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PANEL 2

Housing Rights versus Property Rights?*

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Constitutional Property Rights – Setting Parameters for Responses to the Housing Crisis

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1. Introduction

This paper is a response to the request from the Commission to consider *How does the Irish Constitution protect property rights, and how have these rights been interpreted by the courts? What are the drawbacks, if any, with the status quo?* It argues that a wide range of restrictions on property rights are permissible within the parameters currently set by Irish constitutional property law. This reflects on the one hand, the dual protection of both individual property rights and private ownership as an institution in Articles 40.3.2˚ and 43 of the Constitution, and on the other hand, the empowerment of the State to restrict the exercise of property rights in Article 43.2. Proportionality and procedural fairness are key considerations. In a small number of decisions, the Supreme Court ruled in a way that suggests resistance to the burdening of discrete social groups with the costs of remediating social problems. Those decisions created ambiguity concerning the circumstances in which an interference with property rights could be deemed to be 'unjust' or 'disproportionate'. However, although they have not been overruled, those precedents have not been applied by the Superior Courts in more recent cases that raised similar issues. As such, there is significant scope to introduce redistributive measures within the constitutional parameters currently set by the property rights guarantees.

2. The Protection for Property Rights in Articles 40.3.2˚ and 43 of the Constitution

The Irish Constitution contains two core provisions addressing private property rights, Articles 40.3.2˚ and 43, which the Supreme Court has indicated should be interpreted in conjunction with Article 40.5's guarantee of the inviolability of the dwelling.[1]

First, private property rights are protected alongside other personal rights in Article 40.3:

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[1] *Reid v IDA* [2015] IESC 82.

> 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Second, the right to private ownership and the exercise of property rights are dealt with in Article 43:

> 1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

The current judicial consensus is that individual rights over owned property are protected by Article 40.3.2°, but that the concept of "unjust attack" in Article 40.3.2° must be read considering "the principles of social justice" and "the exigencies of the common good" referenced in Article 43.2. Article 40.3.2° is the source of protection for individual rights over property (*i.e.* rights of ownership), while Article 43.1 guarantees the individual right to private ownership of property (*i.e.* an institutional guarantee of private ownership). The rights protected by these provisions are not absolute, but rather can be qualified based on the principles set out in Article 43.2.

This interpretation of the Constitution as affording 'double protection' for property rights is rooted in *Blake v The Attorney General.*[2] In that Supreme Court decision, O'Higgins CJ characterised Article 43 as a statement concerning the attitude of the Irish State towards private ownership, involving an institutional guarantee of private property coupled with a statement of the circumstances in which the exercise of rights flowing from that institutional guarantee (property rights) could be restricted. Individual property rights were held to be dealt with alongside other personal rights in Article 40.3.2°.[3]

In subsequent decisions, the courts have drawn on both Article 40.3.2° and Article 43 in constitutional property rights adjudication, seeking to achieve a harmonious interpretation of the two constitutional property clauses.[4] For example, in *Re Article 26 and Part V of the Planning and Development Bill 1999*[5], the Supreme Court characterised the approach adopted in *Blake*, whereby the impugned restriction was analysed solely by reference to Article 40.3.2° on the basis that it affected *individual* rights over private property and so did not engage Article 43, as drawing an unduly rigid line between the two provisions. It noted that in most cases where legislation was challenged because of its impact on property rights, debate would arise over the consistency of the legislation with "the exigencies of the common good" and "the principles of social justice."[6] In this way, Article 43.2 is treated by courts as relevant to the concept of "unjust attack" in Article 40.3.2° and informs judicial analysis of restrictions imposed on individual property rights.[7]

This harmonious interpretation provides a persuasive and workable reading of the relative functions of Articles 40.3.2˚ and 43. The regulatory power set out in Article 43.2.2° is stated to be over the "exercise" of the rights set out in Article 43.1. The *prima facie* right to own is exercised by owning particular property, meaning any restrictions imposed by the

[2] [1982] IR 117, hereafter *Blake*.
[3] *Ibid*, at 135.
[4] *See eg PMPS v Attorney General* [1983] IR 355, *Cafolla v O'Malley* [1985] IR 486, *Madigan v Attorney General* [1986] ILRM 136, *Lawlor v Minister for Agriculture* [1990] 1 IR 356, *An Blascaod Mór Teoranta v Commissioners of Public Works* [1998] IEHC 38, *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, at 366-367.
[5] [2000] 2 IR 321.
[6] *Ibid*, at 348.
[7] See also *Dreher v Irish Land Commission*, where Walsh J stated, "I think it clear that any State action that is authorised by Article 43 of the Constitution and conforms to that Article cannot by definition be unjust for the purpose of Article 40.3.2": [1984] ILRM 94, at 96. Interestingly, both Henchy J and Griffin J agreed with Walsh J's judgment, but referred simply to the failure of the applicant to show any inconsistency between the impugned compensation provision and Article 40.3 of the Constitution. *Ibid*, at 98-99. This statement was approved the Supreme Court *O'Callaghan v Commissioners for Public Works* [1985] ILRM 364, at 368 and *ESB v Gormley* [1985] 1 IR 129, at 150. See similarly *Carrigaline Community Television Broadcasting Co Ltd v Minister for Transport* 1997] 1 ILRM 241, at 288.

State pursuant to Article 43.2 must necessarily impact on individual property rights. Following such an interpretation, the State is absolutely precluded from abolishing private ownership in general. It is further prohibited from setting down exclusionary rules about who can and cannot own property or avail of the major incidents of ownership such as the right to transfer and bequeath property. Article 43.1 prohibits the State from abolishing the general right to transfer, bequeath or inherit property. In *O'B v S*, which concerned statutory limitations on the right to inherit property, the Supreme Court emphasised the general nature of these guarantees, holding that legislation could prevent succession to property by individuals in some circumstances.[8] Consequently, Article 43.2 does not guarantee a protected core of rights of transfer, inheritance and bequest to all owners – rather, it prohibits the *general abolition* of these aspects of the institution of private ownership. Most significantly, the specific allocation of property is not frozen for all time by Article 43.1. On the contrary, the State is expressly empowered in Article 43.2 to control how individuals exercise their property rights to secure the common good and social justice. Indeed, Article 43.2's reference to 'the exigencies of the common good' has been repeatedly relied upon by courts to justify a wide variety of restrictions on property rights.[9]

3. Standards of Review in Irish Constitutional Property Law

In *J & J Haire and Company Ltd v Minister for Health*, McMahon J in the High Court gave a good synopsis of the factors that a court will consider in reviewing the constitutionality of legislation or administrative decisions on property rights grounds, saying that "unjust" in Article 40.3.2° "…refers to matters such as retrospectivity, lack of fair procedures, unreasonableness and irrationality, discrimination, lack of proportionality and, in some cases, lack of compensation."[10] As signalled by McMahon J, where a statutory provision is challenged on the basis that it unconstitutionally interferes with property rights, it will usually be subjected to proportionality analysis by the courts. Such analysis generally favours the

[8] [1984] IR 316.
[9] See Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th edition, Bloomsbury, 2018), at pp. 2422-2424.
[10] [2009] IEHC 562.

public interest, with relatively little weight given to the impact on adversely affected property rights in most cases.[11]

In some cases, the courts apply rationality review as set out in *Tuohy v Courtney*, in addition to or instead of proportionality review.[12] *Tuohy* rationality provides that where legislation balances competing individual rights, courts should not impose their views on the appropriate balance to be struck, with the judicial role limited to determining '…whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.'[13] For example, a measure that balanced private property rights against any constitutional right to housing would in principle fall to be assessed by reference to that rationality standard. However, the courts have not been consistent in their use of the rationality standard in 'balance of rights' cases.[14]

The Supreme Court in *Re Article 26 and the Health (Amendment) (No. 2) Bill 2004* suggested another approach to reviewing interferences with property rights more closely focused on the text of Article 43.2 of the Constitution:

> [T]he Court is satisfied that the correct approach is: firstly, to examine the nature of the property rights at issue; secondly, to consider whether the Bill consists of a regulation of those rights in accordance with principles of social justice and whether the Bill is required so as to delimit those rights in accordance with the exigencies of the common good; thirdly, in the light of its conclusions on these issues, to consider whether the Bill constitutes an unjust attack on those property rights.[15]

The courts have not adopted a consistent approach to the selection of the appropriate standard of review.[16] For example, it remains unclear whether the *Health Bill case* established a new 'test' for reviewing interferences with the exercise of property rights, or merely stated a property-specific gloss on proportionality and/or rationality review.

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[11] On this, see Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 *DULJ* 1.
[12] See e.g. *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *BUPA Ireland Ltd v Health Insurance Authority* [2006] IEHC 431.
[13] [1994] 3 IR 1, at 47.
[14] See Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge: Cambridge University Press, 2021), at pp. 109-111.
[15] [2005] 1 IR 105, at 201.
[16] See Walsh (2009), at pp. 8-9.

4. Targeted Social Burdens in the Irish Courts

(a) The Anti-Redistribution Strand in Constitutional Property Doctrine

Overall, the Irish courts have usually upheld legislation that restricts the exercise of property rights, even where compensation is not paid to an owner to off-set any losses suffered. There is no absolute right to carry out any particular profitable use of private property, with for example Kenny J in *Central Dublin Development Association* holding that a deprivation of one 'stick' in an owner's 'bundle of rights' generally will not warrant compensation.[17] However, in three significant decisions - *Blake v Attorney General, Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* and *Re Article 26 and the Employment Equality Bill 1996* - the Supreme Court ruled in a way that suggested resistance to the imposition of burdens on discrete groups in the public interest and at least some degree of constitutional protection for profitable use of private property.

