THE GUARANTEE OF THE INVIOLABILITY OF THE 'DWELLING' IN ARTICLE 40.5 OF THE IRISH CONSTITUTION: A 'DEFENSIVE SOCIAL RIGHT'?

Abstract: This article seeks to highlight an emergent similarity between Article 40.5 of the Irish Constitution which guarantees the inviolability of the 'dwelling', and Section 26(3) of the South African Constitution which provides that no one may be evicted from their 'home' without a court order made after considering all relevant circumstances (as one element of a right to housing). I argue that the 'all relevant circumstances' inquiry carried out by South African courts, and the recent insistence by Irish courts that (at least) certain decisions which have the effect of depriving a person of their 'dwelling' must be reviewed for their 'proportionality', both represent instances of a 'defensive social right' at work. A 'defensive social right' operates as a 'shield' against the deprivation of a person's existing access to a socio-economic good like housing. I conclude by contending that the addition of an express right to housing to Bunreacht na hÉireann – as most recently recommended by a majority of the Housing Commission – would complement and fortify the interpretation of Article 40.5's guarantee of the inviolability of the 'dwelling' as a 'defensive social right'.

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Introduction

The scale of the housing and homelessness crisis in Ireland has been well-documented. The latest figures reveal that 14,760 people, including 4,561 children are currently living in emergency accommodation.[1] In response to this crisis, there have been many calls, both from civil society[2] – human rights organisations, homelessness charities etc – and from within the political system,[3] to adopt a constitutional right to housing. Indeed, as far back as 2014, the members of the Constitutional Convention voted overwhelmingly in favour of extending constitutional protection to a range of social and economic rights, including the right to housing.[4] The Government at the time did not act upon this recommendation.[5] However, in January 2022, the current Government established a Housing Commission tasked with, amongst other things, advising on a referendum on a constitutional amendment on housing,

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[1] Kitty Holland, 'Homelessness in Ireland hits record high of 14,760 people' *The Irish Times* (Dublin, 25 October 2024) <https://www.irishtimes.com/ireland/housing-planning/2024/10/25/homelessness-in-ireland-hits-record-high-of-14760-people/> accessed 29 October 2024. A study from last year suggested that the true extent of the homelessness crisis is even worse than the official figures indicate: Rory Hearne and Kenneth McSweeney, 'Ireland's Hidden Homelessness Crisis: Applying the ETHOS Approach to Defining and Measuring Homelessness and Housing Exclusion in Ireland' (Maynooth University 2023).

[2] See for example, the 'Home For Good' coalition composed of groups such as Amnesty, Focus Ireland, Threshold, and others: <https://www.homeforgood.ie/who-we-are/> accessed 2 February 2024.

[3] For example, Eoin Ó Broin, 'A constitutional right to housing could restore faith in our political system' *The Irish Times* (Dublin, 10 August 2023) <https://www.irishtimes.com/opinion/2023/08/10/a-constitutional-right-to-housing-could-restore-faith-in-our-political-system/> accessed 2 February 2024.

[4] The Convention on the Constitution, *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural Rights* (March 2014).

[5] In 2017, the then Government secured the passage of motions in both Houses of the Oireachtas providing for the referral of the *Eighth Report of the Convention on the Constitution* to the Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach, to consider the implications of the *Report*. However, it appears that the Committee has not yet done so. See Dáil Deb28 September 2017, vol 959 No. 5: Eighth Report of the Convention on the Constitution: Referral to Joint Committee; and Seanad Deb 11 October 2017, vol 253 No. 10: Eighth Report of Convention on the Constitution: Motion.

in line with a Programme for Government commitment.[6] Also in January 2022, Hogan J delivered a judgment for a unanimous Supreme Court in the case of *McDonagh v Clare County Council*.[7] The case centred around a Traveller family unlawfully occupying public land with the mobile homes and caravans in which they resided. It was accepted that the family's occupation of the land constituted trespass and unauthorised development contrary to planning law. Nonetheless, Hogan J reversed the Court of Appeal's decision to uphold the High Court's grant of a mandatory interlocutory order directing the family to leave the land, on the basis that no *proportionality* assessment of the decision to remove the family had been carried out prior to the granting of the injunction. *McDonagh* is one of a number of cases in recent years to examine the nature and scope of the protection afforded by Article 40.5 of the Constitution.[8] This article argues that the nature and scope of the protection provided by Article 40.5 to a person's 'dwelling' is now similar to that secured by Section 26(3) of the South African Constitution which prohibits the eviction of a person from their 'home' without a court order made after considering all of the relevant circumstances. In other words, both constitutional provisions, I argue, act as 'defensive social rights' insofar as they 'shield' a person's existing access to housing.

