

SITUATING SOCIAL RIGHTS: HOUSING AND DISTRIBUTIVE JUSTICE – POST TD

Abstract: This article considers the impact of TD on housing rights in Ireland. While Ireland has signed up to multiple housing rights protections in the international human rights context, it has failed to implement them. TD ensures no constitutional intervention from the courts in this context. Despite generous Irish State funded social housing over the past century, access to shelter or housing is not treated as a rights issue.

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Introduction

The TD¹ case marked a watershed in Irish law in many ways, and its implications for housing and housing rights still reverberate today. What seemed a simple case of curial oversight of the provision of services for a young vulnerable person became a touchstone for Irish constitutional socio-economic rights enforcement. Since the need for such services is concentrated among those with few resources, or indeed, political power, the ‘last resort’ role of courts becomes all the more significant. This article begins by providing some insights into the nature of housing in Ireland, and the nature of international housing rights adopted by Ireland – albeit as a dualist State. It then considers some issues of distributive justice in the modern Irish housing context, where historically the Irish State has heavily and generously funded social housing, leading to a relatively healthy (if unaffordable) housing system, but where applied human rights have no role.

Housing

Housing, for most public commentators, is primarily about buildings. How and where we build them, how much they cost to build and maintain, how we pay for them, who can access them, and for how long, what purposes can we use them for, and, of course, what is their value? Actually there is a very clear gender perspective hidden in this approach – and it describes a very male view of housing. Womens’ descriptions and views on housing are quite different. Here, we see terms like home, household, place of care and support. Lorna Fox-‘O Mahony has described home as a building plus an ‘x-factor,’ representing the social, psychological, and cultural values that a physical structure acquires through use as a home.²

It is therefore, not surprising that when we translate the debate about housing into constitutional or property law that analogous conceptual divisions emerge. Can we give someone access to a building or caravan site, or not? Alternately, we might ask what physical and social supports can the State provide to support and enhance the lives of people without resources. This is not to say that male judges are blind to the second approach, just that constitutional and property law is generally framed in this way. Thus, it is not surprising that arguments about recognising constitutional rights to housing (and support services as in TD) seem to always come down to questions of buildings, land, money and the power to allocate

¹ *TD v Ireland* [2001] IESC 101.

² Lorna Fox-‘O Mahony, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (2002) 29(4) *Journal of Law and Society* 580.

these. Some of these debates are being applied to the way courts regard property rights in Ireland, highlighting the potential for a more expansive approach.³

Of course, we must begin any discussion on housing by recognising that homelessness in a modern developed country like Ireland is a violation of human rights. Homeless people are the most marginalised, vulnerable and poorest people in society. In July 2022, there were some 10,568 homeless people (including 3,137 children) living in emergency accommodation, who cannot enjoy the normal rights which are the expectation of every one in Irish society.⁴ Their life opportunities and those of their children are diminished. They suffer socio-economic discrimination – a principle not recognised within the panoply of the life, liberty and property rights model of the Irish constitution.

Separation of Powers

In Irish constitutional law doctrines on the separation of powers, courts can refuse to acknowledge that the legislature [government] or the executive [Minister and civil service] have any binding responsibility to safeguard or promote any rights beyond the basic eighteenth century liberal principles of life, liberty and property. In the earlier iconic housing case of *O' Reilly v Limerick Corporation*, Costello J had already spelt out the respective tripartite elements of the State.

The powers of Government [legislature] of the State are to be exercised by the organs of State established by it. The sole and exclusive power of making laws for the State is vested in the Oireachtas; the executive [Minister and civil service] power of the State is exercised by or on the authority of the Government; and justice is to be administered in courts established by law.⁵

This orthodox Irish constitutional position, based on the principles of Montesquieu, was echoed by Hardiman J in *TD*:

The elaboration of the theory by Montesquieu in his *De l'Esprit des Loix* (1748) was influential with the framers of the French revolutionary constitutions and, more historically significant, of the United States Constitution. The principle is set out with unusual clarity in the Constitution of State of Virginia (1776)...⁶

However, it is worth noting that Denham J (later Chief Justice) took a more nuanced and less absolutist approach:

In general the courts do not favour the making of mandatory orders against the executive. If a constitutional issue arises relevant to executive actions then the best practice is for the courts to make a finding and declare a right in a situation where the executive has indicated that it will abide by the

³ See Rachael Walsh, 'Distributing Collective Burdens and Benefits: O' Reilly, TD and the Housing Crisis' (2022) 6(3) IJSJ 63; and Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge: CUP 2021).