Blake is a decision that often arises in considering the impact of the constitutional property rights guarantees on housing measures, as it involved the invalidation by the Supreme Court of a statutory scheme of rent control.[18] Specifically, it concerned the constitutionality of Parts II and IV of the Rent Restrictions Act 1960 as amended by the Rent Restrictions (Amendment) Act 1967 and the Landlord and Tenant (Amendment) Act 1971. The Act applied only to properties of a specified rateable value and fixed the rents payable by tenants at 1966 levels. [19] However, many of the affected properties had been subject to earlier temporary rent restriction schemes. The depressed rents applicable under those schemes were carried forward in 1966 so that most of the affected properties received rents fixed at 1946 levels, although some were fixed at 1914 levels. Landlords remained liable for repairs and were heavily restricted in their ability to recover possession.

In the Supreme Court, O'Higgins CJ first held that the Act interfered with the exercise of property rights. He noted that the evidence showed that the rents obtainable on the open market were between 9 and 19 times more than could be recovered by the plaintiffs and that this was not an abnormal consequence of the application of the Act. He further noted that

[17] (1975) 109 ILTR 69.
[18] [1982] IR 117, hereafter *Blake*.
[19] Under the terms of the Act, properties outside the valuation limits, and all properties built after 1941, were exempt from rent control. Local authorities were exempted from the application of the Act in cases where they were landlords.

the obligation to repair the controlled premises was burdensome, particularly in respect of old properties requiring heavy maintenance but yielding only low rents. The legislation was mandatory in effect, unlimited in duration, and operated to override contractual arrangements. Second, O'Higgins CJ considered whether that interference amounted to an "unjust attack." He held that the Act restricted rents in certain cases without any rational basis for the selection of controlled properties, noting '… the basis for the selection is not related to the needs of the tenants, to the financial or economic resources of the landlords, or to any established social necessity'.[20] Furthermore, it was permanent in nature, rather than crisis-focused. In addition, there was no compensation provision and no possibility for reviewing the application of the Act in particular cases. Consequently, O'Higgins CJ concluded that the rent control scheme was arbitrary and unfair and unjustly attacked the affected landlords' property rights, noting '…the provisions of Part II of the Act of 1960 (as amended) restrict the property rights of one group of citizens for the benefit of another group.'[21]

A few features of *Blake* are worth noting. First, the statutory scheme in question was very outdated, resulting in arbitrariness in its application. Second, it lacked features that would have enabled a proportionate response to the rent control issue, such as a scheme for review and a consistent, well-considered approach to rent-capping. Fair procedures are an important element of the Constitution's protection for property rights as interpreted by the courts, with owners generally entitled to be heard before significant restrictions are imposed on their rights.[22] Third, and most significantly, the rent control scheme was not designed in a way that responded to any clearly established need on the part of the benefiting tenants, or to any wider social need, whether temporary or permanent.

Following *Blake*, the legislature introduced a new Bill, the *Housing (Private Rented Dwellings) Bill, 1981,* which was designed to remedy the problems created by the invalidation of the 1960 Act. It provided that in the context of controlled dwellings, rent should by either agreed or fixed by the District Court on essentially a market value basis.[23] Under s. 9, the move to market rent was phased. Tenants whose rents were increased would

[20] [1982] IR 117, at 138.
[21] *Ibid*, at 139-140.
[22] See e.g. *MacPharthalain v The Commissioners of Public Works* [1994] 3 IR 353; *Dellway v National Asset Management Agency* [2011] IESC 14*; CAB v Kelly* [2012] IESC 64.
[23] Section 6 of the Bill provided that the rent fixed by the court would be that which in the opinion of the court a willing lessee who was not in occupation would give and a willing lessor would take for the dwelling on the basis of vacant possession being given to the tenant and having regard to the other terms of the tenancy and the letting values of dwellings of a similar character and location.

pay their old rent plus 40% of the increase in 1982, rising to 55% of the increase in 1984, 70% in 1985, reaching the full amount in 1986. The Bill also improved the ability of the landlord to recover possession of a controlled property, for example removing the entitlement of a tenant to assign the controlled tenancy and limiting the rights of the family of such a tenant to take over the tenancy. The Supreme Court held that it was unconstitutional because it deferred payment of the "just rent" and as such involved '…different but no less unjust deprivations' than the Act struck down in *Blake*.[24]

The 1981 Bill was introduced to respond to the problems created by the decision in *Blake,* and so covered the same controlled properties. As such, the Supreme Court's decision might be explained by the fact that the Bill carried forward the underpinning selection criteria for controlled properties that had been invalidated in *Blake*, thereby tainting the 1981 with the same irrationality. The Court noted the coverage of the Bill and the criticism of the selection criteria in *Blake* as not grounded in any clearly established social need, but it accepted the argument that the basis for selection was determined by the prior Supreme Court decision. However, the Court focused on the phased introduction of market rents in striking down the Bill. As it saw it, there was no constitutionally permitted justification for postponing the right to receive market rent evidenced in the Bill. The Court did acknowledge that an immediate demand for fair rents could cause some tenants hardship, but it regarded such hardship as appropriately remedied by the State rather than private landlords.[25] As such, it apparently did not regard the risk of hardship to tenants as a 'constitutionally permitted justification' for rent control where the costs of such control fell upon private landlords, not the State.

Judicial resistance to targeted burdening was in evidence outside the housing context in *Re Article 26 and the Employment Equality Bill, 1996*.[26] The bill that was referred to the Supreme Court in that case precluded discrimination in employment on a variety of grounds, including disability. Section 16 required employers to take all reasonable steps to accommodate the needs of disabled persons, including by making provision where necessary for special treatment or facilities that would enable a disabled person to perform the duties and tasks associated with a job. Section 35 created an exemption from this obligation where,

[24] *Re Article 26 and the Housing (Private Rented Dwellings) Bill, 1981* [1983] IR 181, at 191. Hereafter the *Housing Bill* case.
[25] Indeed, it expressed its view that the legislature would and should act swiftly to legislate for new rent control measures. [1983] IR 181, at 191-192.
[26] [1997] 2 IR 321, hereafter the *Employment Equality Bill case*.

having regard to all the relevant circumstances, it would cause undue hardship to an employer. The Bill allowed the financial circumstances of an individual employer to be considered in decisions on exemptions.[27] The exemption provision was to be applied by the administrative bodies empowered under the Bill to deal with disputes concerning employment equality.[28]

The Supreme Court held that despite the public interest advanced by the Bill, it was unjust to require employers to pay for adaptations to the workplace for disabled persons, reasoning, '…the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society's problems on to a particular group'.[29] This conclusion was reached despite the exemption provision that the Court was required to presume would be applied in accordance with the Constitution. The Supreme Court attempted to limit the scope of its holding by listing in its decision examples of *permissible* targeted legislation. It cited health and safety legislation, pollution remediation, and the facilitation of disabled access to public buildings and private buildings intended to be open to the public, arguing that these burdens could legitimately be regarded as part of the restricted owners' operating costs. Connecting this feature of the decision to the earlier decisions in *Blake* and *Housing (Private Rented Dwellings) Bill* suggests that a targeted burden may be permissible where it is closely connected to profit-making activities of the burdened group provided there is a clearly established need on the part of the benefiting group. In the housing context, this could be an important basis for imposing restrictions on the rights of landlords and property developers to enhance access to housing. However, the profit-making rationale cannot explain the Court's decision on the constitutionality of the Employment Equality Bill itself. The employers affected by the Bill were making profits in the public sphere through operating workplaces, and as such, following the Court's line of reasoning, could plausibly have been required to make such profits in an accessible environment.

(b) Judicial Acceptance of Targeted Burdens

[27] The Court stressed that the Bill did not exempt small firms and defined "disability" in such broad terms that an employer could not assess his liabilities in advance. Furthermore, the Bill required an employer to reveal confidential financial information if it wished to be considered for an exemption from the accommodation requirement. *Ibid*, at 368.

[28] The applicability of the exemption was to be determined with regard to the nature of the facilities and/or treatments required by the disabled person, the cost of same, the financial circumstances of the employer, the disruption that would be caused by the provision of the facilities and/or treatments, and the nature of any benefit or detriment which would accrue to any persons likely to be affected by the provision of the treatment or facilities.

[29] [1997] 2 IR 321, at 367-368.

Despite the decisions in *Blake*, the *Employment Equality Bill case*, and the *Health Bill case*, the courts have often rejected challenges to legislation based on alleged unfairness in the distribution of the costs of securing public goods. The focus of such decisions is on the public interest served by the restriction, rather than on its impact on the victim.

A key example is the decision of the Supreme Court in *Re Article 26 and Part V of the Planning and Development Bill, 1999.*[30] The Bill in issue empowered local authorities to require developers to cede up to 20% of their land, serviced sites, or built units for social and affordable housing as a condition of a grant of planning permission. The developer would receive compensation reflecting the existing use value of the land, which assumed that no development other than exempted development would be allowed on the land at the time it was transferred.[31] Developments consisting of four or fewer houses or of housing on 0.2 hectares or less were exempt from these obligations.[32] The arguments made by counsel opposing the Bill's constitutionality drew heavily on the earlier anti-redistribution decisions, contending that the Bill entailed an impermissible imposition of social costs on a discrete group of owners.[33]

Nonetheless, the Supreme Court held that the Bill did not constitute an unjust attack on property rights. It reasoned that since the effect of Part V was simply to claw back part of the value contributed to the land by a grant of planning permission, less than market value compensation was permissible.[34] The Court also rejected the argument that Part V unfairly discriminated between those who were burdened under its terms and those who benefited from it. The Court acknowledged that insofar as the scheme benefited individuals in need of housing support at the expense of landowners, it did provide for unequal treatment. However, it held that this was constitutionally permissible, particularly considering the need

[30] *Re Article 26 and Part V of the Planning and Development Bill, 1999* [2000] 2 IR 321, hereafter the *Planning and Development Bill case*.