I begin by elaborating on the idea of a 'defensive social right'. I then provide brief overviews of Section 26 and Art 40.5 before examining their shared value commitments and the extent to which they provide shields – vertical and horizontal – that protect a person's 'home' or 'dwelling', highlighting echoes across the case law of the two jurisdictions. I conclude by looking at what 'added value' a right to housing could bring in terms of going beyond the protection presently afforded by Art 40.5 of Bunreacht na hÉireann.

'Defensive Social Rights'

Contrary to what might be assumed, 'social rights' are not just 'swords' which can be wielded to demand improvements to social programmes or to generate new entitlements for individuals to be provided with goods and services by the State.[9] They can also be deployed defensively, as 'shields', to preserve *existing* access to resources, such as housing, for example.[10] In fact, Dixon and Landau cite the right to housing in South Africa and its use 'in assessing the validity of eviction orders against those living in informal housing and on other legislation impacting on the enjoyment of existing formal housing entitlements' as one of the 'clearest examples' of the defensive social rights phenomenon.[11]

However, they note that courts across the world use a 'variety of doctrinal approaches' beyond just express social rights guarantees to construct 'shields' for individuals.[12] Accordingly, courts have found room to involve themselves in 'defensive social rights enforcement' through the use of other types of rights and by reliance on constitutional

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[6] See 'Terms of Reference for the Housing Commission' (12 January 2022) available here: <https://www.gov.ie/en/publication/e9d71-terms-of-reference-for-the-housing-commission/> accessed 22 May 2023. The Commission's recommendation in respect of a constitutional amendment on housing is considered later.

[7] [2022] IESC 2, [2022] 2 IR 122.

[8] For a review of the Article 40.5 case law, see Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th ed, Bloomsbury 2018) 2019-2060. See also Conor Crummey, 'Unconstitutional Evictions' (2023) 7(3) *Irish Judicial Studies Journal* 1.

[9] Rosalind Dixon and David Landau, 'Defensive Social Rights' in Malcolm Langford and Katharine Young (eds), *The Oxford Handbook of Economic and Social Rights* (OUP 2022). (Published online – no page numbers available).

[10] ibid.

[11] ibid.

[12] ibid.

principles such as proportionality.[13] This approach can be 'especially significant' in jurisdictions where 'courts are reluctant to rely directly on social rights or where those rights are considered more novel.'[14] Indeed I will argue that the Irish courts – traditionally wary of socio-economic rights claims[15] – can now be said to fall into this category through their interpretation of Art 40.5 – arguably drafted as a civil-political right – as requiring a proportionality analysis of decisions which have the effect of depriving people of their 'dwelling'.

As well as aiding individuals, it is also possible for defensive social rights to be invoked by states to 'shield' policy measures and legislation from attack.[16] This can often occur in the context of property rights-based challenges to redistributive measures.[17] States can argue that their policies, for example, authorising the importation and sale of cheap generic drugs, are necessary to vindicate a particular constitutional right or principle, like access to healthcare, thereby helping to justify interfering with constitutionally protected corporate property rights in expensive patented medicines.[18]

The structure of the right to housing in the South African Constitution – Section 26

The Constitution adopted in South Africa in 1996 – following the end of the apartheid era which had been characterised by extreme levels of racial discrimination, including in relation to access to land and housing – sought to transform society based on a commitment to the values of equality, dignity, and freedom.[19] The inclusion of a right to housing,[20] as one of a number of justiciable (and horizontally, as well as vertically, applicable social and economic) rights,[21] in the Constitution's Bill of Rights was a key part of that transformative constitutional vision to correct the injustices of the past.[22] Section 26 of the South African Constitution enshrines the right to housing in the following form:

> 1. Everyone has the right to have access to adequate housing.
> 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.[23]

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[13] ibid.
[14] ibid.
[15] *Sinnott v Minister for Education* [2001] 2 IR 545; *TD v Minister for Education* [2001] 4 IR 259.
[16] Dixon and Landau (n 9).
[17] ibid.
[18] ibid.
[19] Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co 2010).
[20] For a theoretical analysis of the right to housing with reference to South Africa, see Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Bloomsbury Publishing 2013). For a comparative analysis of the right to housing in South Africa more generally, see Sandra Fredman, *Comparative Human Rights Law* (OUP 2018).
[21] For an analysis of the social and economic rights jurisprudence of the Constitutional Court of South Africa and lessons that may be learned from it for Irish constitutional law, see Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*. See also, Sandra Liebenberg, 'Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow' (2014) 37(1) DULJ 137.
[22] Liebenberg (n 19). For an assessment of the extent to which the South African Constitution has fulfilled its transformative vision, see Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (CUP 2018).
[23] The Constitution of the Republic of South Africa, 1996. A right to 'shelter' for children is protected by Section 28 of the Constitution.