⁴ Department of Housing, Local Government and Heritage Monthly Homelessness Report July 2022 (26 August 2022) <<https://www.gov.ie/en/publication/7d630-homeless-report-july-2022/>> Accessed 5 October 2022.

⁵ [1989] IILRM 181 at 194/5.

⁶ *TD* (n 1), per Hardiman J, [74]-[75].

determination of the court. In consequence a mandatory order is unnecessary, a simple declaratory order suffices. As a matter of practice it happens regularly that counsel indicate to a court that should the decision be against the executive (be it a Minister or other body) then a mandatory order would not be necessary. This is an illustration of the two institutions (the court and the executive) exercising their powers for the ultimate benefit of the State as a whole, with the interest of the State and the people as the fundamental concern.⁷

The separation of powers doctrine has most significance in the tussle over who should authorise State expenditure on socio-economic rights derived from the Constitution. Much of this can be traced to the iconic case of *O' Reilly v Limerick Corporation*,⁸ where the applicants sought damages arising from a breach of their unenumerated personal constitutional rights of bodily integrity under Article 40.3.2.⁹ In *Ryan v Attorney General*,¹⁰ Kenny J held that Article 40.3.2 enumerated a number of particular rights such as the right to bodily integrity, based on the 'Christian and democratic nature of the State'. Costello J had set the scene for the *TD* case when he pointed out in *O' Reilly v Limerick* that the judiciary have no special qualifications to deal with public expenditure levels or priorities, and concluded with the iconic phrase that:

I am sure that the concept of justice which is to be found in the Constitution embraces the concept that the nation's wealth should be justly distributed (that is the concept of distributive justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts.¹¹

Hardiman J in *TD* echoed this statement that responsibility for ensuring that any socio-economic rights were realized must be sought in Leinster House and not the Four Courts. He also set out very clearly that judges should not determine or approve a particular policy or make detailed orders for its execution using public money.

Under our Constitution, all political power in the State derives from the people. By Article 6, this general power is divided into the three major powers of government, the legislative, the executive and the judicial. These powers are separate and distinct in order to prevent any one power, or the individuals who hold it, from becoming dominant. The legislative power makes laws and elects the executive government which is responsible to it. These branches of government are responsible for the formulation and implementation of policy on a vast range of issues of importance to the community as a whole. They are jointly responsible for the expenditure of public monies. Each of these two powers are directly or indirectly elected and are liable to recall and replacement by the democratic process. Their independence of the judiciary

⁷ *ibid*, per Denham J. See also Gerard Hogan and others, *Kelly: The Irish Constitution* (5th ed, Bloomsbury Professional 2018).

⁸ [1989] IRLM 181.

⁹ Gerry Whyte *Social Inclusion and the Legal System: Public Interest Law in Ireland*, (2nd ed, 2015 IPA). Article 40.3.2 of the Irish Constitution provides that: 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'

¹⁰ [1965] IR 294.

¹¹ [1989] IRLM 181.

is essential if the great democratic value of popular sovereignty is to be maintained.¹²

Of course, the *TD* case is also significant for the announcement by Keane CJ of the demise of the Irish curial powers to create enforceable unenumerated rights from Article 40.3.2 of the Constitution. The Chief Justice stated that he had the ‘gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as ‘socio-economic rights’ to be unenumerated rights guaranteed by Article 40’.¹³

All this might sound quite academically fanciful, but it had a profound effect on the role of courts in the enforcement of even the most basic of human rights protections for needy and vulnerable groups in society. For instance, in *O'Donnell v South Dublin County Council*,¹⁴ McMenamin J held that it was only in exceptional cases, where there was clear evidence of inhuman and degrading treatment, that a court could marshal State resources, even to protect the right to bodily integrity, and order the executive branch of the State to provide essential services.