[31] Where houses and/or sites were transferred, the compensation paid to the developer would include the building and attributable development costs as agreed between the parties, including profit on that cost. In certain circumstances, the compensation payable under s. 96 could be greater than the existing use value of the land. If the developer bought the land before 25 August, 1999, he could claim the price actually paid for the land plus interest if that sum was greater than the existing use value of the land on the date of transfer. However, where land was acquired as a gift or through inheritance before that date, the owner could only claim a sum equal to the market value of the land on the valuation date estimated in accordance with s. 15 of the Capital Acquisitions Tax Act, 1976, or the existing use value, whichever was greater. The valuation date was the date of the gift or the date of the death of the person from whom the land was inherited.

[32] S 97. This exemption was probably a response to the criticism of the exemption provision in the Employment Equality Bill 1996 in the *Employment Equality Bill case* [1997] 2 IR 321, at 368.

[33] *See* [2000] 2 IR 321, at 339-341.

[34] *Ibid*, at 354-356.

to afford substantial leeway to the legislature to deal with controversial social and economic matters and to reconcile the conflicting claims of different sections of society. The Court also emphasised that while the obligations in relation to social and affordable housing only applied to a discrete category of individuals, they formed part of a wider code of planning control to which all land was subject that limited the expectations that owners could legitimately form in relation to land use. The decision in the *Planning and Development Bill case* was not the first time the Supreme Court adopted such an approach. In *O'Callaghan v Commissioners for Public Works*, the Supreme Court held that the common civic duty of owners to contribute to preserving national heritage meant that the restriction involved in a preservation order constituted a permissible reconciliation of the use of land with the exigencies of the common good. [35]

During and after the economic crisis, the Irish courts drew on prevailing adverse economic conditions to justify redistributive measures that on their face could have fallen foul of the anti-redistribution principle identifiable in the *Housing (Private Rented Dwellings) Bill* case and the *Employment Equality Bill* case. For example, *J & J Haire & Company Ltd v Minister for Health* concerned the constitutionality of changes made to the fees for the provision of public services paid to pharmacists that were introduced in regulations enacted pursuant to s. 9 of the Financial Emergency Measures in the Public Interest Act 2009. [36] In the High Court, McMahon J held that the plaintiffs did not have a contractual right to continued fees at a particular level, and consequently he determined that the legislation was not an "unjust attack" on property rights. However, he also stated *obiter* that even if the plaintiffs did have such a property right, it would not have been unjustly attacked by the impugned reductions. [37] He reasoned:

> …the State is facing an unprecedented economic crisis, whereby the State is forced to introduce drastic economies and cuts across the board. These economic realities must inform the interpretation of the constitutional phrases in assessing what the State can do and what distributive measures

[35] [1983] ILRM 391, [1985] ILRM 364, hereafter *O'Callaghan*.
[36] [2009] IEHC 562.
[37] He noted various features of the scheme in concluding that it was a proportionate restriction. Under s. 9 (4), a process of consultation had to take place before regulations could be introduced. The Minister had to take a specified list of matters (including existing contracts) into account and was required to set rates that were "fair and reasonable" in light of the Act's objectives (s.9 (5)). Even then, the regulations were open to annulment by the Oireachtas (s. 9 (16)), and had to be reviewed on an annual basis, with both the Ministers for Health and Finance required to consider the appropriateness of any changes in the rates payable to pharmacists (ss. 9 (13) and 13). Finally, pharmacists were permitted to withdraw from providing services for the State upon giving 30 days notice, regardless of their contractual obligations (s. 9 (8)).

> it must take to ensure not only the stability of the economy, but the stability of the State itself.[38]

He interpreted the decision of the Supreme Court in *Re Article 26 and the Health (Amendment) (No. 2) Bill 2004* to mean that where an 'extreme financial crisis or a fundamental disequilibrium in public finances' exists, the abrogation of individual property rights in the interests of the public finances could be justified.[39]

In *Unite the Union v The Minister for Finance*, Kearns P. upheld the constitutionality of s. 2 of the Financial Emergency Measures in the Public Interest Act 2009, which provided for the imposition of a pension levy in respect of public sector pensions, rejecting the contention that it was an unjust attack on property rights.[40] Drawing on *Haire*, he stressed that the legislation responded to a serious economic crisis. He concluded that even if the deductions involved in the pension levy could be said to interfere with property rights, they were not disproportionate, given the 'dire financial circumstances' in which the Act was passed. He held that considering the benefit of a public sector pension, the amount deducted did not impose a disproportionate burden on adversely affected individuals.

More recently, in *Dowling v Minister for Finance*[41], the Court of Appeal stressed the dire economic circumstances in which the Credit Institutions (Stabilisation) Act 2010 was introduced in upholding the constitutionality of that Act. In analysing its proportionality, Hogan J stated '…some flexibility must necessarily be allowed to decision makers, not least in cases of this kind where the decision in question had large scale macro-economic implications and was required to be taken urgently and against the background of an acute emergency.'[42] The challenge in that case concerned the value paid to shareholders under the terms of the Act as part of the process of compulsory acquisition by the State. The Court held that the prevailing adverse economic context meant that the bank in question was within days of being wound-up at the moment of acquisition. Against that backdrop, it determined that the dilution of the value of the adversely affected shareholdings could not be regarded as a violation of constitutionally protected property rights, but rather represented legitimate 'burden-sharing' between the State and shareholders.[43]

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[38] [2009] IEHC 562.
[39] [2009] IEHC 562.
[40] [2010] IEHC 354.
[41] *Dowling v Minister for Justice* [2018] IECA 300.
[42] [2018] IECA 300, at para 145.
[43] [2018] IECA 300, at para 160.

5. Conclusions

Irish constitutional property law is complex, and not always entirely consistent. There are three outlier decisions of the Supreme Court that suggest that imposing the costs of realising particular social goods on discrete groups of owners is unconstitutional. Although those decisions have not been overruled, the Court of Appeal's reference in *Dowling* to 'legitimate burden-sharing' suggests that the anti-redistribution logic of those decisions might not find favour with the courts today. On balance, given the nature of the protection for property rights enshrined in the Constitution (an institutional guarantee and a qualified individual rights protection, coupled with an express statement of the State's power to delimit the exercise of property rights) and the inconsistent attitude of the courts to targeted burdens, there is ample scope within the current constitutional framework to introduce measures that restrict the exercise of property rights to respond to the housing crisis.

This is already reflected in the introduction of measures such as rent pressure zones throughout Ireland, vacant site levies, increased security of tenure for tenants of residential properties, and restrictions on the use of properties for short-term letting. The judicial decisions on the property rights implications of austerity measures confirm that an adverse economic context is relevant to the scope of the State's power to delimit the exercise of property rights in the public interest and to the deference that courts will afford to legislative judgments on distributive issues. Given Article 43.2's empowering provisions, in particular their reference to 'the principles of social justice' and 'the exigencies of the common good', the housing crisis, no less than the economic crisis, should be capable of having a similar impact. Properly understood, the existing constitutional property rights guarantees are compatible with a robust legislative response to problems with housing provision.

However, the ambiguity created by the 'anti-redistribution' decisions concerning the scope of the legislature's power to enact measures that restrict property rights to secure the common good is a significant drawback of the status quo. It may in part explain the repeated government statements that the Constitution prevents it from taking particular actions in response to the housing crisis. While the public interest usually prevails over individual property rights in Irish constitutional property law, decisions that suggest that the courts will review decisions concerning the appropriate distribution of collective burdens reached by the democratically-elected branches of government increase political concerns about the risk of

invalidation. Such concerns are compounded by the tendency in Irish constitutional property law for judicial decisions to lack a clear articulation of reasons. For example, it is often unclear from a judicial decision *why* a restriction is or is not unjust, or disproportionate, in terms of its impact on property rights.[44]

In short, notwithstanding the predominance of judicial deference to political decision-making on constitutional property rights issues, the answer to the question 'is this proposed regulatory interference with property rights constitutionally permissible' often will necessarily be, 'it depends', since a wide range of factors and variables might influence a court in determining whether an interference with property rights is 'proportionate' or 'unjust'. Accordingly, *ex ante* assessments of the constitutionality of proposed legislative and/or administrative interferences with property rights will be unavoidably qualified and contingent. The kinds of clear cut answers about legality that are often sought by legislators and administrators and that are easier for politicians to communicate to voters and affected stake-holders are not likely to often be forthcoming.

In light of the existing case-law, if measures restrictive of property rights are introduced in response to the housing crisis, a clear articulation of a public interest that will be directly served by such a measure is important. *Blake* and *Private Rented Dwellings Bill* demonstrate that a statutory scheme should be tailored insofar as possible to ensure that those benefited by such measures need the relevant protection, thereby realising 'the principles of social justice' through any restriction imposed on property rights. Proportionality and fair procedures are key, meaning that transitionary provisions, review provisions, and other procedural safeguards may also be very significant depending on the type of measure being introduced. Subject to these requirements, the existing constitutional protection for property rights is compatible with a wide range of housing measures that may limit such rights, suggesting that the case for a constitutional right to housing should not turn on any suggestion of significant existing constitutional barriers to legislative action.

[44] See Walsh (2009), at pp. 23-27.

PROPERTY RIGHTS AND COLLECTIVE BURDENS

DR RACHAEL WALSH, TCD

- ***HOW DOES THE IRISH CONSTITUTION PROTECT PROPERTY RIGHTS AND HOW HAVE THESE RIGHTS BEEN INTERPRETED BY THE COURTS?***
- ***WHAT ARE THE DRAWBACKS, IF ANY WITH THE STATUS QUO?***

PROPERTY RIGHTS IN OVERVIEW

- ‘Double protection’ for property rights in Articles 40.3.2 and 43.
- Express recognition of the State’s power to restrict property rights to secure social justice and the common good.
- Proportionality analysis.
- Broadly pro-public interest in terms of outcomes.