The right is segmented into three constituent elements: first, the general right to have 'access' to 'adequate' housing in subsection (1). This has been held to entail 'at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.'[24] An elaboration of this negative duty is found in subsection (3) (discussed below). The idea of a right of '*access to* adequate housing' – as opposed to a 'right to adequate housing' – also signals that the State's responsibility is not solely to provide housing, but to enable and facilitate 'other agents' in society, including 'individuals themselves', to provide housing.[25] The second element of the right to housing is the expressly qualified positive obligation placed on the State to progressively realise, subject to available resources, that right through the adoption of 'reasonable' legislative and other measures. The third element of the right to housing is the guarantee against eviction from one's home without a court order 'made after considering all of the relevant circumstances', and the allied prohibition on 'arbitrary evictions'.

The combined first and second elements of the right to housing have been interpreted in a cautious fashion by the Constitutional Court.[26] For example, the Court has declined to specify the 'minimum core' content of the right,[27] exhibited reluctance to interpret the substantive content of the concept of 'adequate' housing,[28] relied on a deferential reasonableness standard of review in assessing the State's compliance with its positive obligations,[29] and favoured declaratory remedies over mandatory forms of injunctive relief where a breach of the state's positive housing obligations has been found.[30] By contrast, the Constitutional Court has been far more willing to engage with the third element of the right to housing – the protection contained in Section 26(3) against eviction from one's 'home' without a court order.[31] While the Court has found that the State's positive obligation to provide housing to those that lack access to it is limited by the criteria – reasonableness, progressive realisation, and available resources – stipulated in Section 26(2), there is no equivalent qualification of the negative duty on the State (and private actors) to avoid depriving people of their *existing* access to housing.[32] As a result, deprivations of existing access to housing are treated as interferences with a person's 'home' which can only be justified under the 'stringent requirements' of the general limitations clause in Section 36 of the Constitution.[33] This entails *proportionality* (rather than reasonableness) review of any legislation or action which removes *existing* access to housing.[34]

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[24] *Government of the Republic of South Africa and others v Grootboom and others* (CCT11/00) [2000] ZACC 19 [34].
[25] ibid [35].
[26] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007).
[27] *Grootboom* (n 24) [33]. See also *Mazibuko v City of Johannesburg* (CCT39/09) [2009] ZACC 28, (2010) 4 SA 1 (CC). For an analysis of the concept of the 'minimum core', see Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113.
[28] Bilchitz (n 26). Although Mokgoro J in *Jaftha v Schoeman and Others* (CCT74/03) [2004] ZACC 25, at paras [25]-[26] was prepared to say that a commitment to security of tenure was reflected in Section 26.
[29] Sandra Liebenberg, 'Grootboom and the seduction of the negative/positive duties dichotomy' (2011) 26 SAPL 37.
[30] *Grootboom* (n 24) [96]. Rosalind Dixon, 'Creating dialogue about socio-economic rights: Strong form versus weak-form judicial review revisited' (2007) 5(3) *International Journal of Constitutional Law* 391.
[31] David Bilchitz, 'The Performance of Socio-economic Rights in the South African Constitution' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (CUP 2018).
[32] Liebenberg, 'Grootboom' (n 29).
[33] ibid.
[34] ibid.

The inviolability of the 'dwelling' – Article 40.5 of Bunreacht na hÉireann

Article 40.5's guarantee that the 'dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.' has been said to lie 'at the heart of what makes us a free society.'[35] The inspiration for the provision has been traced (via the 1922 Constitution of the Irish Free State) to the European constitutional tradition, particularly the Constitution of Weimar Germany.[36] It has classically been treated as a safeguard against unlimited 'coercive State interference' with the privacy of the dwelling in the context of criminal law investigation and enforcement.[37] This safeguard includes a requirement for substantive justification for entry into the dwelling, i.e. it is not enough for the State to simply provide legislative authorisation for entry, it must also refrain from 'stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution'.[38] However, its protections, especially in more recent years, have also been invoked in civil law contexts, including in proceedings which can result in the loss or deprivation of a person's 'dwelling'.

In the words of Hardiman J, the 'dwelling' for the purposes of Article 40.5 includes 'every sort of premises from a palace to a shack'.[39] In this regard, various forms of accommodation, such as rooms provided to asylum seekers in a direct provision centre,[40] as well as caravans and mobile homes,[41] have been found to constitute constitutionally protected dwellings. As such, whether or not something is a person's 'dwelling' is answered by reference to a factual assessment of whether it is their 'ionad cónaithe' or place of residence, i.e. where they actually live.[42] Dwellings unlawfully constructed by trespassers and landowners without planning permission have thus been held to enjoy protection too,[43] meaning that Article 40.5's guarantee does not just apply to lawful occupiers but can encompass squatters and trespassers and a *'wide variety of people with dubious legal titles, such as an overholding tenant'*.[44] It has also been held that even temporary permissive occupants such as invited guests fall within its protective reach.[45] As the authors of *Kelly* observe, the case law demonstrates that the fact of occupation rather than proprietary right is the trigger for an entitlement to rely on Article 40.5.[46]

