to appropriate, affordable housing and from the risks and realities of home loss are consistent with the commitment to social justice set out in the 1937 Constitution.¹ Ireland's constitutional approach to property, housing and home was—like all written Constitutions—a product of its time. Enacted in living memory of the Land Wars of the late nineteenth century, it recognised the importance of securing private property rights,² and of advancing social justice and the needs of a 'just society'.³ The legacies of the past, as well as the international context of the 1930s Great Depression imbued a deep sense that the effective governance of private property rights to promote social justice in the collective interests of the Irish people was properly part of the state's role as the guardian of the people. These dual commitments—to private ownership and state intervention to secure social justice—shaped the Irish property *nomos*, generating a distinctive theoretical approach to property, housing and home: respect for private property rights, delimited by social justice considerations.

Since the Irish Constitution was ratified in 1937, the conceptual landscape of housing and home has developed, as the right to adequate housing has been given legal recognition under international treaties and human rights instruments and national constitutions and an extensive body of empirical research and theoretical analysis has examined the meaning and content of rights to housing and home. This paper sets out the theoretical concepts through which constitutional and human rights to housing and home can be articulated and advanced. The paper examines the key components and characteristics of rights to housing and home. It draws out the distinctions between the concepts of *housing*, *home* and *shelter*, the goals they serve and the harms they mitigate.

¹ See R. Walsh & L. Fox O'Mahony, *Land Law, Property Ideologies and the British–Irish Relationship*, 47 *Common Law World Review* 7 (2018).

² Centuries of conquest, colonialism, Penal Laws and exclusion from private property rights had fueled a desire for the transfer of property rights to the Irish people, and for the protection of those newly vested rights through the liberal property system.

³ R. Walsh, *Property Rights and Social Justice: Progressive Property in Action* (2021).

2. The theoretical concept of 'Home'

In *Conceptualising Home: Theories, Laws and Policies*,⁴ I set out the key components of a legal concept of home. One way of expressing the concept of home is 'Home = House + x'.⁵ This separates out the idea of home into the physical structure of the house (which provides physical shelter and a locus for the experience of home), on the one hand, and the 'x-factor' or experiential aspects of 'home' that distinguish it from 'house' on the other. Crucially, the concept of home recognises that the social, psychological and cultural values which a physical structure acquires through *use as a home* stems from experience. Thus, it is argued, a 'home' cannot be bought or acquired: rather, it is the 'house' that can be bought and can then, through experiences of use and occupation as a home, become the 'home' to which occupiers feel particular attachment.

The concept of home developed from empirical research into what home means to occupiers, the needs and values it serves, the process of 'home making' and the impact of loss of home. In *Conceptualising Home*, I proposed five value clusters that comprise and give content to the idea of 'home'; these have been adopted in much of the home scholarship since then.

- a. *Home as a financial investment* – this relates to the capital value of the property and the financial stakes of owners, mortgage lenders, landlords, tenants, developers
- b. *Home as a physical structure* – relating to the material shelter and accommodation provided by the home; the 'bricks and mortar' and the physical amenities that sustain and support occupiers and are often essential to their very survival
- c. *Home as territory* – relating to security and control, a locus in space, belonging, rootedness, permanence (the permanent address), continuity, privacy, refuge from the outside world
- d. *Home as identity* – shaping and reflecting self-identity, our ideas and value, and social identity – an indicator of personal status/avoidance of stigma
- e. *Home as a social and cultural unit* – the locus for relationships with family and friends, a centre for activities and signal of social status

In reality, these clusters overlap, and can be expressed in different ways, but collectively they summarise and reflect the meanings and attachments that distinguish a *house* from a *home*.

Before the development of the concept of *home* – first in environmental psychology from the 1970s, and more recently in legal discourse from the 2000s—home was sometimes equated with the physical structure of the house or shelter. An example of this can be seen in the fact that the absence of physical shelter ('*houselessness*') is

⁴ L Fox, *Conceptualising Home: Theories, Laws and Policies* (2007); see also L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2003) *Journal of Law and Society* 580.

⁵ *Conceptualising Home, ibid*, p145.

often—politically and popularly—described as ‘homelessness’. This conflation of the language of *home* with a statement about *shelter* has had important practical and policy consequences: for example, Peter Somerville explained how the ‘minimal definition’ of homelessness in terms of ‘rooflessness’ tended to dominate political debate in the 1980s.⁶ Focusing on the lack of physical shelter diminished the impacts of homelessness by ignoring the psychological, social, cultural and emotional experiences and impacts of homelessness. Reducing the experience of homelessness to lack of shelter results in: “[t]he emotive aspects of homelessness... [being] entirely neglected. An issue of deep human misery is thereby reduced to a problem which is merely technical.”⁷

The physical structure of the house is a necessary component of home, providing shelter, as well as the space in which experiences of home can be located. However, the conflation of ‘home’ and ‘shelter’ diminishes and misrepresents the meanings, values and needs associated with home for human occupiers. Pioneering ‘home’ scholar Rapoport explained that:

“Very early in recorded time, the house became more than shelter...almost from the beginning, [home] was much more than a physical or utilitarian concept...If provision of shelter is the passive function of the house, then its positive purpose is the creation of an environment best suited to the way of life of a people—in other words, a social unit of space.”⁸

The physical structure of home, through shelter and space, provides the physical basis for occupiers to experience all of the attributes and meanings of home. It provides the locus for family life, the potential for safety, privacy, continuity and permanence. It is an important starting point, but it is important to recognise home is both a physical structure and a ‘human space’.⁹ As such, *loss* of that ‘human space’—the particular home that occupiers have developed attachments through use and occupation as a home—can be a traumatic experience, for reasons that go beyond exposure to the loss of shelter.

Reducing ‘home’ to ‘house’ fails adequately to reflect or recognise the empirical evidence of home meanings and the experiential nature of the home. These broader home meanings have been positively associated with basic psychological needs,¹⁰ health and human wellbeing: to be ‘at home’ means “to know where you are; it means to inhabit a secure centre and to be oriented in space.”¹¹ The significance of ‘home as territory’, and particularly the psychological need for security in the home, is

⁶ P Somerville, ‘Homelessness and the Meaning of Home: Rooflessness or Rootlessness?’ (1992) 16 *International Journal of Urban and Regional Research* 529.

⁷ Somerville, p530.

⁸ A Rapoport, (1979) 46 *Ekistics* 129.

⁹ J Sixsmith, ‘The Meaning of Home: An Exploratory Study of Environmental Experience’ (1986) 6 *Journal of Environmental Psychology* 281 at 292.

¹⁰ JD Porteous, ‘Home: The Territorial Core’ (1976) 66 *Geographical Review* 383.

¹¹ K Dovey, ‘Home and homelessness’ in I Altman & CM Werner, *Home Environments* (NY: Plenum Press, 1985), p36.

heightened by the association between home and family and, particularly, the presence of children. Lack of home, and loss of home, are associated with considerable personal stress and distress for displaced occupiers. 'Homelessness' and loss of home are associated with dramatic and overwhelmingly negative physical and mental health consequences, and these are most detrimental for people who are most socio-economically disadvantaged.¹²

In *Home Ownership in a Risk Society*, Ford, Burrows and Nettleton analysed the evidence base concerning the individual psychological health and wellbeing effects of loss of home in the context of repossession actions, as well as articulating the individual and collective economic impacts of repossession. They set out a range of financial costs (direct costs, loss of value to properties due to physical deterioration); social and psychological costs of housing debt, restricted residential mobility and relationship difficulties, health and labour-market costs, adverse impacts on educational outcomes for children, and political and administrative costs. These costs were borne by a wide range of stakeholders: dispossessed borrowers, lenders, insurers, central government, local government, health services, housing market institutions, labour market institutions and employers. Disruptions to home are traumatic, eliciting grief responses and adversely affecting mental health and causing social and psychological pathologies.

The meanings of home are cut across with family meanings: the 'home as financial investment' may be an asset to pass on to children; the importance of 'home as territory' is heightened by the presence of children and concern to provide a safe, secure and protective home for children. The home as a site for family life includes providing the physical and the social/psychological/emotional base for caring for children. This is important for parents and carers; and also for children themselves. The importance of the home environment as the principal setting for the growth and development of children is well-established in the research literature.¹³ Childhood research has emphasised the importance of 'place' for children's agency.¹⁴ The home is a key setting for children's development: "[i]n terms of a child's physical world socialization, the home is undoubtedly an environment of primary importance";¹⁵ with the immediate home more significant for younger children, with other setting in the locale of the home (school, outdoor play areas, friends' homes) more important as the child grows older.¹⁶ A child's bedroom, with their belongings

¹² Ford, Burrows and Nettleton, pp163-4.

¹³ RD Parke, 'Children's Home Environments: Social and Cognitive Effects' in I Altman & JF Wohlwill (eds), *Children and the Environment* (1978); L Chawla, 'Childhood Place Attachments' in I Altman & SM Low (eds), *Place Attachments* (1992); L Chawla, 'Home is where you start from: Childhood Memory in Adult Interpretations of Home' in EG Arias (ed) *The Meaning and Use of Housing* (1993); P Christensen & M O'Brien, *Children in the City: Home, Neighbourhood and Community* (2003).