'ANTI-REGULATORY AMMUNITION'

- 'Anti-regulatory ammunition' created in 3 decisions:
  - *Blake v AG*
  - *Re Article 26 and the Housing (Private Rented Dwellings Bill) 1981*
  - *Re Article 26 and the Employment Equality Bill 1996*

- Blake: **"…the provisions of Part II of the Act of 1960 (as amended) restrict the property rights of one group of citizens for the benefit of another group."**

- Employment Equality Bill: **"…the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society's problems on to a particular group."**

COUNTER-NARRATIVES

- **Profit-Making** – *Re Article 26 and Part V of the Planning and Development Bill.*
- **Austerity** - *J&J Haire v Min for Health: '…economic realities must inform the interpretation of the constitutional phrases in assessing what the State can do '.*
- **'Legitimate burden-sharing'** - *Dowling v Minister for Finance.*
- **Marginality/Vulnerability** – *Re Article 26 and the Health (Amendment) (No. 2) Bill 2004.*

DRAWBACKS

- Residual ambiguity about the Supreme court's 'anti-regulatory ammunition' - would it be followed now? How would the 'exceptions' carved out be interpreted?
- That ambiguity leads to 'it depends' answers to pre-legislative questions about constitutionality of distributive measures.
- Creates the risk that a concern to avoid unconstitutional legislation may contribute to regulatory inertia or to the dilution of reforms.

IMPACT ON LEGISLATION

INERTIA

DILUTION

GUIDANCE

- Proportionality:
  - Clear articulation of social justice/common good rationale for interference;
  - Clear articulation of how means selected achieve that rationale.
- Fair procedures
- Prospective application only?

A CONSTITUTIONAL RIGHT TO HOUSING?

- All of this leads to the conclusion that arguments for a constitutional right to housing should not be framed in terms of the need to off-set or soften the strength of the property rights guarantees in order to facilitate legislative housing measures.
- Good arguments?
  - Expressive and symbolic impact, particularly given Ireland's complex history re land and property issues;
  - Requiring legislative action on housing issues.

Written evidence to the Government of Ireland's Housing Commission submitted by Dr Conor Casey, Lecturer in Law at the University of Liverpool School of Law & Social Justice

INTRODUCTION

1. I have been invited by the Housing Commission to give evidence to aid their work in examining the "complex constitutional questions arising…around potential wording for an amendment to the Constitution" in respect of housing and property rights.[1]

2. My submissions address the following questions:

(i) How does the Constitution in its current form inhibit the State's response to the housing crisis?

(ii) Has the protection afforded to private property rights been overestimated?

[1] Terms of Reference of Housing Commission (12 January 2022), https://www.gov.ie/en/publication/e9d71-terms-of-reference-for-the-housing-commission/.

SUMMARY

1. The Constitution in its current form – the text of Articles 40.3 and 43 and how they have been consistently interpreted by the Superior Courts – do not inhibit the Oireachtas and Government in taking whatever steps are required to delimit the exercise of property rights to ensure they are compliant with the common good. The deeply entrenched political perception of the strength of constitutional protection afforded to private property rights – that they pose a very serious stumbling block to legislative action - is therefore very significantly overstated.

2. It is reasonable to infer that the legal advice Government has received from the Attorney General's Office has something to do with the entrenchment of this view. There are two plausible explanations for how legal advice relates to this constitutional misperception entrenched amongst political actors.

3. The first is that the legal advice given by the Attorney General's Office has been excessively cautious and risk averse, underestimating the Oireachtas' authority to regulate private property rights while overemphasising the legal risk of a Court invalidating legislation designed to address Ireland's housing crisis.

4. The second is that Attorney General's advice is not actually excessively risk averse or conservative, and the real problem is that it is being presented as such by members of the Government in the Oireachtas and in public statements. What we might be witnessing is a situation where valid legal risks identified by the Attorney General are exaggerated, inflated, and find public expression in a more categorical type of claim that the Government has been advised that a measure *could not* be considered constitutional. That is, the Government might tactically convey the impression a measure contained in a bill has been emphatically dubbed unconstitutional, to side-

step pressure to take political action it simply does not want to take for policy reasons.

5. It is hard to establish which account is more accurate given the very high levels of confidentiality surrounding Attorney General's legal advice. But either would be problematic and unsatisfactory.

6. On balance, I suggest it would be constitutionally irresponsible to pursue a referendum to amend Articles 40 and 43 based on nothing more than an ultimately *mistaken* political perception of how they are hamstringing the ability of the Oireachtas to regulate private property rights.

7. The Government and Oireachtas should instead first seek to test the bounds of their existing constitutional authority to regulate property rights. This could happen in conjunction with disclosure of Attorney General's advice – whether in full or précis form – to bring a measure of transparency to bear upon the ostensible difficulties blocking the Oireachtas taking robust legislative action.

8. Should the Superior Courts invalidate legislative measures brought to address the housing crisis – whether via an Article 26 reference or in the course of ordinary litigation – it would then be a more appropriate and proportionate response to consider pursuing a referendum that would better empower the Oireachtas to regulate property rights.

SUBMISSIONS

I. Constitutional Background

1. In our constitutional system, decisions about the most important policy questions – including taxation, education, health, the funding of public services, and the provision and supply of housing – are the responsibility of the Government and Oireachtas.

2. Our Constitution provides the Oireachtas the sole and exclusive power of making laws for the State.[2] The Constitution provides the Government with the executive power of State, making it responsible for faithfully implementing the laws enacted by the Oireachtas.[3] The Constitution also provides the Government authority over preparing the annual budget outlining the revenue the State is estimated to take in in taxes, and how much it will spend on things like public services, that the Dáil must then consider and approve.[4]

3. Moreover, in practice the Government drafts most bills that are introduced to the Oireachtas for consideration, with the aid of the civil service and parliamentary draftsmen in the Attorney General's Office.[5]

4. Because Ireland does not have a federal or devolved system of government, the executive and legislative powers of the Government and Oireachtas are unitary, and not divided amongst sub-national political actors. This gives them very significant policy authority over issues like housing.

5. However, the powers of both Government and the Oireachtas are limited by other provisions of the Constitution. One limitation is that the Constitution does not permit the three organs of State – Oireachtas, Government, and judiciary – to take over each other's functions, or to voluntarily alienate

[2] Article 15.2.1.
[3] Article 28.2.
[4] Article 28.4.4.
[5] Conor Casey & David Kenny, 'The Resilience of Executive Dominance in Westminster Systems: Ireland 2016–2019' (2020) Public Law 356, 359-362.

them.[6] So, it would be unconstitutional to let the Courts make laws, and for the Government to start adjudicating cases for example.

6. Another limitation, more relevant to these submissions, is that the powers of the Oireachtas and Government must be exercised consistent with, and not repugnant to, fundamental rights posited in the Constitution. This includes the right to private property protected by Article 40.3[7] and Article 43.[8]

7. A law may be found unconstitutional by a Court in two ways. One is through pre-enactment judicial review through the procedure established in Article 26. This allows the President, at her "absolute discretion" to refer a bill to the Supreme Court for a judgment on its constitutionality. If it is found unconstitutional the bill will not be signed into law. If the bill is upheld as constitutional the President will sign it into law. If a bill is found to be constitutional, its constitutionality cannot be challenged again. Article 26 challenges have become increasingly rare, and there has not been a reference made since 2005.[9] Most constitutional questions do not arise through Article 26 references, but through ordinary litigation before the High Court where a Plaintiff pleads a particular statutory provision is unconstitutional.

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[6] *Pringle v. Ireland* [2012] IESC 47.

[7] 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

[8] 1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

[9] See Hilary Hogan, 'The Decline of Article 26: Reforming Abstract Constitutional Review in Ireland' (Forthcoming 2022) 67 Irish Jurist.

II. Philosophical Background to Constitutional Property Rights

8. The dominant philosophical influences on the text of Article 43 come from the classical natural law tradition[10] and Catholic social teaching.[11] For example, it is well documented how the Papal Encyclicals *Rerum Novarum*[12] and *Quadragesimo Anno*[13] had a significant impact during the drafting process. Both encyclicals at their core emphasised the need for "rights-based protection of private ownership subject to State-imposed limitations designed to secure social justice".[14]

9. In the Thomistic natural law tradition and in contemporary Catholic Social Teaching, the right to hold and bequeath property is an aspect of the natural law because of its intimate connection with both individual human flourishing and the common good, through its connection to promoting social stability, sociability, familial security, and values associated with subsidiarity.[15]

10. This means people cannot be denied the right to own and hold property and that the institution of private property cannot be legitimately abolished and absorbed by the State. Instead, the institution of private property must be respected by the positive law enacted by public authorities. This is reflected very clearly in Article 43's guarantee that the State shall pass "no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property."

11. But aside from non-abolition of the institution of private property, these philosophical traditions give a very wide latitude to public authorities to

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[10] Professor Doyle notes the "intellectual lineage of Article 43 unquestionably lies in the natural law tradition" Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart 2018) 94.
[11] Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021) 60.
[12] Pope Leo XIII, *Rerum Novarum: On Capital and Labour* (May 15, 1891).
[13] Pope Pius XI, *Quadragesimo Anno: On the Reconstruction of the Social Order* (May 15, 1931).
[14] Walsh (n 11) 61; Donal Coffey, *Drafting the 1937 Irish Consttution: Transnational Influences in Interwar Europe* (Palgrave Macmillian 2018) 236-241.
[15] Conor Casey & Adrian Vermeule, Myths of Common Good Constitutionalism 45 (2022) Harvard Journal of Law & Public Policy 103, 138-144.

prudently delimit and tailor the scope of an individual's property entitlements, to ensure these entitlements are conducive to the common good and to the flourishing of the whole community.