For those who work in housing and associated areas, the decision of *TD* and similar constitutional cases exemplified something of a ‘pass the parcel’ approach to socio-economic rights. Housing advocates are dismayed that—even where there is a clear constitutional obligation to provide a service—there are three different State actors involved, and a labyrinth of rules, that can be used to avoid any enforceable obligation on any part of the State.

Housing Rights

Ireland prides itself, at international level, on its human rights record, with its promotion and ratification of international human rights. Of course, these international human rights instruments are currently non-justiciable in Irish courts,¹⁵ (except those in the EU Charter of Fundamental Rights in the context of an EU law issue), and therefore there are no binding obligations at national level to respect or promote these rights. Ireland’s dualist approach to international public law ensures that courts will not enforce these rights – in another ‘pass the parcel’ legal acrobatic exercise within the Irish State.

Ireland has adopted the UN *Universal Declaration on Human Rights* (1948) which refers to housing rights as part of the right to an adequate standard of living.¹⁶ In 1989, Ireland also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966)¹⁷, which obliges Ireland to respect, protect and fulfil these rights. Some obligations, known as ‘minimum core obligations’ have immediate effect (on ratifying a UN human rights instrument) guaranteeing the minimum core obligation of shelter, in an equal and non-discriminatory manner.¹⁸ The priority in allocation of increasing resources, however,

¹² *TD* (n 1) judgment of Hardiman J, [3].

¹³ *TD* (n 1), per Keane CJ

¹⁴ [2015] IESC 28.

¹⁵ See *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97 reiterating that under Articles 29.6 and 15.2.1. of the Constitution, UN and Council of Europe treaties are not part of Irish domestic law, and are not binding on courts.

¹⁶ Universal Declaration of Human Rights, UNGA Resolution 2200A (XXI) UN Doc A/810. Article 25.

¹⁷ Article 11 ICESCR (1966) UN Doc. A/6316 states: ‘The States Parties [...] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate [...] housing’.

¹⁸ UN HABITAT The Right to Adequate Housing Fact Sheet No. 21/Rev.1. <https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf> Accessed 16 September

must be to address those most in need.¹⁹ Beyond the minimum core obligations, the principle of ‘progressive realization’ of rights requires that the State gradually and fully implement the rights, as resources permit, with no unjustified regression. A UN Monitoring Report for Ireland suggested making ICESCR rights part of domestic law.²⁰

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

Further relevant UN instruments ratified by Ireland as a State, which promote the right to housing, include the UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979)²¹, the *Convention on the Rights of the Child* (CRC)(1989),²² the *International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990),²³ the *UN Convention Relating to the Status of Refugees* (1951),²⁴ and the *Convention on the Rights of Persons with Disabilities* (CRPD) (2006).²⁵

Ireland has also ratified the European Social Charter (ESC) and Revised Charter (RESC) of the Council of Europe since 1964, with a range of housing rights for disabled persons, families, migrant workers, elderly persons, and those experiencing poverty and social exclusion. However, the Irish State has refused to ratify Article 31 RESC, on the right to housing, on the basis that:

Article 31 of the Charter [on the right to housing] could not be accepted because of existing provisions in the Irish Constitution which have not changed since the ratification of the Charter... The issue of accepting Article 31 will be re-examined if and when the constitutional position changes.²⁶

Modern Housing and Distributive Justice

In *O’Reilly v Limerick Corporation* Costello J had already spelt out the respective tripartite element of the State:

2022; and Padraic Kenna, ‘Housing Rights after the Treaty of Lisbon - Are they Minimum Core Obligations?’ 2014 3(1) *Cyprus Human Rights Law Review* 13.

¹⁹ See UN Doc. E/1992/23. Committee on Economic, Social and Cultural Rights, General Comment No. 4 on the right to adequate housing. Para 11. states: ‘States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.’

²⁰ UN Doc. E/C/12/IRL/CO/3 UNCESCR *Concluding Observations on the Third Periodic Report of Ireland*, 2.

²¹ UN Doc. CEDAW/C/TUN/3-4 [2000].

²² UN Doc. CRC/C/GC/10 [1989].

²³ UN Doc. A/RES/45/158.

²⁴ UN Doc. A/RES/429.

²⁵ UN Doc. A/RES/61/106.