¹⁴ G Hallden, 'Children's Views of Family, Home and House' in Christensen and O'Brien, *ibid.*

¹⁵ HM Proshansky & AK Fabian, 'The Development of Place Identity in the Child' in CS Weinstein & TG David (eds) *Spaces for Children: The Built Environment and Child Development* (1987), p24.

¹⁶ Chawla, 'Childhood Place Attachments', *op cit*, p66.

and sanctuary from the control of parents is central to the child's development of self-identity.

Conversely, children experience psychological, social and health consequences as a result of losing their home,¹⁷ ranging from embarrassment at having to tell their friends and disruptions to their social identity, to "interruption of their school, the loss of their friends, malnutrition and infection...The loss of a child's home is nothing less than an invitation to chronic illness."¹⁸ The loss of home will often also involve loss of other attachments in the neighbourhood: children may have to move schools, leave friends and the familiar environments that constitute their sense of self. The home is the site of family life, where children develop their sense of belonging,¹⁹ and their relationships with others,²⁰ and well as where they are sheltered:

"The house creates opportunities for everyday life and is a key site for 'belonging' and for creating and maintaining social ties and relationships, a shelter for children and their families."²¹

Nettleton *et al* noted that loss of home for children often coincides with other traumatic life events: parents separating, a parent's ill-health or job loss, or the death of a close relative.

In 'The Minor as (a) Subject: The Case of Housing Law',²² Cowan and Dearden identified a range of obstacles that make children less visible as subjects of housing law. Housing is dominated by the disciplines of property law and contract law, and children are marginalised within these disciplines: for example, because their contracts are voidable; they cannot hold a legal estate in land; and they don't fit the model of financially-productive autonomous citizen-consumer. Yet, children are profoundly affected by the risks of home loss, and particularly vulnerable. In 'Bankrupt Children', Elizabeth Warren explained that while children do not file for bankruptcy, the sociological story of bankruptcy is a story about children.²³ The fact that debtors have dependents means that household incomes must be stretched to cover a wider range of needs. Caring for dependents simultaneously reduces the earning capacity of adults in the household. Warren signalled to a hierarchy of risk based on household types, with single female-headed households with minor children at the greatest risk; followed by 2-adult households with children, while households without children were at the lowest risk of bankruptcy. Indeed, the

¹⁷ Ford, Burrows and Nettleton; S Nettleton, R Burrows, J England & J Seavers, *Losing the Family Home: Understanding the Social Consequences of Mortgage Repossession* (1999).

¹⁸ See FL Smizik & ME Stone, 'Single Parent Families and a Right to Housing' in E Mulroy (ed), *Women as Single Parents* (1988), pp229-30.

¹⁹ J Brannen and M O'Brien (eds), *Children in Families: Research and Policy* (1996).

²⁰ P Christensen and A James (eds), *Research with Children: Perspectives and Practices* (2000).

²¹ Hallden, *op cit*, p34.

²² D Cowan & N Dearden, 'The Minor as (a) Subject: The Case of Housing Law' in J Fionda (ed), *Legal Concepts of Childhood* (2001).

²³ E Warren, 'Bankrupt Children' (2002) 86 *Minnesota Law Review* 1003.

strength of the link between bankruptcy, home-loss and children led Warren to argue that these risks should be spread across the wider population rather than falling on individual households and families. A constitutional protection for home would provide a more secure legal framework for political and legal action to prevent these harms.

3. The right to respect for home, Article 8, European Convention on Human Rights

The right to respect for home under the European Convention on Human Rights is embedded in the overall framework of Article 8, which states that:

“(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 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 wellbeing 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.”

At first glance, Article 8 and its incorporation into Irish law through the European Convention on Human Rights Act 2003, appears to provide a basis for advancing *home* arguments in domestic courts. However, it is important to note that (as well as being a qualified right²⁴) the conceptual framework of Article 8 is geared around ‘interferences’ with the right to respect for home. The right is focused on protecting citizens against (unjustified, disproportionate) interferences with their *established* home. This was established shortly after the Convention was adopted, in the decision of the European Commission on Human Rights in *X v Germany*.²⁵ The Commission, which in this period ruled on the admissibility of claims brought under the Convention, rejected the argument that Article 8 imposed a duty on the state to provide citizens with a home. The Commission held that the right to an adequate standard of living and the right to suitable accommodation were not in principle among the rights and freedoms safeguarded under the ECHR.²⁶ This point has been reiterated by the European Court of Human Rights in several subsequent decisions: Article 8 does not confer the right to be provided with a home, or the right to have one’s housing problems solved by the authorities.²⁷

²⁴ Interferences with the right can be justified under Article 8(2), if they are ‘in accordance with law and necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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.’

²⁵ (1956) 1 Yearbook ECtHR 202.

²⁶ See AH Robertson (ed), *Privacy and Human Rights* (1973), [79].

²⁷ *Chapman v U.K.* (2001) 33 EHRR 399 at 427 [99]; *Marzani v Italy* (1999) 28 EHRR CD 175 at 179; *O’Rourke v United Kingdom* App No 39022/97, 26 June 2001.

This is consistent with the conceptual nature of ‘home’ outlined above. ‘Home’ is a phenomenological or experiential concept:²⁸ it is an attachment that develops through the experience of being situated ‘at home’. Home-making is a process:²⁹ homes are not ‘bought’ but made,³⁰ through the experiences of use and occupation *as a home*. It makes sense, therefore, that the right to ‘respect for home’ refers to the established home. The right has the potential to do important work, nonetheless, in offering legal protection against interferences with this established home, for example, in cases of eviction or repossession. The right to respect for home is embedded in the overall context of Article 8, which is strongly associated with *privacy*, or aspects of the right to *private life*.³¹ In *Markx v Belgium*, Sir Gerald Fitzmaurice claimed that: “...the main, if not indeed the sole, object and intended sphere of application of Article 8 was that of what I will call the ‘domiciliary protection’ of the individual”;³² primarily against *state* intrusion in the home.

‘Home’ is defined by use and occupation *as a home*. In *Surugiu v Romania*,³³ the court confirmed that the status of a property as a ‘home’ for the purposes of Article 8 does not depend on the occupier having any proprietary right of interest in the property. Similarly, a person may have a property right in a dwelling for the purposes of Article 1 of the First Protocol, without having sufficient ties to the property for it to constitute their ‘home’ under Article 8.³⁴ The European Court of Human Rights recognises the affective nature of home, as discussed above in section 2: the court’s guide to Article 8 explains that:

“[i]n view of the crucial importance of the rights secured under Article 8 to the individual’s identity, self-determination and physical and mental integrity, the margin of appreciation afforded to States in housing matters is narrower in relation to rights guaranteed by Article 8 than to those protected by Article 1 of Protocol No 1.”³⁵

In *Gladysheva v Russia*, the court explained that: “no individual on the [social housing] waiting list would have had the same attachment to the flat as the applicant, or would hardly have had a vested interest in that particular dwelling, as opposed to a similar one.”³⁶

²⁸ D Case, Contributions of Journeys Away to the Definition of Home: An Empirical Study of a Dialectal Process (1996) 16(1) *Journal of Environmental Psychology* 1.

²⁹ F Samanani & J Lenhard, Hole: Ethnographic Encounters (2020).

³⁰ Arien Mack described the “common—and, unlike many common expression, vulgar—use of ‘home’ as a euphemism for ‘house’ is by and large the linguistic waste product of the American real-estate industry.”; A Mack, *Home: A Place in the World* (1995) p37.

³¹ See European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* www.echr.coe.int/documents/guide_art_8_eng.pdf.

³² *Markx v Belgium* (1979) 2 EHRR 330 [7].

³³ Application No 48995/99, 20th April 2004.

³⁴ *Khamidov v Russia*, Application No 72118/01, 15th November 2007.

³⁵ European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* www.echr.coe.int/documents/guide_art_8_eng.pdf, [69]; *Gladysheva v Russia*, Application No 7097/10, 6th December 2011.

³⁶ *Gladysheva v Russia*, Application No 7097/10, 6th December 2011, [95].

One important area in which the Article 8 right has been invoked is in relation to home loss through eviction.³⁷ Eviction represents an extreme interference with the right to respect for home. In these Article 8 cases, the outcome often turns on the question of proportionality: was the interference proportionate to the lawful purpose pursued by the evictor. After a decade of litigation, the English courts finally accepted that when social (but not private)³⁸ tenants are evicted, they are entitled under Article 8 to have the proportionality of the eviction assessed by a court.³⁹ There have been cases in which courts have held that interferences with home through eviction are disproportionate—see, for example, *McCann v United Kingdom*⁴⁰—although the court’s view that the state had exceeded its margin of appreciation was triggered by the lack of procedural safeguards in the eviction process.