The shared value commitments of Section 26(3) and Article 40.5: Dignity, privacy, and security

In the *Port Elizabeth Municipality* case, Justice Sachs observed that Section 26(3):

> evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy

35 *Omar v Governor of Cloverhill Prison* [2013] IEHC 579 [33].
36 *The People (DPP) v Cunningham* [2012] IECCA, [2013] 2 IR 631, 650-651. See also, Hogan and others (n 8) 2019.
37 ibid Hogan and others 2042.
38 *Ryan v O'Callaghan* (HC) 22 July 1987; *King v Attorney General* [1981] IR 223, 257 (Henchy J).
39 *The People (DPP) v Barnes* [2006] IECCA 165, [2007] 3 IR 130, 145.
40 *CA v Minister for Justice* [2014] IEHC 532, [2021] 2 IR 250.
41 *The People (AG) v Hogan* (1972) 1 Frewen 360.
42 ibid [57].
43 *McDonagh v Clare County Council* [2022] IESC 2.
44 *DPP v Lynch* [2010] 1 IR 543, 546.
45 *Barnes* (n 39), 145.
46 Hogan and others (n 8) 2023.

> and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.[47]

As such, this aspect of the right to housing reflects the idea that a home is more than just a physical structure, it is a place to live in security, peace, and dignity.[48] The idea of the 'dwelling' as a place of privacy, security, and protection from the troubles of the outside world was also eloquently articulated by Hardiman J in *Barnes*. In words similar to those used by Sachs J in *Port Elizabeth Municipality,* Hardiman J stated:

> a person's dwellinghouse is far more than bricks and mortar; it is the home of a person and his or her family, dependents or guests (if any) and is entitled to a very high degree of protection at law for this reason…
>
> The free and secure occupation of it is a value very deeply embedded in human kind and this free and secure occupation of a dwellinghouse, apart from being a physical necessity, is a necessity for the human dignity and development of the individual and the family.[49]

Hardiman J stated further in *O'Brien* that the:

> constitutional guarantee [of Article 40.5] presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world… [it] thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee.[50]

This commitment is evident in the decision of Hogan J in *Sullivan v Boylan*[51] where he held that the harassment of the plaintiff through the intimidatory activities of the defendant debt collector – including persistently parking a van outside her home with the phrase 'Licensed Debt Collector' imprinted on it – amounted to a breach of her constitutional right under Article 40.5. Hogan J commented that:

> Few things are more important in life than the security of one's own dwelling and the right to come and go from that abode without interference…It is only when that security has been threatened…that we realise how important that sense of safety, security and a general sense of repose from the cares of the world actually is.[52]

Hogan J also held in *Sullivan* that the guarantee of the inviolability of the dwelling is horizontally applicable between and enforceable against private citizens – another

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[47] *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7 [17].

[48] For an account of 'a philosophically thick conception of the 'home', as a place of shelter in which one can attend to one's basic needs, but also a space in which important social relationships are constituted and made possible', see Crummey (n 8) 23.

[49] *Barnes* (n 39) 144, 148-149. In *Muintir Skibbereen Credit Union Ltd v Crowley* [2016] 2 IR 665, Hogan J, at 676, described the protection of family life entailed by the Family Home Protection Act 1976 (prohibition on unilateral sale of the family home by one spouse without the consent of the other spouse) as '*reflecting constitutional values embraced in… Art 40.5*' of the Constitution.

[50] *DPP v O'Brien* [2012] IECCA 68 [17].

[51] *Sullivan v Boylan* [2012] IEHC 389.

[52] *Sullivan v Boylan (No 2)* [2013] IEHC 104, [2013] 1 IR 510, 512-513.

overlapping feature with the negative dimension of the right to housing in Section 26(3). The implications of the horizontality of Article 40.5 are considered in more detail below.[53]

The theme of the dwelling as a safe and intimate space is further reflected in case law relating to the privacy of communications generated from within the home.[54] In *Schrems v Data Protection Commissioner*, Hogan J said that legislation authorising State surveillance and interception of data contained in emails, text messages etc sent from inside the home would have to satisfy the proportionality test in order to pass constitutional muster.[55] Otherwise, he noted, the 'potential for abuse' would be 'enormous' and run the risk that 'no facet of private or domestic life within the home would be immune from potential State scrutiny and observation.'[56]

Thus, it may be observed that both Section 26(3) of the South African Constitution and Article 40.5 of the Irish Constitution share a foundational value commitment to the 'dwelling' or 'home' as a place of sanctuary and privacy in which the dignity of the individual is protected.[57] Admittedly, the particular contextual backdrop to the adoption of Section 26 – the legacy of apartheid housing policy – is a point of differentiation between it and Article 40.5. However, the commonality of (judicially identified) value commitments – the dignity of the individual and so on – between Section 26(3) and Article 40.5 remains, I suggest, despite this difference. Moreover, it might be argued that just as the interpretation of 26(3) should be shaped by the societal context of the legacy of apartheid and the need to redress it, our reading of Article 40.5 too should be influenced by the setting in which it currently operates, i.e. a society experiencing a housing and homelessness emergency which is imperilling the dignity of many.