12. This point cannot be overemphasised: respect for property is mandated by the natural law tradition *not* because protecting individual liberties like property is first and foremost the most important job of the State, but because of the contribution private ownership of property can make to the common good and human flourishing of all in a community.

13. Where patterns of property entitlements and ownership begin to have consequences contrary to human flourishing and the common good, the State may have a duty to take action to reorient their exercise to the common good by delimiting them.

III. Superior Court's Treatment of Property Rights Provisions

14. In our constitutional system, it falls on the judges of our Superior Courts – the High Court, Court of Appeal and Supreme Court - to interpret our Constitution's fundamental rights provisions and consider the impact legislative or executive action has on them. If the Courts are satisfied the impact is repugnant to the right or in clear disregard of it, it may quash the action of the Oireachtas or Government as beyond their constitutional authority.[16]

15. It is of course difficult to concisely sum up over 80 years of constitutional doctrine on private property rights, but the consensus amongst public law scholars is that Irish Courts have largely interpreted the property rights provisions in a manner consistent with the basic tenor of its background influences. Our Courts have consistently held that property rights are not absolute, can be extensively regulated by the Oireachtas in the interests of

[16] Article 34.3.

the common good, and that Courts should be deferential in assessing whether legislative action taken by the Oireachtas to reconcile the exercise of individual property entitlements to the common good is repugnant to the Constitution.[17]

16. Since the 1990's, the Courts have moved away from explicitly using the language of the classical natural law tradition and Catholic Social Teaching when assessing the constitutionality of legislation regulating private property, in favour of using the proportionality test of the kind found in many constitutional systems around the world, and in supranational courts like the European Court of Justice and European Court of Human Rights.

17. The proportionality test typically involves an assessment of whether a legislative measure engaging a right aims at advancing a legitimate aim, is framed in a manner rationally connected to that aim, interferes with the right no more than necessary to achieve the aim, and has an impact on the right in issue which is overall proportionate to the good of the objective to be achieved by the legislation.

18. But while the legal test used by the Courts in reviewing the constitutionality of legislation regulating private property rights has altered, they have applied the proportionality test in a manner highly deferential to the Oireachtas. Therefore, in substance, there has been continuity with the natural law tradition's emphasis on the need for public authorities to have wide latitude to regulate property rights to ensure their exercise is consistent with the common good.[18]

19. The leading scholarly authority on constitutional property law, Professor Walsh, surmises that the predominant response of Irish judges "has been to

[17] Walsh (n 11) 14.
[18] David Kenny, 'Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland', 66 (2018) American Journal of Comparative Law 563-564; see Rachael Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 Dublin University Law Journal 1.

defer to judgments about the appropriate mediation of property rights and social justice reflected in legislative and/or administrative decisions".[19] Invalidations of legislative measures are, says Walsh, "rare overall" and when they do occur typically concern a failure of basic rationality or fair procedures, as opposed to a Court second-guessing whether a measure was in the interests of the common good or proportionate overall.[20]

20. On whether the property rights provisions place a serious obstacle in the way of the Oireachtas legislating to regulate property rights, Professor Walsh concludes that:

> On balance, given the nature of the protection for property rights enshrined in the Constitution (an institutional guarantee and a qualified individual rights protection, coupled with an express statement of the State's power to delimit the exercise of property rights)…it is suggested that there is ample scope within the current constitutional framework to introduce measures that restrict the exercise of property rights to respond to the housing crisis.[21]

21. The authors[22] of *Kelly's: Irish Constitution*, the leading treatise on Irish constitutional law, similarly argue that analysis of the Court's case-law yields the conclusion that "considerable latitude is given the Oireachtas to regulate and organise a modern economy" and that the "popular conception to the contrary is a pure myth."[23]

[19] Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021) 14.
[20] id.
[21] Rachael Walsh, 'Constitutional Property Rights – Setting Parameters for Responses to the Housing Crisis: Written Submissions to Housing Commission' (May 2022).
[22] *Kelly: The Irish Constitution* (Bloomsbury 2018). Including Professors Rachael Walsh, David Kenny, Gerry Whyte and Judge Gerard Hogan.
[23] id., xvii.

IV. Disjunction between Case Law and Political Practice

22. The account just sketched might surprise the average reasonable citizen who, although not familiar with the minutiae of Court's treatment of Articles 40 and 43, has repeatedly heard the Constitution's ostensible rigorous protection of property rights being invoked by successive Governments to justify not pursuing certain policy measures to address Ireland's housing issues.[24]

23. Indeed, an ambient impression has undoubtedly gained traction in public[25] debate that private property rights are strictly protected by the Constitution and very place onerous legal burdens and risks in the path of the Oireachtas and Government seeking to regulate them in the interests of the common good.

24. This gives rise to a serious disjunct in need of explanation. How can we have a situation where Irish Courts have been largely deferential when assessing if legislative measures regulating property rights are constitutional, but nonetheless also have a widespread perception that the Constitution's protection of property rights presents a serious stumbling block to successful legislative action on housing issues? How can these facts, which clearly pull in incompatible directions, possibly be reconciled, or explained?

25. I have argued, along with several others, that one reasonable explanation is that successive Governments have internalised a deeply skewed, crabbed, and highly risk averse understanding of the Oireachtas' constitutional law-making authority to regulate property rights for the common good.

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[24] Hogan and Keyes note how the "manner in which constitutional property rights have been debated and discussed by those in Government over the past decade suggests that the Constitution and the courts prohibits radical State intervention in the housing market." Hilary Hogan and Finn Keyes, The Housing Crisis and the Constitution (2021) 65 Irish Jurist 87, 117.

[25] See e.g., Fergus Finlay, "We must change the Constitution if we want to end homelessness scandal", *Irish Examiner* (27 January 2020); Liam Cahill, 'To tackle homelessness we must amend the Constitution' Irish Times (18 August 2017).

26. The confidentiality of Government deliberations[26] makes it hard to say definitively how its internalisation of a skewed understanding of the relevant constitutional law has come about. But evidence can be gleaned by analysing what members of Government say in their public statements and during debates in the Oireachtas about why and how they have come to adopt this position. And when one analyses these statements, I argue it supports the contention that legal advice given to the Government has played an outsized role in shaping their views on the legality of regulating property rights

27. It is well documented that the small group lawyers who provide legal advice to Government – the Attorney General, Advisory Counsel in the Attorney General's Office, the Office of Parliamentary Legal Counsel, and the small circle of senior barristers externally briefed to provide opinions to assist the Attorney General's work – exercise a significant influence over the policymaking process. Even though the Attorney-General is constitutionally strictly speaking only a legal *advisor,* in practice Governments have proceeded on the basis their "advice is not merely highly authoritative and of great weight when considering policies, but binding as a constitutional matter."[27]

28. This means it is no exaggeration to say, as Professor Carolan does, that the work of the Attorney General and those assisting them is amongst the "most significant constraint in the Irish system on the content of public policy".[28] The content and tenor of the legal advice given to the Government by the Office therefore plays a critical role in fixing the bounds of what its incumbents internalise as constitutionally possible and licit policy choices.[29]

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[26] Article 28.4.3.
[27] Conor Casey & David Kenny, (n 5) 369.
[28] Eoin Carolan, 'The Constitution, politics and public policy', in David Farrell and Niamh Hardiman (eds.), *Oxford Handbook of Irish Politics* (Oxford University Press 2020) 236.
[29] id., 239.

29. The starting point for assessing the likely impact the legal advice given to Government on the constitutionality of property rights has had on housing policy, is to note that Attorney General's advice is legally privileged. There is a very strong level of confidentiality maintained by Government over the content of the legal advice it receives.[30] Because the Government enjoys legal privilege and the benefit of cabinet confidentiality, it cannot be *compelled* to disclose the legal advice it receives. But the Government can *choose* to disclose the advice it receives anytime it wants, and in any format it wishes. It is entirely within its gift as the client in receipt of the legal advice.

30. While within the Government's gift, successive administrations have flatly refused to disclose the content of the legal advice it receives, unless they see a political advantage in doing so.[31]

31. Because they are strongly wedded to confidentiality, the best we can do to assess the impact and influence of legal advice on policymaking concerning housing issues is to draw reasonable inferences from the way the Government characterises the advice in its public statements and in the course of Oireachtas debates.[32] That is, by considering how members of Government themselves characterise the impact of legal advice on their disposition toward a proposed policy or bill.

32. Helpfully for the purposes of this assessment, Governments have consistently and vocally invoked legal advice received from the Attorney General, in their public statements and during parliamentary debates, to justify not taking a course of legislative action in respect of Ireland's housing issues.[33]

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[30] See Conor Casey & David Kenny, 'The Gate Keepers: Executive Lawyers and Executive Power in Comparative Perspective' (Forthcoming 2022) International Journal of Constitutional Law.
[31] Conor Casey & David Kenny, 'A One-Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (2019) 42 Dublin University Law Journal 89, 96.
[32] Conor Casey & Eoin Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' (2021) 17 European Constitutional Law Review 202, 210.
[33] Casey & Kenny (n 5) 369-371.