Michel Vols’ review of the effectiveness of proportionality arguments raised by tenants found that, in a large number of contracting States, the Article 8 right does not make a material difference to the tenant’s legal position.⁴¹ Limits on the right to respect for home as it has been articulated and interpreted in Article 8 include the requirement that the interference was by a public authority, so that its protections do not extend to interferences by private landlords or lenders;⁴² the relative weight placed on justifications for interferences and the margin of appreciation granted to Contracting States in relation to housing.⁴³ In *Ivanova and Cherkezov v Bulgaria*,⁴⁴ the court noted that:

“..if in such proceedings the national courts have regard to all relevant factors and weigh the competing interests in line with the above principles – in other words, where there is no reason to doubt the procedure followed in a given case – the margin of appreciation allowed to those courts will be a wide one, in recognition of the fact that they are better placed than an international court to evaluate local needs and conditions, and the Court will be reluctant to gainsay their assessment (see *Pinnock and Walker v. the United Kingdom* (dec.), no. [31673/11](#), §§ 28-34, 24 September 2013).”⁴⁵

It is important, however, to recognise that there is no *conceptual* or *legal* reason that a constitutional or human right to respect for home cannot provide a material

³⁷ See M Vols, ‘European Law and Evictions: Property, Proportionality and Vulnerable People’ (2019) 27(4) *European Review of Private Law* 719-752.

³⁸ *FJM v United Kingdom (Admissibility)* (776202/16); [2019] HLR 8.

³⁹ *London Borough of Harrow v Qazi* [2003] UKHL 43; *McCann v United Kingdom* (2008) 47 EHRR 40; *Kay v United Kingdom* (2012) 54 EHRR 30; *Manchester City Council v Pinnock* [2010] UKSC 45.

⁴⁰ Application 19009/04, 13th May 2008.

⁴¹ M Vols, ‘European Law and Evictions: Property, Proportionality and Vulnerable People’ (2019) 27(4) *European Review of Private Law* 719-752.

⁴² *FJM v United Kingdom (Admissibility)* (776202/16); [2019] HLR 8.

⁴³ *Hudorovič and others v Slovenia*, Applications 24816/14 and 25140/14, 10th March 2020.

⁴⁴ Application 46577/14, 21st April 2016.

⁴⁵ Para [53].

protection against eviction that bolsters the tenant's legal rights. Rather, the question of delineation of protection afforded under the provision is a matter of political framing and interpretation at the national level.

4. The 'right to housing'

While the concept of 'home' relates to the already 'made' or established home, with legal 'home rights' talk focused on maintaining, sustaining, protecting or respecting the *status quo* of the home against interference, the 'right to housing' is focused on the *need to be housed*. The right to housing is recognised in several international and national rights instruments. These include Article 25 of the Universal Declaration of Human Rights (UDHR), which recognises the right to housing as an essential component of the right to an adequate standard of living:

“Everyone has the right to a standard of living adequate for the health and wellbeing 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.”

By referring to 'housing' within the broader context of adequacy to realise the right to an adequate standard of living, the concept of housing embedded in the UDHR nests 'housing' within what is 'adequate' to support the 'health and wellbeing of himself and of his family'.

This conceptual rootstock of the right to housing *as a means of realising the right to a standard of living adequate for the health and wellbeing of himself and his family* underlines the centrality of the concept of *home* within the right to housing. The concept of home set out in section 2, above, is geared around human experiential and psychological needs with respect to home, and concerned with how access to, and the sustainability of, home meanings impacts on the health and wellbeing of occupiers. To this end, 'home' and the 'right to housing' are conceptually closely related. While 'home = house + x', with the 'x-factor' meanings derived from the experiential phenomenon of use and occupation *as a home*, the active verb-form 'housing' reflects the same types of experiential 'doing'. While the phenomenological concept of home and the international human right to housing emerged from different scholarly and political traditions, they refer to the same underlying human needs and experiences. Both are conceptually anchored in a recognition that, as the foundational site and scene of human individual and family life, the 'house' serves active functions that are essential to human health and wellbeing.

The 'right to housing' is recognised in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR framework is a primary reference point for conceptual analyses of the 'right to housing' and for 'housing rights'. With the International Covenant on Civil and Political Rights

(ICCPR), it is the most widely ratified, most comprehensive and well-developed of international human rights instruments and the standard against which others are evaluated.⁴⁶ Article 11 provides for:

“...the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

Described as the “clearest international legal expression” of the ‘right to housing’;⁴⁷ it is clearly derived from article 25 UDHR. However, Article 11 separates ‘housing’, and other component elements, from ‘adequate standard of living’.

The protection conferred under Article 11(1) is not absolute, and nor does it ‘guarantee’ the right to housing. Contracting States have committed to taking ‘appropriate steps’ towards the realisation of the right:

“...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights...by all appropriate means, including particularly the adoption of legislative measures.”⁴⁸

The steps taken must be ‘deliberate, targeted and concrete’,⁴⁹ and must ‘move as expeditiously and effectively as possible’ towards progressive realisation of the right; to prevent regression. General Comment No. 3 (1991) also introduced the principle of ‘minimum core’ or ‘at the very least, minimum essential levels’; although the substantive question of what constitutes a ‘minimum core’ is not answered, and the obligation is limited by the ‘full use of the maximum resources’ available to the state. Yet, Hohmann described the implementation of ICESCR as ‘notoriously underachieved’.⁵⁰

Moving from the international to the regional European level, Article 31 of the Revised European Social Charter provides that:

“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.”

In contrast to the European Convention on Human Rights, there is no direct judicial enforcement mechanism for the European Social Charter, which is monitored through country reports to, and recommendations from, the European Committee of Social Rights. The power of the ESC is largely political, providing a mechanism

⁴⁶ Hohmann, p15.

⁴⁷ Hohmann, p17.

⁴⁸ ICSECR, Article 2(1).

⁴⁹ United Nations Committee on Economic, Social and Cultural Rights, *The Nature of States’ Parties Obligations* (Article 2(1)): Committee on Economic, Social and Cultural Rights General Comment 3 (1990) E/1991/23, para 2.

⁵⁰ Hohmann, p19.

for states' actions and provisions to be held up against the commitments they have made.⁵¹

In *FEANTSA v France*, the Social Committee defined 'adequate housing' under Article 31 as:

“...a dwelling which is safe from a sanitary and health point of view, that is, possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity; is structurally secure; not overcrowded; and with security tenure supported by law.”⁵²

In the same case, 'affordable housing' was defined as that for which a household can afford to pay initial costs (deposit, advance rent); current costs (rent, mortgage and utilities); without compromising minimum standards of living as defined within the relevant society.⁵³ Noting the specific reference in Article 31(2) to preventing, reducing and eliminating homelessness, and the structural enforcement mechanism of the RESC in allowing for collective complaints to be brought to the Council of Europe on the basis of a state's general provision (rather than individual violations), cases brought under Article 31 have also drawn on the concepts of 'shelter' and 'accommodation' when holding states to account for their failure to meet the most basic needs of the most marginalised members of their communities.

FEANTSA v France focused on the living conditions of France's poorest people: the lack of basic and essential services, overcrowding and homelessness (in the sense of the absence of *shelter* or *accommodation*). In *Defence for Children International (DCI) v The Netherlands*,⁵⁴ the Social Committee held that the eviction of children from shelter in a situation where no alternative shelter or accommodation was available would leave those children in a “situation of extreme helplessness which is contrary to the respect for their human dignity.”⁵⁵ In both cases, the issues raised focused on the most vulnerable and marginalised members of the community, and their abject need for accommodation that could be regarded as meeting the most basic standards of health and safety. Applying the heuristic of Maslow's 'hierarchy of needs', we can understand the right to *shelter* as a 'basic need': essential to the physical survival of human life because it is core to physiological and safety needs.