²⁶ See European Committee of Social Rights (ECSR) (2021) *Fourth Report on Non-Accepted Provisions of the European Social Charter – Ireland*, 6 <<https://rm.coe.int/4th-report-on-non-accepted-provisions-of-the-esc-by-ireland-2021/1680a3c1b4>> Accessed 16 September 2022. The ECSR ‘considers that the legislative and practical measures, including funding, taken by the Irish authorities to ensure the right to housing open the possibility for Ireland to accept Article 31 of the Charter. It therefore encourages the Irish authorities to consider accepting this provision in the near future’.

... In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to Dáil Eireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation.²⁷

But this view represents something of a dated concept of the modern State. Young suggests that two legal concepts have become fundamental to questions of resource allocation in the modern state: rights and queues. Rights in modern States give rise to queues, which are the basic template for allocating State resources in modern liberal capitalist democracies. As rights are increasingly recognised in areas such as housing, so too are queues used to administer access to State provision, especially in conditions of scarcity.²⁸ In some ways, discussions on the right to housing default into priorities in the social housing queue, and opportunistic breaches of this queue (queue-jumping). And yet, the queue is the veritable tip of the iceberg in the distributive and redistributive decisions that are made about the allocation of publicly-subsidized housing.

The provision and sale to tenants of over 240,000 social housing units, along with grants and other supports for home-ownership, in the first century of the State, have been described as laying the basis for a distinct Irish asset-based welfare system.²⁹ This State support for housing-as-property, promoting a distinct style of political society – a ‘property-owning democracy,’ has resulted in a situation where housing accounts for two-thirds of net worth household wealth of €830bn.³⁰ The financialisation of housing has utterly changed established housing models, even the established tenets of social housing.³¹

The Modern State

The role of the State has expanded enormously since the decision of Costello J and *TD*. Indeed, eligibility for ‘social housing support’ is comparatively generous in Ireland, with eligibility based on annual income for a single person no more than €35,000 in the main cities, €30,000 in smaller towns and €25,000 elsewhere, with slightly higher levels for households with children.³² Indeed, more than 50% of the population, based on current income deciles, would, in principle, be eligible for social housing support, but, of course, most are already satisfactorily housed.³³ While the Local Authority Summary of Assessments of Housing Need (2020)³⁴ showed some 61,880 applicants were deemed eligible for social housing support, the tenure/housing occupancy of these ranged from private rented housing 28,194 (45.6%) (50% of whom were in receipt with rent supplement); living with parents 14,825 (24%); living with friends/relatives 6,431 (10.4%); living in emergency

²⁷ *ibid* 194-5.

²⁸ Katherine G. Young, ‘Rights and Queues: On Distributive Contests in the Modern State’, (2017) Boston College Law School: Legal Studies Research Paper Series, No 431.

²⁹ See Michelle Norris, *Property, Family and the Irish Welfare State* (Palgrave Macmillan 2016).

³⁰ See Faris Bader and Cormac O’ Sullivan, *New High in Irish Household Wealth: What is Different this Time?* (Central Bank of Ireland 2019) <<https://www.centralbank.ie/statistics/statistical-publications/behind-the-data/a-new-high-in-irish-household-wealth-what-is-different-this-time>> Accessed 16 September 2022.

³¹ Mark Stephens, ‘How Housing Systems are Changing and Why: A Critique of Kemeny’s Theory of Housing Regimes’, (2020) 37(5) *Housing, Theory and Society* 521; and Manuel B. Aalbers, *The Financialization of Housing* (2016 Routledge).

³² See Guidance Notes on the Household Means Policy (March 2021. Circular 11 of 2021 relating to the Social Housing Assessment (Amendment) Regulations 2021 (S.I. 116 of 2021).

³³ CSO Survey on Income and Living Conditions (SILC) 2020, Table 2.6.