33. For example, the Fine Gael-Labour coalition government (2011-2016) claimed to face very severe limitations on legislative action due to legal advice on constitutional property rights. Measures apparently thwarted by included land-hoarding restrictions, capping mortgage interest rates, eviction protections, and regulation of 'vulture funds'. Alan Kelly TD, having served as the relevant Minister for Housing for much of this period, stated later:[34]

> I was not hampered by political or financial obstacles. I was blocked by the Constitution. From the time it is taking to introduce the vacant site levy to tackle land hoarding, to protecting tenants fro m eviction in circumstances where their landlord wishes to sell the property, and many other issues, I was repeatedly blocked from making provision for what I believed was the common good by the strength by which property rights are protected under Article 43 of the Constitution.[35]

34. In a particularly forensic study, Hogan and Keyes document that from 2010-2020 over 13 Private Members bills proposing a range of policy measures have been rejected by Governments, *not* because of straightforward policy disagreement, but ostensibly because of constitutional concerns raised in Attorney General's advice.[36] Examples of bills rejected on this basis include those proposing to (i) ban upward only rent review clauses; (ii) vacant site levies designed to curb site hoarding and speculation and encourage development; (iii) restricting the statutory grounds upon which a tenant could be evicted; (iv) introduce temporary rent controls or freezes. On some occasions the Government expressed sympathy to the goal behind a legislative proposal and stressed that their objection was purely legal.[37]

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[34] Kitty Holland, 'Kelly Says Constitution Blocked Attempts to Tackle Housing Crisis' The Irish Times (Dublin, 31 March 2016).
[35] id.
[36] Hogan and Keyes, (n 24).
[37] Casey and Daly, (n 32) 210-211.

35. It is clear then that legal advice tendered by the Attorney General is regularly invoked as a major stumbling block to robust legislative action. This raises an additional question: how can this advice be squared with the case law of the Superior Courts?

V. Assessing the Political Impact of Attorney General's Advice: Two Plausible Accounts

36. Political perception of the strength of constitutional protection afforded to private property rights is very significantly overstated, and it seems reasonable to infer that the legal advice recent Governments have received has something to do with its entrenchment. There are two plausible explanations for how legal advice is linked to the misperception entrenched amongst political actors.

37. The first is that the legal advice given by the Attorney General's Office, likely informed by opinions offered by external counsel from the Law Library, has been excessively cautious and risk averse; downplaying the constitutional authority the Oireachtas enjoys while overemphasising the legal risk of a Court invalidating a proposed policy measure.

38. Assuming the Government's representation of the tenor and content of the constitutional advice it is receiving in the examples given above is accurate, it appears the advice has the following general characteristics:

- it has a heavy focus on risk minimisation;
- it places careful attention to whether policies, particularly those with ambitious scope, might engage the interests of constitutional rights-holders with the incentive and means to take litigation;

- it has keen awareness of the risk that even an ultimately successful defence of a challenged policy may "lead to significant delays and costs on the part of the State";[38]
- it works with an assumption that the best way to minimise risk is to practise cautious "political risk-avoidance in the design or introduction of policy measures",[39] whether by diluting, or excessively proceduralising preferred policies, or requiring elevated burdens of proof as to their necessity and efficacy.

39. Attorney General's advice appears to put a "peculiar premium…on risk aversion in the sense of minimising the risk of constitutional invalidation or even of legal challenge altogether".[40] To be clear, this is not a criticism of the professional norms or technocratic competence of the lawyers involved in advising the Government on these constitutional issues. Legal risk aversion amongst Government legal advisors is certainly not unique to Irish political life and has been well-documented in other legal systems where senior legal advisors are designed to be a largely technocratic figure, as opposed to a dual legal-political actor along the lines of the UK Attorney General.[41]

40. However, this cautious and risk-minimising disposition to legal advice giving can have significant costs and downsides, like helping to seriously narrow what political actors like the Government regard as the appropriate scope of political action for the common good. Given that, in practice, Attorney General's advice is treated as binding, this existence of a high aversity to *legal risk* can help us account for clear evidence of aversity to *political risk* concerning the "initiation of new laws that restrict property

[38] Carolan (n 28) 241.
[39] id.
[40] Casey and Daly, (n 32) 223.
[41] Conor Casey & John Larkin, 'The Attorney General and Renewed Controversy Over the Law/Politics Divide' (Forthcoming 2022) 2 Edinburgh Law Review.

rights"[42] notwithstanding extensive latitude offered to the Oireachtas in the Court's case law.

41. Another plausible account of how legal advice relates to the Government's deeply entrenched and misperceived understanding of constitutional doctrine, begins from the premise that Attorney General's advice is not actually excessively risk averse or conservative, and the real problem is that it is being presented as such by members of the Government in the Oireachtas and in public statements.

42. In other words, what we might be witnessing is a situation where valid legal risks identified by the Attorney General are exaggerated, inflated, and find public expression in a more categorical type of claim that the Government has been advised that a measure *could not* be considered constitutional. That is, the Government might tactically convey the impression a measure contained in a bill has been emphatically dubbed unconstitutional by the Attorney General, to side-step pressure to take political action it simply does not want to take for policy reasons.

43. There is a very serious difference between advice identifying the presence of relevant legal risks, and advice which offers a categorical statement about unconstitutionality. Virtually all consequential legislation is likely to raise *some* identifiable legal or constitutional risk. The more important question is whether the relevant legal risk identified is that legislation will fail, on any reasonable view, to satisfy the deferential standards of review outlined by the Court in its case-law and be found unconstitutional. Thus, what might at first impression look like Government deference to conservative legal advice, may in fact involve a strategic and misleading use of confidential legal advice to shore up a controversial political position or state of inaction.

[42] Walsh (n 11) 244-245.

44. In the absence of any transparency over the content of Attorney General's advice, it is hard to say which account is more plausible. Both are undesirable in their own way. But the latter account outlined – of strategic Government presentation of equivocal legal advice as unequivocal – would be worse and more problematic.

V. Implications for Reform Discussions

45. What relevance does this have for current debates over potential constitutional reform? I suggest several points are worth considering.

46. My main suggestion is that our Constitution – the text of Articles 40 and 43 and how they have been consistently interpreted by the Superior Courts – do not inhibit the Oireachtas and Government in taking whatever steps are required to delimit the exercise of property rights to ensure they are compliant with the common good. I fully agree with Professor Walsh in her written submissions to this commission that:

> On balance, given the nature of the protection for property rights enshrined in the Constitution…there is ample scope within the current constitutional framework to introduce measures that restrict the exercise of property rights to respond to the housing crisis.[43]

47. I argue it follows from this fact that a referendum is not required, if the purpose and intent of a proposed amendment would be merely to make more explicit that the Oireachtas can act wherever necessary to regulate private property rights in the interests of the common good. Given the current state of constitutional law such an amendment would be, from a legal perspective, redundant.

48. Some might argue the entrenched political belief of successive Government's that Articles 40.3 and 43 impose a serious and

[43] Walsh (n 21).

insurmountable obstacle to robust legislative action, *by itself justifies* holding a referendum. Simply put, the argument is that whether or not the Government's position on the constitutional limits on the Oireachtas' power to regulate property rights is misconceived, a referendum would be justified if it can make clear, beyond any doubt, that the Oireachtas has ample authority to act in this domain.

49. I appreciate the sentiment motivating this kind of argument. It is frustrating to see Governments over the last decade deploy legal advice which is clearly - whether in substance or in its presentation - seriously out of step with the Superior Court's treatment of Article 40.3 and 43. It is particularly frustrating when this entrenched misperception is used to block action and justify inaction on Ireland's serious housing difficulties.

50. However, my considered opinion is that it would nonetheless be constitutionally irresponsible to pursue a referendum to amend Articles 40 and 43 based on nothing more than an ultimately *mistaken* political perception of how they are hamstringing the ability of the Oireachtas to legislate. Amending our fundamental law based on an erroneous understanding of existing constitutional limitations on the Oireachtas is no way for a mature constitutional democracy to resolve its political problems.

51. Instead, the Government and Oireachtas should first seek to test the bounds of their existing constitutional authority to regulate property rights. Should the Superior Courts invalidate legislative measures brought to address the housing crisis under the Oireachtas existing constitutional authority – whether via an Article 26 reference or in the course of ordinary litigation – then at that point it would be a more appropriate and proportionate response to consider a referendum that would better empower the Oireachtas to regulate property rights.

52. But to pursue amendment now, in circumstances where (i) the Superior Courts have been very consistent in their attitude of deference to the Oireachtas and (ii) where no one outside Cabinet knows the precise reasons why the Oireachtas is ostensibly constitutionally hamstrung, seems to me a regretful waste of political energy.

53. I suggest the most appropriate course of action, that could be undertaken immediately, would be to disclose what constitutional problems the Attorney General's Office and Government are concerned about – whether in full or précis form – in order to bring a measure of transparency to bear upon the ostensible difficulties blocking the Oireachtas taking robust legislative action. Then, the Government could consult widely with relevant constitutional experts to see what solutions could be found to address these concerns.

54. Following this, the Government could bring forward whatever legislative measures it thinks appropriate to address Ireland's current housing issues and to test the bounds of the Oireachtas' existing constitutional authority.

Conor Casey

25th April 2022

The Right to Housing and the Right to Property:

Comparative Perspectives

- **Gautam Bhatia***

In comparative constitutional theory, the right to housing is commonly believed to fall under the category of "second-generation" (or socio-economic) rights, in contrast with "first-generation" (or civil and political rights).[1] The key distinction – it is often argued – is that second-generation rights are unsuitable for judicial enforcement, as they require budgetary expenditure and calibration of budgetary priorities – something that belongs exclusively in the domain of legislative policy.[2]

This clean-cut separation between first-generation and second-generation rights has been challenged in contemporary constitutional literature, with critics pointing out that civil and political rights also require financial investment – and an infrastructure of implementation – if they are to be effective.[3] Contemporary constitutional *texts*, however, appear to track this division: for example, Section 26 of the South African Constitution guarantees to everyone "the right to have access to adequate housing"[4], but qualifies this guarantee with the stipulation that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[5] The phrase "progressive realisation" is a term of art: it has been interpreted to mean that courts will refrain from *directly* imposing an obligation upon the State to provide a specific claimant with a house[6], should such a claim come before them. Courts may, however, subject existing State

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[1] See e.g. Katharine G. Young, *Constituting Economic and Social Rights* (OUP 2012).