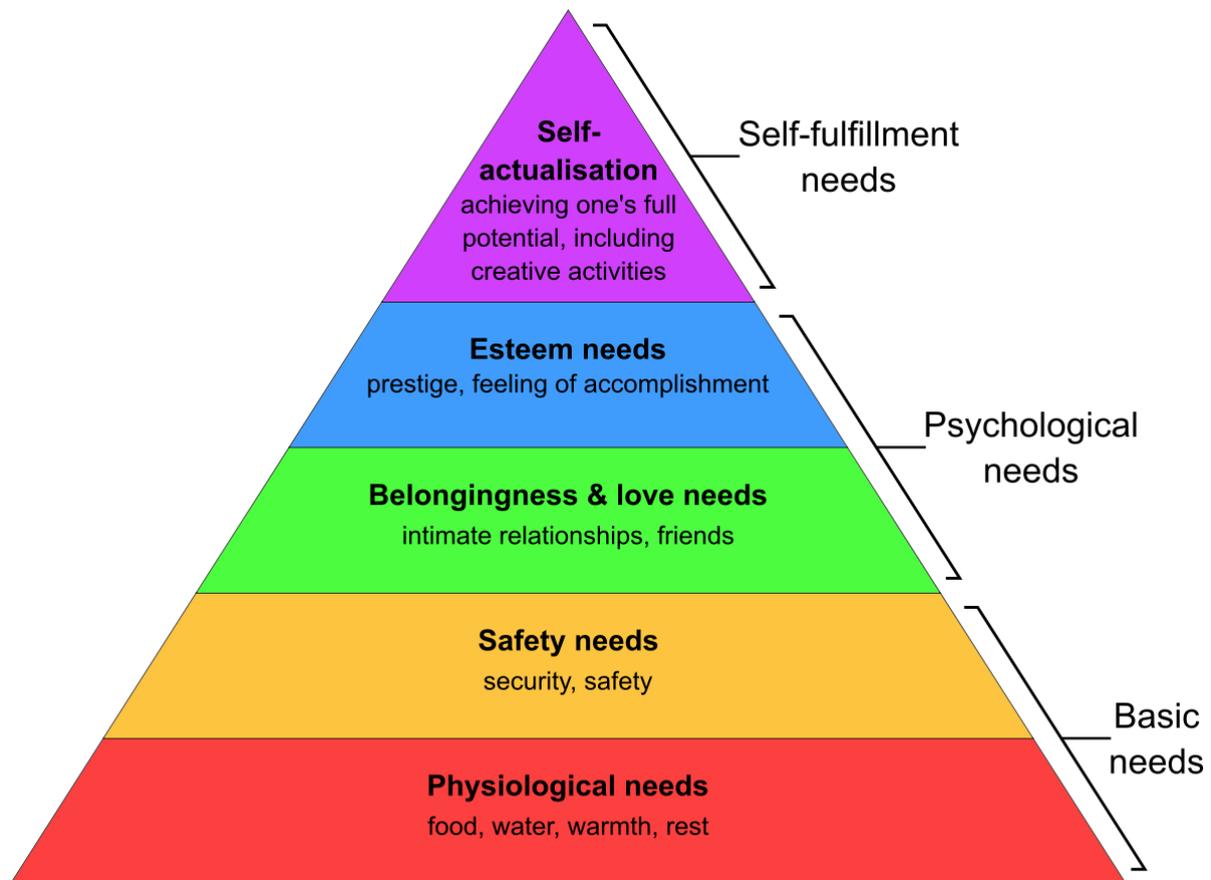
⁵¹ H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretive Methods of the European Committee of Social Rights' (2009) *Human Rights Law Review* 61.

⁵² *European Federation of National Organisations Working with the Homeless (FEANTSA) v France* (ESCR Case no 39/2006), decision on merits, 5 December 2007, para 76.

⁵³ *Ibid*, para 124.

⁵⁴ ESCR Case no 47/2008, decision on merits, 20 October 2009.

⁵⁵ *Ibid*, para 63.



Maslow's 'hierarchy of needs'; Credit: Wikimedia Commons

Housing and *home* encompass shelter, but refer also to what we might think of as 'medium-order' needs:

"Housing provides and protects some of the most fundamental needs. Safe and secure housing shields us from the elements and provides refuge from external physical threats. It gives us a material base from which to build a livelihood and take part in the life of the community and the state. But housing also provides a space in which our psychological needs can be met. Secure housing is both intrinsically and instrumentally important in the formation and protection of community, belonging and place in the world. Those whose housing is inadequate, who are forced from their homes, and who are homeless suffer severe personal and social deprivations with both psychological and material impacts."⁵⁶

A right to adequate *housing*, arguably builds towards the middle layers of Maslow's pyramid: it includes both those basic survival needs that constitute the base of the pyramid, and the psychological, social and relational (eg family) needs that are essential to human dignity. 'Shelter' and 'accommodation' are components within the theoretical frameworks that delineate rights to housing and home. However, it is widely recognised in conceptual accounts of 'housing' and 'home' that while they are essential to human survival and provide the base on which housing and/or home

⁵⁶ J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (2013), pp4-5.

are established, ‘shelter’ and ‘accommodation’ are thin concepts, and fall far short of internationally accepted standards for adequacy in respect of housing and home. This includes the international obligations that Ireland has recognised as universal under the ICESCR. Any new constitutional provision based on ‘shelter’ or ‘accommodation’ would fall far short of internationally-recognised minimum standards in relation to housing and home.

5. The concept of housing rights and housing adequacy

The conceptual requirements for ‘adequacy’ in respect of the Article 11 right to housing have been set out by the United Nations Committee on Economic, Social and Cultural Rights, and include: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy (General Comment 4, 1991). Under Article 2(2), the requirement of non-discrimination is also embedded in the Article 11 right. Like the concept of home, the concept of a ‘right to housing’ or ‘right to adequate housing’ goes beyond a right to physical shelter, or accommodation. The General Comment 4 requirements identify a set of fundamental needs that adequate housing serves. These are expressed in practical terms, and can be conceived in relation to what the *housing* itself provides—distinct from the attachment that occupier’s develop to *home*. Nevertheless, the requirements of *adequate housing* clearly create the conditions of possibility for *home*: habitability requires that the physical structure of the house is adequate; legal security of tenure ensures that the physical structure of the house and the x-factor meanings that it provides shelter and location for (territory, security, control, identity) are safeguarded; affordability is a necessary condition for home as financial investment to be realised, and to ensure that housing and home are sustainable. The availability of services, local and cultural adequacy underpin the development of socio-cultural home meanings.

The ‘right to adequate housing’, articulated under Article 25 of the UDHR and Article 11 ICESCR in the context of a right to an adequate standard of living, is a social right, inasmuch as it is conceived as necessary to enable humans to exist in society at a minimum level, and thereby enabling human participation in the life of the community.⁵⁷ It is linked to the realisation of economic rights: as noted in section 2, above, housing and home underpin participation in the labour market. It is also a cultural right:

“[t]he form, location, arrangement and materials of the home are an expression in cultural practice and values. This is true for all groups, not just for indigenous and minority groups, though it is these groups for whom the cultural aspect of housing rights might most often be violated.”⁵⁸

⁵⁷ A Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in RP Claude & BH Weston (eds), *Human Rights in the World Community: Issues and Action* (3rd Edn 2006); C Fabre, *Social Rights under the Constitution: Government and the Decent Life* (2006).

⁵⁸ Hohmann, p8.

To the extent that social rights enable participation in the life of the community and the state, there is also an important link across to civil and political rights. Hohmann explains that: “[t]he means by which participation is achieved may be different for the two sets of rights, but the normative basis upon which the protection rests appears strikingly similar...”⁵⁹

Hohmann draws an important distinction between the ‘right to housing’ and ‘housing rights’. She describes the ‘right to housing’ as the human rights, codified or implied in international and regional rights treaties and declarations, and into domestic constitutional orders through bills or declarations of rights. Hohmann explains that these rights exist separate from questions of citizenship. As human rights, they are universal:

“based on the recognition of human beings *as* human beings, not the rights one has by virtue of one’s membership of a particular national political community or on one’s status within a specific sovereign state.”⁶⁰

The claim to a right to housing as a human right stems not from the claimant’s citizenship of a particular country, but from the universal rights that have been recognised by the Contracting State as inherent to all people. ‘Housing rights’ are the legal rights that are provided for in the domestic law of a specific nation state. A second distinction drawn by Hohmann is between the recognition of a *right* to housing, on the one hand, and the substantive provision of adequate housing on the other. Hohmann noted the importance of defining ‘adequacy’ and also the steps that states will take to realise the right: “If the right cannot be laid claim to it is a hollow promise and any attempt to invoke it as an instrument in a project of advocacy is fraught with uncertainty.”⁶¹

It is perhaps trite to observe that while the importance of safe and secure housing in providing for and protecting our most fundamental human needs is widely recognised, there is no single model for ‘adequate housing’. The question of what constitutes adequate housing is culturally and historically contingent, and a diversity society will require diverse housing forms depending on the context (eg urban/rural; family form). The conceptual framework for housing adequacy recognises that it is not productive to attempt to distil or reduce the form for housing adequacy. Rather, it focuses on principles that can be applied in a wide range of cases to guide the development of housing provision and to evaluate whether standards or criteria have been met in any given case.

On the one hand, the right is intricate, fluid and dynamic; but, on the other hand, it is “more limited and constrained than might be imagined.”⁶² Much of the scholarship and debate concerning the ‘right to housing’ has focused on how clearly

⁵⁹ Hohmann, p8.

⁶⁰ Hohmann, pp5-6.

⁶¹

⁶² Hohmann, p13.

defined the content of the right is; how clearly defined the obligations are on Contracting States; how effective enforcement mechanisms are—noting that international and regional human rights treaties and instruments are not necessarily directly justiciable in domestic law; and what specific steps state institution and actors are required to take. Hohmann’s analysis of the scope, content and meaning of the right to housing in international and regional human rights instruments and national constitutions highlighted three key weaknesses in the ‘right to housing’ as interpreted in human rights law:⁶³

- (1) The “failure of the courts and monitoring bodies responsible for its development and enforcement to spell out a normative core, such that it remains difficult to say what the right is, or, as a consequence, what might be claimed through it.”
- (2) “the right is overly procedural, even programmatic appearing to privilege means at the expense of ends.”
- (3) “most fundamentally, the legal interpretation of the right to housing appears to float in a vacuum, divorced from the actual questions of suffering, marginalisation and destitution it should seek to remedy.”