Section 26(3) as a 'shield'

In *Port Elizabeth Municipality*, Sachs J analysed the constitutional and implementing legislative framework – the Prevention of Illegal Evictions and Unlawful Occupations Act 19 of 1998 ("PIE") – governing evictions.[58] The case concerned the illegal occupation of private land by people living there in self-built shacks for periods ranging from two to eight years. At the behest of the landowners and others living in the area, the local municipality sought an eviction order against the occupiers. Sachs J commented that PIE provides 'legislative texture to guide the courts in determining the approach to eviction' required by Section 26(3) of the Constitution.[59] Section 6 of PIE (regulating applications for eviction brought by State organs) says that a court may grant an eviction order in respect of land which is being illegally occupied and the structures erected upon it are either unauthorised or pose a health and safety risk to the occupiers or the general public, if it is 'just and equitable' to do so having considered all the relevant circumstances.[60] A court is required in determining what is 'just and equitable' to 'have regard to' the circumstances of the occupation of the land, the length

[53] For an analysis of the issue of the horizontality of constitutional rights, see Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Michigan Law Review 387.
[54] Hogan and others (n 8) 2044-2045.
[55] *Schrems v Data Protection Commissioner* [2014] IEHC 310, [2014] 3 IR 75.
[56] ibid [52].
[57] On the moral underpinnings of the 'dwelling', see Crummey (n 8) 11-16.
[58] *Port Elizabeth Municipality* (n 47). See also the Extension of Security of Tenure Act 62 of 1997 – the 'companion statute' to PIE in implementing s 26(3) – which provides protection to lawful occupiers against eviction, requiring that certain factors must be considered by a court before ordering an eviction.
[59] *Port Elizabeth* (n 47) [24].
[60] PIE, s 6. Section 4 of PIE governs the process by which private landowners may seek removal of unlawful occupiers from their property.

of time the unlawful occupier and their family have resided on the land, and the availability to the occupier of suitable alternative accommodation or land.[61]

In relation to the first of these factors, Sachs J observed that the motivation of the occupiers could be relevant: for example, were they in an emergency situation with nowhere else to go?[62] He stated further that greater sympathy would be shown to those who had a plausible belief that they had permission to occupy particular land compared to those who deliberately sought to 'queue jump' by invading land and disrupting a local municipality's housing programme.[63] The second factor – the duration of the occupation – is concerned with fairness in terms of the degree of disruption of an eviction on those affected. According to Sachs J, the more rooted occupiers are in a given location, the 'greater their claim to the protection of the courts.'[64] The third factor – the existence of alternative accommodation – while not being dispositive 'would go a long way towards establishing' that a proposed eviction was just and equitable.[65] The provision of alternative accommodation was subsequently made a condition precedent to the lawfulness of an eviction in the *Blue Moonlight* case (discussed later). Sachs J was also of the view that the factors listed in section 6 of PIE were not exhaustive in light of the broad scope of the concepts of justice and equity and that those concepts gave the courts a 'very wide mandate' to consider any circumstances that might be relevant in a particular case.[66] Such matters might include whether the occupiers in question were especially vulnerable, like the elderly, children, or the disabled, and whether the party seeking an eviction order was a local authority with constitutional duties in relation to the provision of housing, as opposed to a private landowner.[67] In essence, what the Court was required to do under Section 26(3) and PIE was to 'decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes.'[68] In other words, Section 26(3) acted as a counter-weight to the protection of private property rights in Section 25 of the Constitution, requiring a balance to be struck where housing rights and property rights come into conflict:

> 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.[69]

Thus, while Section 26(3) is *not* an absolute guarantee against eviction, it also does not allow for evictions automatically to take place simply because valid legal grounds for them exist.[70] It requires a judicial balancing of the competing rights at stake and provides an entitlement to individuals to demand a justification – based on a consideration of all the relevant

[61] PIE, s 6(3).
[62] *Port Elizabeth* (n 47) [26].
[63] ibid.
[64] ibid [27]
[65] ibid [29].
[66] ibid [30].
[67] ibid.
[68] ibid [32].
[69] ibid [23].
[70] ibid [21] and 31. For analysis, see Bilchitz, 'Performance of Socio-economic Rights' (n 31) 58 and Kirsty McLean, 'Housing', in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa*, (2nd ed, Vol 4, Juta 2008) 55.6.