[2] Ibid.

[3] Ibid.

[4] Section 26(1), Constitution of South Africa, 1996.

[5] Section 26(2), Constitution of South Africa, 1006.

[6] Or a specific medicine, or food, as the case may be, depending upon the right.

policy on the implementation of these rights to a broad rationality review[7], and also enquire whether – at the very least – the "minimum core" of the right is being fulfilled.[8]

With these prefatory remarks in place, in this paper, we shall consider a specific set of conflicts that have arisen in certain jurisdictions that have recognised the right to housing. These conflicts involve the clash between the right to housing and the right to property, and take the following form: the State – or a private party – attempts to enforce its right to property by evicting individuals who – it claims – are trespassers, or residing there illegally (or, in neutral terms, are physically present upon the property without a legal claim to it). The evictees then invoke the constitutional right to housing as a *shield*, arguing that the use of the law to physically remove them from the property would violate their right to housing. It is important to note that these are not cases where a claimant approaches the Court to enforce their right to housing – i.e., with a claim that the State be directed to provide them housing (the "positive" aspect of the right). Rather, these are cases where individuals argue that forcibly removing them from the property they occupy *interferes* with their right to housing in its narrower, "negative" sense.

(i) India: From thin proceduralism to thick proceduralism

The Indian Constitution does not have a guaranteed right to housing. Over the years, however, the Supreme Court of India has "read it into the Constitution", by holding that the

[7] See e.g. Minister of Health v Treatment Action Campaign, 2002 (10) BCLR 1033 (Constitutional Court of South Africa), where the government's failure to set out a national programme for combating HIV/AIDS, and its policy of limited provision of the antiretroviral drug neviarapine, were subjected to judicial review on the touchstone of the right to health.

[8] See e.g. Government of the Republic of South Africa v Grootboom, 2000 (11) BCLR 1169 (Constitutional Court of South Africa). The concept of the "minimum core" is also found in General Comments to the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

right to life[9] – on an expanded interpretation – includes the "right to shelter."[10] This has set the stage for legal battles – in particular – between the State and individuals and groups who – it is alleged – are "squatting" on public property. These cases are complicated by the fact that in many instances, individuals resisting eviction belong to socially and economically marginalised classes and castes, and have fallen through the cracks of India's thin social security net.[11]

Initially, the Supreme Court of India articulated a thin set of procedural guarantees to protect against arbitrary evictions: the State was required to provide adequate notice (and, on occasion, a hearing) to affected individuals, before proceeding with an eviction (and demolition of the evictees' property).[12] This is little more than insisting upon a fair administrative procedure, and it is difficult to see what substantive difference a constitutional right to housing – or a constitutional right to livelihood, which was also invoked by the Courts – made to the outcome.

In more recent years, however, there has been an attempt – especially by the High Court of Delhi, but also by the Supreme Court – to broaden the rights of evictees, and constitutionalise them. The doctrinal tool that the courts have used for this purpose has been that of "meaningful engagement", borrowed from South Africa (which we shall consider in the next section). "Meaningful engagement" is a form of thick procedural constraint upon the State before proceeding with an eviction. As the name suggests, it requires the State to engage with the evictees – whether or not they have legal title to the property that they are on – on issues such as the notice period, whether there are alternatives to eviction, and – if

[9] Article 21, Constitution of India, 1949.
[10] See e.g., Rajesh Yadav v State of Uttar Pradesh, (2019) 3 UPLBEC 1853 (High Court of Allahabad), for a recent restatement of this principle.
[11] See e.g. Olga Tellis v Bombay Municipal Corporation, AIR 1986 SC 180 (Supreme Court of India).
[12] Ibid.

not – the manner and mode of rehabilitation.[13] The last aspect – in particular – suggests one way in which the enforcement of the right to housing has been "constitutionalised" on the one hand, and judicial reconciliation with the right to property on the other: that is, *if* individuals are being removed from a space that they occupy (i.e., their negative right to housing is being interfered with), then the State bears the burden of effective rehabilitation, as a condition precedent to removal. In other words, while individuals cannot *claim* housing from the State as a matter of right, they cannot be *deprived* of housing without an alternative being provided by the State.

Two things deserve to be noted before parting with Indian jurisprudence. The first is that its development has been – and continues to be – patchy and uneven, with Courts often walking back on expansive declarations of rights.[14] An absence of enforcement is also a repeated concern.

Secondly, cases before the Court have primarily involved conflicts over the occupation of *public* land, where the contending parties are individuals and the State. This is because – unlike the cases of South Africa and Kenya, which we shall consider below – India does not have a "horizontal rights" clause in its Constitution, which extends the enforcement of constitutional rights to private parties. In this context, constitutional claims – including claims founded upon a right to housing – cannot be made against non-State parties. It is, of course, possible to make a claim founded on *indirect horizontality*[15]: that is, if one private party

[13] The clearest articulation of this came from the High Court of Delhi in Ajay Maken v Union of India, Writ Petition No. 11616 of 2015 (decided on 18th March 2019) (High Court of Delhi), which involved the clearances of temporary accommodation structures on land that belonged to the Indian Railways (hence, public land). See also Sudama Singh v Government of Delhi (2010) 168 DLT 218 (High Court of Delhi).

[14] See e.g. Almitra Patel v Union of India (2000) 2 SCC 679 (Supreme Court of India), where – in remarks that were severely criticised – the Supreme Court of India compared providing an encroacher on public land with alternative accommodation to "rewarding a pickpocket."

[15] For a typology, see Stephen Gardbaum, 'Where the (State) action is' (2006) 4(4) International Journal of Constitutional Law 760.

attempts to evict another, the latter can argue that at the point that the *law* is used to enforce the eviction, their constitutional right to housing has been violated. Such a claim would require Courts to engage in a direct "balancing" between the (private) right to property and the right to housing. So far, however, Indian courts have not developed meaningful jurisprudence on this point.

(ii) South Africa: Meaningful Engagement

As we have seen above, the South African Constitution guarantees an enforceable right to housing, which is made "progressively realisable" – i.e., subject to the State's budgetary constraints and budgetary policy. Additionally, however, the South African Constitution – under Section 8 – makes constitutional rights conditionally horizontal, with the scope and extent of horizontality depending upon the nature of the right.[16]

Section 8 read with Section 26 of the South African Constitution has therefore become the basis of claims to housing – that is, primarily, claims against eviction – that are sought to be enforced against *private* parties, and has therefore required South African courts to grapple more directly with potential clashes between the right to property and the right to housing, especially in a historical context where existing property distributions *reflect* historically unjust patterns of property holding that were entrenched during the period of apartheid.[17] The Constitutional Court has thus noted that the Constitution:

> "… imposes new obligations on the courts concerning rights relating to property . . . . It counterposes to the normal ownership rights of possession, use and occupation, a

[16] Section 8(2), Constitution of South Africa, 1996.
[17] See e.g., the discussion in Rahube v Rahube, 2019 (1) BCLR 125 (Constitutional Court of South Africa), which also discussed the intersectional nature of the discrimination.

> new and equally relevant right not arbitrarily to be deprived of a home . . . . The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case."[18]

This balancing, according to the Court, has to take into a account a range of circumstances including, for instance, how long occupiers have been on a certain piece of land, meaningful engagement, the availability of alternatives, and so on.

While the South African Constitutional Court has recognised and acknowledge the historical context of unjust property relations, it has not, however, extended the full range of constitutional obligations under Section 26 to private parties (i.e., private property holders). The Court has held that the primary obligation under Section 26 remains upon the State, and not upon private property owners. Private parties have – at the highest – a *secondary* obligation under Section 26, which prohibits them from *directly* interfering with the enjoyment of the constitutional right in question.[19]

What this means in practice is that while the obligations of meaningful engagement and effective rehabilitation before an eviction apply to the State (and, arguably, where the law is being invoked to enforce evictions), they do not apply – or at least, do not apply in the same manner – to private property holders. In other words, therefore – apart from being

[18] Port Elizabeth Municipality v Various Occupiers, 2004 (12) BCLR 1268 (Constitutional Court of South Africa).
[19] See e.g. Governing Body of the Juma Musjid Primacy School v Essay N.O., 2011 (8) BCLR 761 (Constitutional Court of South Africa), which involved the eviction of a public school that was located on private property.

constrained by certain procedural obligations – private property owners are not required to substantively respect the right to housing in the context of evictions.

(iii) Kenya: The Collapse of Public and Private

The case of Kenya is an interesting one, because of the similarities and differences with the South African Constitution. As with South Africa, Kenya has an affirmative right to housing[20], which is subject to progressive realisation[21] – but additionally, the Kenyan Constitution provides that if the State claims that it is unable to fulfil its obligations because of a lack of resources, it bears the burden of demonstrating that, and also of prioritising its resources for the benefit of the most marginalised.[22]

Furthermore, the Constitution of Kenya also has a horizontal rights provision that is *unconditional*, i.e., is not constrained by the "nature of the right."[23] A combination of these two textual provisions has yielded a jurisprudence that – arguably – goes further than India and South Africa in prioritising housing rights over property rights.

Two cases form the heart of this jurisprudence. The first is *Mitu-Bell Welfare Society v The Kenya Airports Authority.* This case involved the eviction of a set of residents of the Mitumba Village, whose houses were demolished upon a week's notice, to make way for an airport. Importantly, the evictees did not have legal rights over the land from which they were evicted.