The next section focuses on how the concepts of housing and home have informed the articulation of rights to housing and home in domestic constitutions; and on how the concepts have been developed through domestic constitutional dispensations.

6. Concepts of housing and home in the national constitutional context

The South Africa example offers a modern illustration of the manifestation and interpretation of internationally-recognised concepts of housing and home within a national constitution. Section 26 of the 1996 Constitution provides 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 the 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.

This domestic constitutional commitment is distinct in its nature from the obligations that states undertake as signatories to international human rights treaties and instruments. While international instruments make expressive and material commitments to the universality of human rights obligations, national constitutions define the relationship between a state and its citizens. Nevertheless, in giving conceptual content to the ‘right to housing’, national-level provisions and the courts tasked with interpreting these, draw on the conceptual frameworks discussed above.

While the Universal Declaration of Human Rights did not include binding legal commitments, the base line of commitments, vocabulary and concepts that

⁶³ Hohmann, p13.

developed through the scaled legal infrastructures⁶⁴: from UDHR to ICESCR, to regional treaties like the ECHR, RESC and African Charter on Human and Peoples' Rights; have collectively developed the conceptual content of rights to housing and home. In this sense, the aspirations articulated and applied at the transnational level are pulled through to provide the conceptual tool-kit from which binding legal commitments are inspired, advanced, directed and developed.⁶⁵ While much attention has been given to the justiciability of 'rights to housing'—to whether they generate binding and enforceable legal commitments—it is also instructive to consider how the conceptual content developed under these dispensations informs domestic constitutional and other legal provisions. 'Right to housing' debates at the transnational level have established the normative frameworks through which concepts of, and commitments to, housing and home are made, recognised, understood, accepted, and valued. This process in turn constructs the frameworks and toolkits for legal, political and community action at the domestic level. Thus, while it is legitimate for international housing rights scholars to focus on ensuring that commitments have 'teeth'; commitments to progressive realisation and minimum core obligations also create the ground from which rights-bearers can hold duty-bearers to account.

Section 26 (right to housing) interacts with section 25 (right to property),⁶⁶ with the work of interpreting and balancing competing rights under the 1996 Constitution remitted back to the Constitutional Court. Just as Ireland, in 1922 and 1937, drew on international examples in framing its hybrid constitutional property provisions; South African constitutional debates in the 1990s were framed by international and domestic norms, with inspiration from hybrid approaches to reconciling competing claims to property and housing in other jurisdictions—including Canada, India and Ireland—influential in shaping a 'specifically South African compromise'.⁶⁷

In *Government of the Republic of South Africa. & Ors v Grootboom & Ors*,⁶⁸ the South African Constitutional Court recognised that the 'right to adequate housing' under section 26 goes beyond mere shelter or accommodation. The court recognised the essential role of housing as the foundation for the realisation of rights to public participation, equality, human dignity and access to information; and the positive obligation on the state to ensure the realisation of these rights. Jacob J stated that:

⁶⁴ While there is no explicitly enumerated 'right to housing' in the ACHPR, the African Commission has implied the right as arising from other requirements of other articles of the Charter, including the right to the highest attainable standard of physical and mental health and the right to protection of the family. See Hohmann, pp76-82.

⁶⁵ H Lauterpacht, *International Law and Human Rights* (1950), 425.

⁶⁶ Article 25(1) recognized the right to private property; article 25(2) limited expropriation to 'a public purpose or in the public interest', and subject to just and equitable compensation (article 25(3)). Land reform and equitable access were included within the 'public interest' (article 25(4)) and the state was placed under an obligation to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis' (article 25(5)).

⁶⁷ Koskeniemi (2017).

⁶⁸ 2001 (1) SA 46 (CC).

“Housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. The right of access to adequate housing also suggests that it is not only the State that is responsible for the provision of houses, but that other agents within society, including individuals themselves, must be enabled by legislative and other measures to provide housing.”

Article 26 required the state to take reasonable steps to achieve progressive realization of this right (*housing*), and protected occupiers against arbitrary eviction from their *homes* (article 26(3)).

At the domestic level, as at the transnational scale—the commitment to a ‘right to housing’ is not a panacea, and nor does it (in and of itself) deliver adequate housing for every citizen. Rather, it provides a framework within which states realise their commitments to citizens through progressive, timely and active steps to improve housing conditions for citizens. Similarly, the constitutional protection of the *home* does not mean that home occupiers can or will never be evicted. Defining citizens’ rights, and states’ obligations, using ‘thick’ concepts of housing and home merely ensures that these commitments are given due weight in political, policy and legal decision-making, and in shaping and determining legal and political action. This can be contrasted with non-constitutional commitments—when specific references to housing and home are not present in domestic constitutions—and to thinner commitments to ‘shelter’. In the absence of a domestic constitutional commitment to housing and home, competing rights and claims—particularly those which do benefit from specific constitutional protection, for example the right to property—can more readily ‘trump’ considerations of housing adequacy and protection from eviction.

In the South African Constitution, the right to housing and protection against arbitrary eviction (section 26) sits alongside the right to property (section 25). Conferring constitutional status on both rights ensures that both types of consideration are weighed in the balance of political and legal decision-making. It establishes a constitutional starting point, from which the interpretation of articles 26(3) and article 25(5) on the one hand, and article 25(1) on the other, are negotiated.⁶⁹ Koskenniemi explained that this type of constitutional mechanism enables: “[p]olitical conflicts over property rights [to be] thus projected into the future...The outcome is a forever changing but bounded interaction”⁷⁰ in which legal standards, options and outcomes are produced taking account of the range of commitments the state has made to its citizens.

⁶⁹ See A. J. VAN DER WALT, *CONSTITUTIONAL PROPERTY LAW* (Cape Town: Juta 2011).

⁷⁰ Koskenniemi (2017).

Although there remains a substantial gap between the aspiration articulated in the 1996 Constitution and the realisation of its full transformative effect, section 26 has paved the way for some important and large-scale regulatory reforms. Since 1996, South Africa has adopted a comprehensive suite of transformative policies and enacted a range of statutes that aim to advance the realisation of the right of access to adequate housing and to protect occupiers against arbitrary eviction. For example, in the aftermath of the seminal judgment of *Government of the Republic of South Africa and Others v Grootboom and Others*,⁷¹ the Department of Human Settlements included a chapter on the upgrading of informal settlements⁷² (“UISP”) in the National Housing Code.⁷³ The upgrading of informal settlements is a “national housing programme” for purposes of section 3(4)(g) of the Housing Act 107 of 1997. The programme was developed to facilitate a structured upgrading of informal settlements in a phased approach.⁷⁴ The objectives of the UISP include promoting: security of tenure; health and safety; and empowerment.⁷⁵ The implementation principles of the UISP seek to approach the upgrading of informal settlements in a “holistic, integrated and locally-appropriate manner.”⁷⁶ A salient feature of this approach is flexibility in that all decisions about upgrading an informal settlement demands a context-sensitive analysis of the rights and needs of unlawful occupiers in order to find concrete and tailored solutions for each community.⁷⁷ The UISP envisages that these case-specific solutions should primarily be – but, invariably is not – achieved through engagement between local authorities⁷⁸ and communities.⁷⁹

Another example is the Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”), enacted to create a regulatory framework for inclusive spatial planning and land use management in South Africa. A list of developmental principles were enumerated in SPLUMA against which all spatial planning, land development and land use management will be evaluated. These principles illuminate the complexities of upgrading informal settlements, which require political will, endurance and multi-sectoral partnerships as essential elements for the success of any upgrading process. Engagements with communities and partnerships with civil organisations, NGOs and public interest lawyers have been beneficial to securing a rights-based approach to the upgrading of informal settlements. A general principle in the Housing Act places an obligation on national, provincial and local government

⁷¹ 2001 (1) SA 46 (CC).

⁷² National Department of Housing *National Housing Programme: Upgrading of Informal Settlements* (2004).

⁷³ Published by the Minister for Human Settlements in terms of section 4 of the Housing Act 107 of 1997.

⁷⁴ Par 13.3.4 of the UISP.

⁷⁵ Par 13.2.1 of the UISP.

⁷⁶ Par 13.2.2 of the UISP (holistic approach).

⁷⁷ See also *Grootboom* para 37.

⁷⁸ Par 13.2.2 of the UISP (public to public partnership).