³⁴ See Housing Agency - The Summary of Social Housing Assessments <<https://www.housingagency.ie/sites/default/files/2021-03/SSHA-2020.pdf>> Accessed 16 September 2022.

accommodation 6,188 (10%); other 4,562 (7.4%) and owner-occupier at risk of losing homes 1,680 (2.7%). However, almost 40,000 had been waiting for accommodation for 2 years or more, and 16,832 have been waiting in excess of 7 years. The Irish State has committed in *Housing for All* (2021) to spend €4bn. (on average) per year in State supported housing between 2021 and 2030.³⁵ A Report by the Houses of the Oireachtas, Parliamentary Budget Office (PBO) in 2022 calculates that, applying normative assumptions with regards to household size and required rooms, the capital cost of meeting the housing needs of those inadequately housed would be approximately €29 billion.³⁶

Compared with other European countries, Ireland has among the lowest average housing costs, and homes with the most rooms per person in the EU, with one third of home-owners owning their property outright.³⁷ In 2020, some 17.5% of the EU population lived in an overcrowded household ranging from less than 5% in Cyprus, Ireland, Malta and the Netherlands, to more than 30% in Slovakia, Croatia, Poland, Bulgaria, Latvia and Romania.³⁸ Across the EU as a whole, some 4.3% of the population suffered from severe housing deprivation in 2020 – Ireland had the fourth lowest severe deprivation rate at 1.4%, after Finland and Malta (both 1%) and Germany (1.2%). The housing cost overburden rate is the percentage of the population living in households where the total housing costs ('net' of housing allowances) represent more than 40% of disposable income ('net' of housing allowances). The housing cost overburden rate for the EU was 7.8% in 2020 and the figure for Ireland was 4.5% - among the lowest of EU Member States.

The average size of housing can be measured as the average number of rooms per person: there were on average 1.6 rooms per person in the EU in 2020. The largest number was recorded in Malta (2.3 rooms), followed by Belgium and Ireland (both 2.1 rooms).³⁹ Eurostat data for 2020 also showed that Ireland had almost twice the EU-27 average (9.6%) of tenants who occupied tenancies at reduced (subsidised) rents (17.2%) - third only to France at 21% and Slovenia at 19.8%. Thus, there is a very high level of State support for tenants and those in housing need in Ireland. At the same time, there is a crisis among those seeking affordable rented housing in Ireland and over 10,000 people are living in emergency housing due to homelessness, representing the complexity of Irish housing.

Conclusion

The *TD* case marked a watershed in Irish constitutional law and the end of curial development of unenumerated constitutional socio-economic rights. It also reflects the conundrum of human rights in Ireland – where the State adopts a high visibility in terms of

³⁵ Department of Housing, Local Government and Heritage, *Housing for All* (Government of Ireland, 2021) <<https://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/>> Accessed 16 September 2022.

³⁶ Houses of the Oireachtas, Parliamentary Budget Office (2022) *Housing Ireland: Trends in Spending and Outputs of Social and State Supported Housing 2001-2020*, 37. <https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2022/2022-03-02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housing-2001-2020_en.pdf> Accessed September 2022.

³⁷ See Eurostat, *Housing in Europe – Statistics Visualised* <https://ec.europa.eu/eurostat/cache/digpub/housing/images/pdf/Housing-DigitalPublication-2020_en.pdf?lang=en> Accessed 16 September 2022.

³⁸ Eurostat, *Statistics Explained : Living conditions in Europe – housing*, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_housing#Key_findings> Accessed 16 September 2022.

³⁹ Eurostat, *Size of Housing*, available at <<https://ec.europa.eu/eurostat/cache/digpub/housing/bloc-1b.html?lang=en>> Accessed 16 September 2022.

human rights, ratifying many instruments and securing a position on the UN Human Rights Council, but ensuring that none of these are legally enforceable at home. Paradoxically, while the Irish State has expended enormous resources in housing, creating wide levels of owner-occupation, and the largest and overall cheapest housing in the EU, this took place without granting any enforceable rights to housing. Cases raising constitutional rights to minimum shelter (or raising similar issues in care in TD) have emerged when this generous machinery of the State has failed, or political inertia or non-action, exposes people to life threatening situations – where courts are called upon to rise to the great liberal society challenge of protecting life, liberty and property. But in this great response of one element of the State, the courts, it is impossible to ignore the ‘pass the parcel’ analogy, which is visible to those asserting their rights. Enforceable socio-economic rights in Ireland are something of a conundrum, within an enigmatic constitutional order and a complex social-democratic, but globalised housing system.