The High Court of Kenya handed down a judgment in favour of the evictees, on multiple grounds. These included, *first*, inadequate notice; *secondly*, that the demolition of houses and personal effects was a violation of the right to property; *thirdly* – and importantly for our

[20] Article 43(1)(b), Constitution of Kenya, 2010.
[21] Article 21(2), Constitution of Kenya, 2010.
[22] Article 20(5), Constitution of Kenya, 2010.
[23] Article 20(1), Constitution of Kenya. For an analysis, see Brian Sang Y.K., 'Horizontal Application of Constitutional Rights in Kenya' (2018) 26(1) African Journal of Comparative Law 1

purposes – eviction without rehabilitation violated the constitutionally guaranteed right to housing; and *fourthly*, there had been inadequate public participation – as mandated by the Kenyan Constitution – before the eviction.[24]

The High Court's judgment was carried in appeal to the Kenyan Court of Appeal, which overturned it. In particular, the Court of Appeal noted that as the evictees did not have legal rights over the land, the State was not under an obligation to reallocate land; furthermore, that the right to housing was a "progressively realisable right", and therefore not capable of immediate enforcement; and particularly importantly – as this is a question that will inevitably arise when the rights to housing and to property clash – that it was "not the role or the function of the Courts to re-engineer and redistribute private property rights."[25]

The case was then taken to the Supreme Court of Kenya, which is Kenya's highest Court. The Supreme Court, in turn, overturned the Court of Appeal's judgment on several grounds. In particular, the Supreme Court examined the Kenyan Constitution's right to housing. It noted that:

> … the right to housing in Kenya is predicated upon one's ability to "own" land. In other words, unless one has "title" to land under our land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.[26]

[24] See Mitu-Bell Welfare Society v Kenya Airports Authority, [2021] eKLR (Supreme Court of Kenya), paragraphs 8 – 21.
[25] Ibid, paragraphs 22 – 45.
[26] Ibid., paragraph 149.

The Court then went on to note:

> … we are of the considered opinion, that where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same. Why, one may wonder, should the illegal occupation of public land give rise to the right to shelter, or to any right at all? The retired Constitution did not create a specific category of land known as "public land". Instead, the constitution recognized what is referred to as "un-alienated government land". The radical title to this land was vested in the president, who through the Commissioner of lands, could alienate it, almost at will. The consequences of this legal regime have been adequately recorded for posterity elsewhere. **The 2010 Constitution has radically transformed land tenure in this country by declaring that all land in Kenya belongs the people of Kenya collectively as a nation, communities and individuals.** It also now creates a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation has **an interest, however indescribable, however unrecognizable, or however transient, in public land.**[27]

According to the Supreme Court of Kenya, therefore, in a democratic polity, the category of "public land" belonged – in the first instance – *to* "the People", granting to every individual a legal *interest* in public land, even though they may not possess a legal *right* over it. The Court then went on to observe that, in the context of the right to housing:

[27] Ibid., paragraphs 151 (emphasis supplied).

> The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. **This right derives from the principle of equitable access to land under Article 60 (1) (a) of the Constitution.** Faced with an eviction on grounds of public interest, such potential evictees have a right to petition the Court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that, the eviction may be entirely justifiable in the public interest. **But, under Article 23 (3) of the Constitution, the Court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (U.N Guidelines), the provision of alternative land for settlement, etc.** … The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". **Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements**. The Courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth."[28]

Thus, the Kenyan Supreme Court drew a link between a public claim over land (which did not translate to a legal right), the constitutional right to housing, and constraints upon State

[28] Ibid., paragraph 152 (emphasis supplied).

evictions under the guise of enforcing the State's property claims over public land. As we can see, this took the form of a "thick procedural constraint" in cases of eviction: that is, evictions themselves were not barred (i.e., the negative right to housing was not made absolute), but compensation, adequate notice, the protection of individual dignity during the process, and – crucially – provision of "alternative land for settlement" (which, according to the High Court, flowed directly from the constitutional right to housing) were all pre-requisites before the State could interfere with the negative right to housing.

As I have pointed out above, however, the Kenyan Constitution mandates direct horizontal application of constitutional rights; consequently, the clean-cut distinction that the Supreme Court drew between "public" and "private" land in *Mitu Bell* – because the case itself involved public land – would soon dissolve.

In July 2021, the Supreme Court decided the case of *William Musembi v The Moi Educational Centre Co.* This was a case where – once again – people were evicted from land; in this case, however, it was private land, and the private landlord was assisted by State officers in carrying out the eviction. Once again, after winding its way through the High Court and the Court of Appeal, when the case came before the Supreme Court of Kenya, the question was to what extent the right to housing applied *inter se* between private parties, and what the role of the State was when it was asked to enforce one private party's property rights, through the process of eviction:

> … we are tasked with the making of a determination on the rights of the Petitioners against those of the 1st Respondent; to determine whether the State took an active positive role in ensuring that the fundamental rights and freedoms of all the parties concerned in this instant matter were protected and that in so doing, there was no

> abuse of the rights of the parties and thus, that the State's negative obligation not to abuse or violate these rights and fundamental freedoms was carried out.[29]

While the Court then held that the rights set out in *Mitu Bell* applied to this case as well – as the State was involved – those obligations did not apply in the same manner to private parties. This was because:

> … the mandate to ensure the realization and protection of social and economic rights does not extend to the 1st Respondent, a private entity. Even though the 1st Respondent has a negative obligation to ensure that it does not violate the rights of the Petitioners, it is not under any obligation to ensure that those rights are realized, either progressively or immediately.[30]

In a manner similar to the South African Constitutional Court, therefore, the Supreme Court of Kenya drew a distinction between a horizontal *negative* obligation not to interfere with an individual's right (to housing) – which was applicable to private parties – and a horizonal *positive* obligation to *realise* an individual's right (to housing) – which was limited to the State.

It is important to note, however, that evictions *do* constitute an direct, negative interference with the right to housing, and that consequently the thick procedural constraints that the Supreme Court placed upon the State in *Mitu Bell* would apply equally to private parties, as far as evictions went. It would also be arguable – at least – that while the obligation

[29] William Musembi v Moi Educational Centre, [2021] eKLR (Supreme Court of Kenya), paragraph 54.
[30] Ibid., paragraph 64.

to provide alternative accommodation is a positive obligation that cannot be imposed upon private parties, the *obligation not to evict until alternative accommodation has been provided (by the State)* remains within the domain of negative obligations, and is therefore enforceable upon private parties.

(iv) Summary: Balancing the Rights to Property and Housing through Procedure

In this paper, I have briefly described the judicial interpretation and enforcement of the right to housing in three jurisdictions – India, South Africa, and Kenya – in the specific context of balancing the right against the counter-veiling right to property.

In these three jurisdictions, the right to housing has been recognised, either implicitly or explicitly in the constitutional text. This has led these jurisdictions to devise a range of protections that individuals – who do not possess legal rights to a particular piece of land – can nonetheless claim in case they are being evicted. As we have seen, the rigour of these protections depends upon the relative weight that these jurisdictions accord to the rights to housing and to property, how keen courts are to recognise the role played by historically unjust property relations in existing skews in the distribution of property, and finally, whether courts see it as part of their adjudicatory role to have their judgments informed by the history, as well as present situation, of property relations.

Thus, these safeguards have moved from thin procedure (simple notice and administrative fairness) to thick procedure, which involves meaningful engagement and alternative accommodation (flowing directly from the right to housing) as pre-requisites to evictions. These apply primarily to public land; in case a private property owner wants to enforce their right to property through eviction, Courts have imposed a somewhat more diluted set of procedural constraints, on the basis that the primary obligation-bearer when it comes to the

right to housing is the State, and not private parties. That does not, however, mean that the Constitution does not apply at all to private parties: judgments of the South African and Kenyan constitutional courts have indicated that it does, although its precise scope remains the subject matter of litigation.

(v) Conclusion: Enforceability as a Constitutional Tort?

By way of conclusion, it is important to note that should the Constitution of Ireland adopt an enforceable right to housing, the issues discussed above are likely to arise here as well. In particular, over the last four decades, Irish courts have developed a rich jurisprudence of "constitutional tort", which is a form of direct horizontal rights application.[31] Irish courts have held that just like the State, private parties are bound to respect constitutional provisions, and may be sued in tort if they do not.[32] Consequently, it is quite likely that Irish courts will also be called upon to balance the rights to housing and to property – even in cases involving private parties – in due course. What form this balancing takes will of course be informed by the precise text of the constitutional provision.

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[31] William Binchey, '*Meskell*, the Constitution and Tort Law', (2011) 33 Dublin U L J 339; John Temple Lang, 'Private Law Aspects of the Irish Constitution' (1971) 6 The Irish Jurist 237; A.S. Butler, 'Constitutional Rights in Private Litigation: A Critique and Comparative Analysis' (1993) 22 Anglo-American L Rev 1; F. Von Prondzynki, 'The Protection of Constitutional Rights: Comparisons between Ireland and Germany' (1980) 2 Dublin U L J 14; T. Kerr and T. Cooney, 'Constitutional Aspects of Irish Tort Law' (1981) 3 Dublin U L J 1.

[32] *Byrne v Ireland*, [1972] 1 IR 241; *Educational Company of Ireland Ltd. v Fitzpatrick (No. 2),* [1961] IR 345; *Meskell v CIE*, [1973] IR 121. See also *Murtagh Properties v Cleary*, [1972] I.R. 330; *Hayes v I.N.T.O.*, [1987] I.L.R.M. 651; *W v Ireland (No. 2),* [1997] 2 IR 141 (HC); *Hanrahan v Merck Sharp and Dohme*, [1988] I.L.R.M. 629 (SC).