⁷⁹ Par 13.2.2 of the UISP (community partnership).

to “facilitate active participation of all relevant stakeholders in housing development”.⁸⁰

These initiatives illustrate the nature of the transformation that followed the enactment of domestic constitutional commitments to thick concepts of housing and home. They demonstrate how constitutional recognition and commitment can function as a vehicle to progress the realisation of social and cultural rights, by drawing commitments to these concepts down to the national, and then to the local level. Another interesting example of this drawing down effect is the Constitution of Portugal (1976). Part I, Title III, Chapter II, Article 65 provides that:

Housing and Urban Planning

- “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.
2. In order to ensure enjoyment of the right to housing, the state shall be charged with:
 - a. planning and implementing a housing policy that is embodied in general town and country planning documents that guarantee the existence of an adequate network of transport and social facilities;
 - b. in cooperation with the autonomous regions and local authorities, promoting the construction of low-cost and social housing;
 - c. stimulating private construction, subject to the general interest, and access to owned or rented housing;
 - d. encouraging and supporting local community initiatives that work towards the resolution of their housing problems and foster the formation of housing and self-building cooperatives.
3. The state shall undertake a policy that works towards the establishment of a rental system which is compatible with family incomes and access to individual housing.
4. The state, the autonomous regions and local authorities shall lay down the rules governing the occupancy, use and transformation of urban land, particularly by means of planning instruments and within the overall framework of the laws concerning town and country planning and urban planning, and shall expropriate such land as may be necessary to the fulfilment of the purposes of urban planning.
5. Interested parties shall be entitled to participate in the drawing up of urban planning instruments and any other physical town and country planning instruments.”

This example, which focuses on planning, housing development and access to adequate and affordable housing provision, offers an illustration of how a high-level thick concept of *housing* can be drawn down within a national constitutional instrument to shape practical changes in political and legal decision-making.

⁸⁰ Section 2(1)(l) of the Housing Act.

Another approach would be to consider how a thick constitutional concept of *home* would inform the development and interpretation of statutory housing rights—for example, the legislation that creates statutory rights of possession, rent control and security of tenure for certain categories of residential tenant. While the content of concepts of housing and home is broadly co-extensive in terms of what is required and valued in and from a residential setting to ensure an adequate standard of living for safety, security, health and wellbeing, the language of ‘*right to housing*’ is more often used to describe acquisition, access and adequacy for people who are excluded from housing, while the language of *home* is more often used to describe attachment to a particular dwelling that is used and occupied *as a home*. The concept of home is phenomenological or experiential, so legal protections for home tend to focus on safeguarding an existing or established home, for example, through protections against eviction or home loss.

(7) Summary

- The concept of **home** encompasses a range of human experiential and psychological needs.
- ‘Home = house + x’, with ‘house’ referring to **shelter** or **accommodation**, while the ‘x-factor’ meanings are derived from the experiential phenomenon of use and occupation *as a home*: security, control, belonging, rootedness, continuity, privacy, refuge, identity, family, cultural adequacy.
- These broader home meanings have been positively associated with basic psychological needs, for health and wellbeing.
- Involuntary loss of home, for example through eviction, is associated with trauma, stress and distress for displaced occupiers, negative physical and mental health consequences. These are most detrimental for people who are most socio-economically disadvantaged.
- The concepts of **home** and **housing** are closely related. While the concepts emerged from different scholarly and political traditions, they refer to the same underlying human needs and experiences. Both are conceptually anchored in a recognition that, as the foundational site and scene of human individual and family life, the ‘house’ serves active functions that are essential to human health and wellbeing.
- The ‘right to housing’ is embedded in the right to an adequate standard of living, to support health and wellbeing.
- ‘**Housing**’ is more often used to describe acquisition, access and adequacy for people who are excluded from housing, while the language of **home** is more often used to describe attachment to a particular dwelling that is used and occupied *as a home*.

THE EMOTIONAL DYNAMICS OF 'HOUSING' AND 'HOME'

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Introduction

Exploring the emotional dynamics of 'home' and 'housing' as part of a constitutional referendum takes us into the field of law and emotion. For the uninitiated (and I counted myself amongst that categorisation, until fairly recently), law and emotion is a comparatively new interdisciplinary field that looks at the role that emotions play, do not play, and ought to play in the practice and conception of law and justice. As Terry Maroney- one of the most prominent scholars in the field- pointed out in a seminal article written in 2006, law has tended to operate on the assumption that there is a world of difference between reason and emotion; that the sphere of law admits only reason; and in this sphere it is essential to keep emotional factors out of the picture.¹ Though the law has always had to take account of human emotion, the conventional explanation has given it a very restricted scope.² Emotions 'get in the way' of reason and logic; and, while judges and lawyers (and law-makers) may have emotions, one of the key skills that they are expected to exercise is setting those emotions aside, to ensure that emotion does not intrude on reason as the true preserve of law.³

The reality has long since been exposed as being fundamentally different. As Susan Bandes- a pioneer of law and emotion as a discipline- declared in the opening words of her edited anthology of original essays on the subject, 'emotion pervades the law'.⁴ Since then, the relationship between the two has developed further, with an ever-expanding body of literature.⁵ Having accepted that there is a role for emotions in law, the debate has moved on to investigate specific emotions in particular areas of law and, more generally, to use the

¹ TA Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 *Law and Human Behavior* 119. See also ML Nelkin, 'Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School' (1996) 46 *Journal of Legal Education* 420; and J Schweppe and J Stannard, 'What's So "Special" About Law and Emotion?' (2013) 64 *Northern Ireland Legal Quarterly* 1.

² SA Bandes (ed), *The Passions of Law* (New York, New York University Press, 1999) 2.

³ Ibid.

⁴ Ibid, 1.

⁵ See e.g. BH Bornstein and RL Wiener, *Emotion and the Law: Psychological Perspectives* (New York, Springer, 2010); SA Bandes and JA Blumenthal, 'Emotion and the Law' (2012) 8 *Annual Review of Social Science* 161; H Conway and J Stannard (eds), *The Emotional Dynamics of Law and Legal Discourse* (Hart Publishing, Oxford, 2016); SA Bandes, JL Madeira, KD Temple and EK White, *Research Handbook on Law and Emotion* (Edward Elgar Publishing, 2021). See also, the collection of articles published in 'Symposium: Law, Psychology and the Emotions' (2000) 74 *Chicago-Kent Law Review*; 'Special Issue on Emotion in Legal Judgment and Decision-Making' (2006) 30 *Law and Human Behavior*; J Schweppe and J Stannard (eds), 'Special Issue: Law and Emotions' (2013) 64 *Northern Ireland Legal Quarterly*; TA Maroney and SA Bandes (eds), 'Special Section: Law and Emotion' (2016) 8 *Emotion Review*; and SB Blix, K Mack, T Maroney and SR Anleu (eds) 'Special Issue: Judging, Emotion and Emotion Work' (2019) 9 *Oñati Socio-legal Series*.

knowledge gained to 'help...understand how the law works, or (more importantly) how it might work better'– in short, to use our 'understanding of the emotions to improve the operation of legal doctrine'.⁶

As one might expect, a lot of the research has focused on areas of law that we might describe as 'obvious suspects': criminal law;⁷ emotion in judging;⁸ victims' rights;⁹ and family law.¹⁰ However, some work has been done on selected aspects of property law,¹¹ and my own research– often carried out with Dr John Stannard, a colleague at Queen's University– has looked at the role that emotions play in property law discourse and disputes.¹² In a recently published chapter on 'The Emotional Dynamics of Property Law',¹³ we began by referencing studies that show that most people have a 'mental toolbox of basic property rules'.¹⁴ This toolbox reflects what private citizens instinctively *feel* about property, its symbolic resonance, and about how the law should regulate and protect certain things– something that, as my paper today suggests, sits strongly with the concepts of 'home' and 'housing'. We also argued in our chapter that people's perceptions of property and what property means to them are not necessarily replicated in property law theory and doctrine, and that the affective connections that exist between owners and their property are often overlooked. Addressing these substantive issues requires nuanced solutions, and we discuss this at length in our chapter. However, we make the point that those who 'do' property law (whether as legislators, practitioners or judges) must be cognisant of the strength of underlying emotional attachments to property, the influence that these can exert and the perceptions that these

⁶ K Abrams, 'Exploring the Affective Constitution' (2008) 59 *Case W Res L Rev* 571, 573.

⁷ See e.g. DM Kahan and MC Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 269; and E Spain, *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge, Cambridge University Press, 2011).

⁸ Maroney has written extensively in this field– see for example, TA Maroney 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 *California Law Review* 629; TA Maroney, 'Angry Judges' (2012) 65 *Vanderbilt Law Review* 1207; and TA Maroney and JJ Gross, 'The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective' (2014) 6 *Emotion Review* 142. See also K Mack and SL Roach Anleu, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2020).

⁹ See e.g. J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford, Hart Publishing, 2009); SA Bandes, 'Victims, "Closure," and the Sociology of Emotion' (2009) 72 *Law and Contemporary Problems* 1.

¹⁰ See for example, S Moldonado, 'Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce' (2008) 43 *Wake Forest Law Review* 441; C Huntingdon, 'Repairing Family Law' (2008) 57 *Duke Law Journal* 1245, and J Carbone and N Cahn, 'Family Law and Emotion' in Bandes et al, *Research Handbook on Law and Emotion* (Edward Elgar Publishing, 2021) 197.

¹¹ See e.g. A Rahmatian, 'Psychological Aspects of Property and Ownership' (2008) 29 *Liverpool Law Review* 287; P DeScoli and R Karpoff, 'People's Judgments About Classic Property Law Cases' (2015) 26 *Human Nature* 184.