circumstances – for a decision to take their homes from them.[71] On the facts in *Port Elizabeth*, Sachs J concluded that it would *not* be 'just and equitable' to make the eviction order requested because of, amongst other things, the length of time the occupiers had lived on the land in question, the fact that no evidence had been presented showcasing a need either on the part of the municipality or the landowners to evict the occupiers to utilise the land for other productive purposes, the lack of engagement by the municipality with the specific problems of this group of occupiers, and the fact that they were a small group who appeared to be in genuine need.[72]

Article 40.5 as a 'shield'

Article 40.5 clearly secures privacy within the dwelling, but to what extent does it provide (at least some level of) security against the deprivation or loss of a person's dwelling? This is a question the courts have increasingly grappled with in recent years. The analysis of the case law that follows seeks to show that similar defensive elements – judicial oversight and proportionality review – which are required by Section 26(3) in respect of measures which have the effect of depriving someone of their home, are also required by Article 40.5. Potential circumstances in which the loss of a person's dwelling would be at stake include applications for demolition orders in respect of unauthorised developments under the Planning and Development Act 2000, the eviction of public and private sector tenants by local authorities and private landlords respectively, and mortgage repossession proceedings brought by lenders.

In the context of eviction of social housing tenants by local authorities *qua* housing authorities, several cases have touched on attempts to resist evictions.[73] In *State (O'Rourke) v Kelly*, a claim that the lack of any discretion (once certain statutory criteria had been established by the housing authority) for a District Court judge to decide whether or not to issue a warrant authorising possession to be taken of a dwelling under section 62(3) of the Housing Act 1966 constituted an unconstitutional interference in the administration of justice was rejected by the Supreme Court.[74]

However, it does not appear that Article 40.5 featured in the case. In both *Dublin Corporation v Hamilton*[75] and *Dublin City Council v Fennell*,[76] the courts stressed the importance of local authorities being able to freely manage their housing stock in order to discharge their housing duties, including having the ability to speedily recover possession of their dwellings. Though again, Article 40.5 was not discussed in these cases. Section 62(3) of the 1966 Act was ultimately the subject of a declaration of incompatibility by the Supreme Court in *Donegan v Dublin City Council* under the ECHR Act 2003, but Article 40.5 was not mentioned.[77] The lack of a mechanism whereby the District Court, i.e., an independent body, could determine a factual conflict between the housing authority and tenant in the context of repossession proceedings was held to breach the requirements of Article 8 of the ECHR. In *Lattimore v*

[71] Crummey (n 8) has recently argued that Article 40.5 can be understood as requiring a 'heightened level of justification' for a decision to deprive someone of their dwelling.
[72] *Port Elizabeth* (n 47) [59].
[73] Last year, a Circuit Court judge declined to grant an eviction order sought by a local authority on the grounds that to grant such an order in the circumstances would be disproportionate. Ray Managh, 'Court applauds as judge refuses to evict family, including baby, from council house' *Irish Examiner* (Cork, 22 May 2023) <https://www.irishexaminer.com/news/courtandcrime/arid-41144830.html> accessed 23 May 2023.
[74] [1983] IR 58.
[75] [1998] IEHC 99, [1999] 2 IR 486.
[76] [2005] IESC 33, [2005] 1 IR 604.
[77] [2012] IESC 18, [2012] 3 IR 600.

Dublin City Council, a request by a single elderly social housing tenant to remain in his three-bed family home was heard by the housing authority itself rather than an independent decision maker as required by Article 8 (respect for 'home') of the ECHR.[78]

Nonetheless, because the Court took the view that the decision to move him was not a disproportionate interference with Article 8, it reasoned by extension that there had been no breach of Article 40.5 of the Constitution. Finally, in *Kelly v Dublin City Council*, Peart J quashed an eviction carried out (due to alleged anti-social behaviour) by a local authority under the provisions of section 20 of the Housing (Miscellaneous Provisions) Act 1997 on the basis that a decision interfering with constitutional or ECHR rights to protection of the home needed to be proportionate, which required that an individual be given an opportunity to be heard prior to an eviction:

> The question of proportionality cannot be decided in the absence of the person affected being afforded an opportunity to be heard, and I consider that such a question is relevant to any decision to exclude a person from a place he/she calls home.[79]

There is therefore authority supporting the position that in the context of the eviction of social housing tenants, there is a requirement for procedural fairness – an opportunity to have disputed questions of fact determined by an independent body which can assess the *proportionality* of a decision which will result in the loss of a person's home – stemming from Article 40.5 and Article 8 of the ECHR.[80]