¹² See H Conway and J Stannard, 'The Emotional Paradoxes of Adverse Possession' (2013) 64 *Northern Ireland Legal Quarterly* 75; H Conway and J Stannard, 'Property and Emotions' (2016) 8 *Emotion Review* 38; H Conway, ' "Where There's a Will": Law and Emotion in Sibling Inheritance Disputes' in Conway and Stannard (2016, n 5) 35; and H Conway and J Stannard, 'The Emotional Dynamics of Property Law' in Bandes et al (2021, n 5) 229.

¹³ Conway and Stannard (2021, n 12).

¹⁴ P DeScoli and R Karpoff (n 11), 186.

create amongst non-lawyers.¹⁵ This something that I want to explore here, in the context of 'housing' and 'home'- and to take us beyond our own disciplinary orbit in the process.

1. Attachment Theory

Before getting to the substance of my talk, it is useful to digress (briefly) into some of the underpinning theory. Research has looked at the link between property and emotions from a psychological perspective, analysing what property means to us as individuals and a society, and basic emotional traits associated with the broad constructs of 'ownership' and 'possession'.¹⁶ One of the dominant theories is attachment theory,¹⁷ and its various subcategories.¹⁸ Studies of real property tend to use the 'place attachment' subgroup as an important theoretical lens.

Simply put, place attachment denotes the affective connection that a person develops and maintains with a particular location. Defined in the literature as 'an emotional bond formed by an individual to a physical site due to the meaning given to the site through interactional processes',¹⁹ the dominant theme is a strong sense of 'person-place bonding that develops over time via repeated interactions with a place'.²⁰ Specific examples might include a favourite holiday destination; an individual's current home or living space; the family residence in which he or she was raised, and the surrounding neighborhood. The result is an emotionally complex yet dynamic concept, based on unique and formative personal histories between the individual and the place in question.²¹

Two other points should also be noted. First, the formative processes and resultant connections to these specific types of property can be personal, group and cultural;²² a sense of 'rootedness' and community ties are important as well.²³ Secondly, and more generally, place attachment involves a *psychological process of appropriation* whereby the place in

¹⁵ Though we must accept that the *weight* to be given to these emotional attachments must be context-specific.

¹⁶ See e.g. FW Rudmin, "'To Own Is To Be Perceived To Own": A Social Cognitive Look at the Ownership of Property' (1991) 6 *Journal of Social Behavior and Personality* 85.

¹⁷ J Bowlby, *Attachment and Loss, Volume 1* (New York, NY: Basic Books, 1969); J Cassidy and PR Shaver (eds), *Handbook of Attachment: Theory, Research and Clinical Applications* (1999).

¹⁸ Material possession attachment, place attachment and brand attachment.

¹⁹ MJ Milligan, 'Interactional Past and Potential: The Social Construction of Place Attachment' (1998) 21 *Symbolic Interaction* 1. See also I Altman and SM Low, *Place Attachment* (New York, NY: Plenum Press, 1992).

²⁰ SS Kleine and SL Baker, 'An Integrative Review of Material Possession Attachment' (2004) 1 *Academy of Marketing Science Review* 1 citing Low and Altman (n 19).

²¹ Kleine and Baker, *ibid*.

²² J Cross, 'Processes of Place Attachment: An Interactional Framework' (2015) 38 *Symbolic Interaction* 493.

²³ CE Anton and C Lawrence, 'Home Is Where The Heart Is: The Effect of Place of Residence on Place Attachment and Community Participation' (2014) 40 *Journal of Environmental Psychology* 451, 452.

question ceases to be a mere geographical location, and becomes closely linked with the person's identity.²⁴

We will see in the next section how these traits may onto the concept of home in particular- and how the associated affective connections shape people's personal, familial and social identities.

2. 'Housing' and 'Home': Social, Psychological and Emotional Dimensions

Numerous authors, and other panellists at this event, stress the importance of housing as a basic human right that speaks to the need of citizens and the promotion of social justice.²⁵ The point has been well made by people more qualified to speak to the matter, and I can only endorse it fully. When we talk about a right to housing, the thought process is instinctively one of housing as providing a *home* for people and a place to live. We all know that homes matter to people, but why? What is it that sets the home apart from other types of private property and makes it more than a 'mere' physical structure?

The concept of 'home' has spawned a vast amount of comparatively recent literature, much of which emphasises its complex and multifaceted nature.²⁶ Fox-O'Mahoney's work, in particular, has shaped debates within the legal sphere on this side of the Atlantic, while drawing on other disciplines.²⁷ When we look beyond law, we get a clear sense of the composite mix of the attachments that people have to the home- attachments that make it so unique. There are feelings about the home itself as a species of property (people often speak of feeling of love for, and contentment in, their homes),²⁸ and emotions also feature in how it is viewed as a place. Gurney, for instance, describes the home as an 'emotional warehouse'.²⁹ For Thompson, it is the 'most intimate space we inhabit...the place where our most significant relationships are nurtured [and] where we can impart a sense of self in both

²⁴ Milligan (n 19), 16-17.

²⁵ See e.g. J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Bloomsbury Publishing, 2013); WD Keating, *The Right to Housing: The Goal Versus the Reality* in KB Anacker, MT Nguyen and DP Varady, *The Routledge Handbook of Housing and Planning* (Routledge, 2019).

²⁶ As well as the sources cited below, see e.g. K Dovey, 'Home and Homelessness' in I Altman and CM Werner (eds), *Home Environments* (London: Plenum Press. 1985) and DB Barros, 'Home as a Legal Concept' (2006) 46 *Santa Clara Law Review* 255. However, Stern is more critical- SM Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) *Michigan Law Review* 1093.

²⁷ L Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007).

²⁸ Though it is important to acknowledge that feelings and emotional attachments to a home can be negative as well- for example, in cases of domestic abuse, or post-divorce where the home now symbolises the loss of the intact family.

²⁹ C Gurney, 'Towards a More Affective Understanding of Home' in *Culture and Space in Built Environments: Critical Directions/New Paradigms* (2000) 33.

physical and psychological ways'.³⁰ Similar sentiments infuse Peter Somerville's 1997 article entitled 'The Social Construction of Home',³¹ which references 'recurrent meanings of home as the center of family life; a place of retreat, safety and relaxation, freedom and independence; self-expression and social status; a place of privacy, continuity and permanence; a financial asset; and a support for work and leisure activities'.³² Somerville also notes that attachment is influenced by things such as class, age and gender;³³ and that it increases the longer a person resides there and accumulates more (positive) memories in the home.³⁴

A number of other core themes can be distilled from these sources and from the broader literature cited here:

- Having a home speaks to a person's sense of self, and sense of identity (both personal and familial).
- Home embodies a sense of security and stability, which feeds a sense of calm and contentment.³⁵
- Emotional attachments are distinct from legal indices of ownership and title: they are not dependent on that.
- Home encompasses a series of embedded relationships- both within the property itself and within the locality/community that is it is part of. Easthope, for instance, describes the home as being 'maintained and developed through the social relations that stretch beyond it'.³⁶ There is a sense of place and community here as well.
- Likewise, emotional attachments to the home cannot be measured in purely financial terms; it is impossible to attach a monetary value to them- even if- within legal realm- economic worth is a harsh yet inescapable reality in e.g. mortgage repossessions, bankruptcy.³⁷

³⁰ S Thompson, 'Home and Loss: Renegotiating Meanings of Home in the Wake of Relationship Breakdown (2007) 10 *M/C Journal* [1].

³¹ P Somerville, 'The Social Construction of Home' (1997) *Journal of Architectural and Planning Research* 226.

³² *Ibid*, 227-228.

³³ *Ibid*, 228-229.

³⁴ *Ibid*, 229 (and the various source cited therein).

³⁵ CJ Jørgensen, 'The Space of the Family: Emotions, Economy and Materiality in Homeownership' (2016) 33 *Housing, Theory and Society* 98.

³⁶ H Easthope, 'A Place Called Home' (2004) 21 *Housing, Theory and Society* 128, 135-136.

³⁷ A good illustration of the last two points is compulsory purchase, when public bodies take over land or buildings without the owner's consent in return for compensation. Take the well-known decision of the US Supreme Court in *Kelo v City of New London* 545 U.S. 469 (2005), when it ruled by a 5:4 majority that residents living in Fort Trumbull, New London, some of whom had been residents for their entire lives, had to vacate their homes for the pharmaceutical giant Pfizer to build a new plant there. The residents lost more than their homes; they lost their neighbourhood as well; the market value 'worth' of each property could not compensate for the personal and community loss, and consequent emotional impact.

So, what we have here is a tangle of 'messy' emotions rather than a single feeling. They have an ethereal quality to them, yet are instantly and universally recognisable; they are also dynamic and fluid, usually intensifying over time.³⁸

Of course, most of the literature is highlighting the feelings associated with *having* a home, and where 'home' tends to be synonym for the owner-occupied single household/ family residence. A right to housing may be something that is more aspirational- that also speaks to not having a home, or not having the home (or tenure)³⁹ that you want or need. The ideal of home ownership is part of the socio-cultural fabric of Irish society, as it is in many other countries.⁴⁰ It represents 'societal participation and belonging as well as respectability and identity'⁴¹ and speaks to the emotional attachments discussed immediately above.