The question of the proportionality of measures which would have the effect of depriving someone of their dwelling has also arisen in proceedings concerning demolition orders in respect of unauthorised developments. *Wicklow County Council v Fortune* concerned a chalet built unlawfully without planning permission in a woodland area of natural beauty.[81] The Council in its role as planning authority rejected applications for retention planning permission and sought an order under section 160 of the Planning and Development Act 2000 to have the chalet demolished. However, Hogan J held in light of Article 40.5's guarantee of the inviolability of the dwelling which 'should enjoy the highest possible level of legal protection' an order under section 160 should not be made 'unless the necessity for this step is objectively justified and…the case for such a drastic step is convincingly established.'[82] This meant, he concluded, that it would be insufficient for the Council to show that the dwelling was an unauthorised structure. Rather, it would have to be demonstrated that 'the continued occupation and retention of the dwelling would be so manifestly at odds with important public policy objectives that demolition was the only fair, realistic and proportionate response.'[83] Hogan J indicated that such a response might be justified where the dwelling jeopardised the rights of others or – like under PIE in South Africa – where it posed a risk to public health and safety.

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[78] [2014] IEHC 233.
[79] [2012] IEHC 94 [40]. The decision was upheld by the Supreme Court, see *Kelly v Dublin City Council* [2019] IESC 56.
[80] For an analysis of the relative levels of protection now afforded by Article 8 of the ECHR and Article 40.5 of the Irish Constitution see Padraic Kenna, '*Clare CC v Bernard and Helen McDonagh and IHREC* [2022] IESC 2' (2023) 5(1) *Irish Supreme Court Review*.
[81] *Wicklow County Council v Fortune* [2012] IEHC 406.
[82] ibid [41].
[83] ibid [42].

In *Fortune (No. 2)*, Hogan J applied the test he had set out in his original judgment.[84] The Council stressed the importance of making the demolition order for environmental protection reasons and to avoid setting a dangerous precedent which might encourage others to unlawfully construct dwellings with the intention of raising Article 40.5 as a shield to defend their actions, thereby undermining the integrity of the planning system. Hogan J rejected the Council's arguments, reasoning that because the dwelling would still be unlawful (and therefore 'effectively unsaleable') even if not demolished, a sufficient deterrent existed to discourage others from emulating Ms Fortune's actions.[85] He also disagreed with the Council's assessment that the dwelling adversely impacted the local environment including an adjacent protected habitat.

However, in two subsequent cases – *Kinsella*[86] and *Murray*[87] – Kearns P in the High Court and McKechnie J in the Supreme Court disagreed with Hogan J's approach in *Fortune*. In *Kinsella*, Kearns P said that Hogan J had not given enough weight to the argument about the danger of setting a precedent which could encourage others to construct unlawful dwellings and that his reading of Article 40.5 as a freestanding protection was open to abuse which could compromise the functioning of the planning system. He further disagreed with reasoning by analogy from cases like *Damache*[88] – regulating State intrusion into the privacy of the dwelling by requiring independent decision making in the issuing of search warrants – to cases involving the implementation of statutory planning rules which afforded procedural safeguards to impacted persons. He felt that the test promulgated by Hogan J for deciding if a demolition order was a proportionate interference with constitutional rights would lead to judges second-guessing the merits of planning decisions contrary to the separation of powers. Accordingly, Kearns P granted an order for demolition of an unlawfully constructed chalet on the grounds that it was a serious traffic hazard.

McKechnie J in *Murray* – a case where landowners built a large property after having been refused planning permission for a smaller one previously – similarly disagreed with Hogan J's *Fortune* decision (though not as emphatically as Kearns P in *Kinsella*) and expressed reluctance to endorse his expansive view of Article 40.5.[89] He reiterated the vital public interest in upholding the integrity of the planning system – a consideration which he felt had not been accorded appropriate weight by Hogan J, pointing out that some people build illegally with the intention of remaining in their properties permanently, meaning that a reduced sale value was not a deterrent. Equally, he said that Hogan J had not attached enough import to the wilful and deliberate nature of the planning violation in *Fortune* and that he had attributed too much significance to the fact that the property in question was a 'dwelling'. McKechnie J also held that the focus in an application for a demolition order should be on why such an order should not be granted rather than on why it should be as Hogan J had suggested in *Fortune* and that it was not appropriate for judges to reach independent views on the merits of a case as 'surrogate' planning authorities.[90]

Nonetheless, McKechnie J – though he rejected the test propounded by Hogan J – outlined a series of factors (in addition to the integrity of the planning system) to be considered in relation to the grant of Section 160 orders. These included 'the nature of the breach,… the conduct of the infringer,… the reason for the infringement' and 'the personal circumstances