Studies have revealed heightened levels of stress and anxiety associated with being unable to afford a home, of being unable to get onto the housing ladder because of rising prices. In a 2008 article based on interviews with people who bought homes in Edinburgh during a time of rapid house-price inflation, Christie, Smith and Munro describe housing markets as 'sources of excitement, distress, pleasure, and despair, both producing winners and fostering a sense of well-being and producing losers and creating a sense of exclusion'.⁴² These are feelings that, one suspects, are commonplace in Ireland today, and reinforce the need for an increased supply of housing. It also goes without saying that this must be affordable housing: home ownership is not a panacea where income(s) barely meet mortgage payments and outgoings.⁴³

This is not to ignore or downplay the significance of the rented home. Many of the affective connections and socio-psychological traits noted above are apparent with rented homes, and studies have shown the high levels of emotional distress caused by forced evictions from rented properties, rising rent costs, and being forced to live in run-down dilapidated buildings where tenants cannot afford to move elsewhere.⁴⁴ The issues around weaker regulation,

³⁸ See e.g. LC Manzo, 'Beyond House and Haven: Toward a Revisioning of Emotional Relationships with Places' (2003) 23 *Journal of Environmental Psychology* 47.

³⁹ Renting instead of owning; or renting under a precarious, short-term lease,

⁴⁰ See e.g. R Ronald, *The Ideology of Home Ownership: Homeowner Societies and the Role of Housing* (Palgrave Macmillan 2008).

⁴¹ H Christie, SJ Smith, and M Munro, 'The Emotional Economy of Housing' (2008) 40 *Environment and Planning A* 2296, 2229.

⁴² *Ibid*, 2300.

⁴³ Mortgage default, and the risk of repossession create emotional- as well as economic- problems.

⁴⁴ See e.g. ME Hatch and J Yun, 'Losing Your Home is Bad For Your Health: Short-and Medium-Term Health Effects Of Eviction on Young Adults (2021) 31 *Housing Policy Debate* 469.

short-term leases and 'landlord power' have already been highlighted within the Irish rental market, with the COVID-19 pandemic shining an even harsher light on this as Waldron and others have pointed out.⁴⁵ In this context, a right to housing speaks to affordable rental properties, with more security of tenure, as well.

3. The Significance of a Right to Housing?

Most legal systems already recognise the inherently unique character of the home, and the complex emotional attachments that citizens have to it- both individual and collectively- in various ways. Under criminal law, the so-called 'castle' doctrine that exists in some jurisdictions (most notably the United States) gives a wide latitude to citizens who use lethal force in defence of the home.⁴⁶ In the family property context, Irish law confers certain protective provisions through the Family Home Protection Act 1976 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

So what impact would have a constitutional right to a 'home' or- more likely- 'housing' have in Ireland; what would be the added benefit? Specific guarantees already exist under existing international human rights instruments: the two obvious examples are the right to respect for a home under Article 8 of the European Convention on Human Rights⁴⁷ and the 'right to housing' that is recognised in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The notion of home and housing as both conceptual bedfellows and basic human rights is well-established and uncontroversial. Hohmann, for instance, states that 'the right to housing makes a crucial connection between the human being at the heart of human rights, and the physical conditions and environment in which she lives her daily life', and that the 'denial of adequate housing goes to the core of what it means to be a human being in community with others'.⁴⁸

Yet, a constitutional guarantee of housing, if accepted in an Irish referendum, would be a fundamentally different legal creature and something that- in my opinion- would be *viewed* very differently. Of course, constitutional theorists can speak to this theme in a way that I

⁴⁵ R Waldron, 'Experiencing Housing Precarity in the Private Rental Sector During the Covid-19 Pandemic: The Case of Ireland' (2022) *Housing Studies* 1; C O'Toole, R Slaymaker, K McQuinn, C Coffey and E Corrigan, *Exploring the Short-Run Implications of the COVID-19 Pandemic on Affordability in the Irish Private Rental Market* (ESRI Report, Research Series No 108, 2020).

⁴⁶ DM Drake, 'The Castle Doctrine: An Expanding Right To Stand Your Ground' (2007) 39 *St Mary's Law Journal* 573.

⁴⁷ Incorporated into Irish law through the European Convention on Human Rights Act 2003.

⁴⁸ JM Hohmann, 'Resisting Dehumanising Housing Policy: The Case for a Right to Housing in England' (2018) 4 *Queen Mary Human Rights Law Review* (pp 5-6 transcript).

cannot; but we can point to superior rights, important rules of principle and relationships between state and citizens that transcend changes of government as core themes. There is something in a constitutional right that advances the collective good of society that recognises it, and creates a strong sense of accountability- with which comes a sense societal reassurance. I would also venture to suggest that people have a stronger sense of connectivity to a constitutional than an international human rights guarantee- that the former has more potency, that it exists to advance the collective good of one's own society, and will bring about real change, attract strong legal protections etc.

Article 40.5 of the Irish Constitution already recognises the inviolability of a dwelling, while Articles 40.3 and 43 protect private property. Yet these are all very distinct protections, none of which come close the sort of express protection for a 'right to housing' that is being contemplated here and its underlying social-economic and political aims. Much depends on the final wording; but one would expect a positive obligation that envisages basic guarantees for housing that drive legislative change, trigger legally protected rights, and increase supply to address the shortage of adequate and affordable homes. These would be significant gains, though the experience from South Africa suggests that constitutional change must be matched by service delivery and linked to other socio-economic rights.⁴⁹

Further down the proverbial line, the role of the courts as guardians and interpreters of such a right will play a major role, and not just in a purely legal sense. Kathy Abrams has suggested that emotions also play an important role in constitutional decision-making 'because specific norms embodied in the Constitution- norms articulated in the document, or in the adjudication that gives it meaning- have crucial affective dimensions'.⁵⁰ The point to note here is a channeling of emotions around constitutional rights; there are already examples in the Irish context in judicial commentary around the emotional connotations of a 'dwelling'. In *DPP v Anthony Barnes*⁵¹ (where the victim died during the course of a domestic burglary) the court referred to Article 40.5 as the 'modern Irish formulation of a principle deeply felt throughout historical time and in every area to which the Common Law has penetrated...[that] a person's dwellinghouse is far more than bricks and mortar'. The court continued:

Though a dwellinghouse is property and often indeed the most valuable piece of property an individual citizen possesses, it would be quite wrong to equate it with

⁴⁹ See e.g. LA Williams, 'The Right to Housing in South Africa: An Evolving Jurisprudence' (2013) 45 *Colum Hum Rts L Rev* 816; M Sobantu, N Zulu and N Maphosa, 'Housing as a Basic Human Right: A Reflection on South Africa' (2019) 31 *Southern African Journal of Social Work and Social Development* 1.

⁵⁰ Abrams (n 6), 580. Though referring to the US Constitution, her arguments were not thus confined.

⁵¹ [2006] IECCA 165

other forms of property such as money or money's worth or other pieces of personal property... [A] dwellinghouse is a higher level, legally and constitutionally, than other forms of property. The free and secure occupation of it is a value very deeply embedded in human kind and this free and secure occupation of a dwellinghouse, apart from being a physical necessity, is a necessity for the human dignity and development of the individual and the family."

Likewise, in *DPP v O'Brien*⁵² (where the issue was whether Gardaí could effect a lawful arrest under s 30 of the Offences Against the State Act 1939 when effectively trespassing in the dwelling in question), the court cited Article 40.5 as 'guaranteeing the "inviolability" of the dwelling'- something that 'presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world'.

One would expect a similar acknowledgement of housing, and its importance to the experience and meaning of everyday life, in any judicial analysis of a new constitutional right.

4. Concluding Remarks

In Hazel Easthope's 2004 article entitled 'A Place Called Home',⁵³ she suggested that, to understand the meaning of 'home' we need to recognise it as a 'particularly significant kind of place *with which, and within which, we experience strong social, psychological and emotive attachments*'.⁵⁴ These are complex, multi-faceted attachments that speak to both the individual and the collective, and to a sense of belonging and social participation. All of these things must be acknowledged as part of the debate on a right to housing, to fully appreciate the wider and deeper impacts that such a right could have on private citizens and on society as a whole.

In seeing law as more than a system of rules, law and emotions scholars argue that emotion is both significant and deserving of scrutiny in the legal sphere, to borrow Terry Maroney's claim in 'A Proposed Taxonomy of Emerging Field'.⁵⁵ Doing so not only helps to inform underlying theories of law; it also allows us to see both the significance and the potential impact of legal change from a distinct yet crucial perspective. With that in mind, the emotions and sentiments embedded in the concepts of home and housing are an important part of the contextual backdrop to the constitutional amendment being discussed here today.

⁵² [2012] IECCA 68.

⁵³ Easthope (n 36)

⁵⁴ *Ibid*, pp 135-136 (emphasis added).

⁵⁵ Maroney (n 1).