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[84] *Wicklow County Council v Fortune (No 2)* [2013] IEHC 255.
[85] ibid [13].
[86] *Wicklow County Council v Kinsella* [2015] IEHC 229.
[87] *Murray v Meath County Council* [2017] IESC 25.
[88] *Damache v DPP* [2012] IESC 11 [2012] 2 IR 266.
[89] *Murray* (n 87) [117].
[90] ibid [124].

of the applicant,… [any] delay,… the personal circumstances of the respondent,' and 'the consequences of [a demolition] order, including its financial impact on the respondent'.[91] Such factors would not look out of place in a 'consideration of all the circumstances' evaluation carried out pursuant to Section 26(3) of the South African Constitution. Indeed, PIE, as discussed in *Port Elizabeth*, specifically lists the length of time of an occupation and whether alternative accommodation will be available upon eviction, and Sachs J said that the motivation for an illegal occupation/construction of a dwelling was a factor the courts would take into account, as was whether the illegality was knowing or unconscious. It is thus possible to conceive of a scenario where a planning authority, for example, delays for a significant period of time in seeking demolition of an unlawful dwelling, and where demolition would render the occupants of that dwelling homeless, in which the scales as a result of Article 40.5 might tip in favour of not granting a demolition order. Though it must be acknowledged, given the strength of McKechnie J's remarks about the public interest in preserving the integrity of the planning system, that such cases would be exceedingly rare and factually contingent, with gross and intentional planning breaches being sufficient in most cases to warrant the availability of a demolition order. As the authors of '*Kelly*' opine:

> *Murray* suggests that core of the constitutional protection of the inviolability of the dwelling is concerned with protecting privacy within the physical confines of the dwelling, but it leaves open the possibility for Article 40.5 to have weaker impact beyond that core.[92]

This 'weaker impact' in terms of ensuring secure possession of the 'dwelling' appears to have been triggered by the particular factual matrix of *McDonagh v Clare County Council* where Hogan J overturned the Court of Appeal's affirmation of the High Court's grant of a mandatory interlocutory injunction pursuant to section 160 of the Planning and Development Act 2000 directing a Traveller family trespassing on public land living in unlawful dwellings to vacate that land.[93] Hogan J repeated that the protection of Article 40.5 extends to caravans and mobile homes because they are an 'ionad cónaithe' or place of residence, i.e. where the appellants actually lived, observing that the close and continuous links parameter required by Art 8 ECHR to establish that a particular place qualifies as someone's 'home' did not apply to Art 40.5.[94] Though he conceded that the force of the constitutional protection of Article 40.5 (following *Murray*) is diminished where an occupation is unlawful – an issue not contested in the case – he maintained that the substance of Article 40.5 even in respect of illegal dwellings would be compromised if decisions the effect of which was the deprivation of a person's dwelling were not subjected to a proportionality analysis. Having reviewed the Article 8 ECHR jurisprudence concerning the right to respect for a person's home and finding that it required the proportionality of a measure depriving someone of their home to be determined by an independent tribunal, he concluded – on the basis that Article 40.5 actually provided greater protection than Article 8 due to its more emphatic language[95] – that 'Article 40.5 [also] requires that any decision leading to the loss of one's dwelling must be capable of being subject to review by an independent tribunal such as a court.'[96] He observed that while the Supreme Court in *Murray* had disagreed with the relative weight he had attributed to the factors at play in deciding not

[91] ibid [90].
[92] Hogan and others (n 8) 2049-2050.
[93] *McDonagh* (n 7). For an analysis of the potential significance of *McDonagh* see Rachael Walsh, 'Property, Proportionality, and Marginality' (*Verfassungsblog*, 04 February 2022) <https://verfassungsblog.de/property-proportionality-and-marginality/> accessed 23 May 2023.
[94] *McDonagh* (n 7) [57].
[95] ibid [46] and [49].
[96] ibid [65].

to make a demolition order in *Fortune*, he did not read *Murray* as saying that a proportionality analysis should not be carried out prior to the making of a demolition order.[97] He was also of the view that the position in *Murray* regarding the requirement for judicial deference to the judgment of planning authorities in relation to applications like those under Section 160 might have to be 're-calibrated slightly' in light of ECHR case law.[98] This meant, that while judges could not 'positively interfere' with the decisions of planning authorities, they must nonetheless be able to 'broadly speaking, make their own independent judgment as to whether the making of an order which had the effect of requiring a respondent to vacate a place where they were living would be proportionate in nature.'[99]

In carrying out the necessary proportionality analysis, Hogan J homed in on a number of factors which he said helped tip the scales against the granting of the injunctive relief sought by the Council. First, he highlighted the fact that the McDonaghs were members of a 'marginalised and socially vulnerable group' – a minority whose distinct cultural traditions the legal system had often struggled to accommodate.[100] Secondly, he observed that the McDonaghs were occupying public as opposed to private land and that Clare County Council was not just a planning authority and land owner, but also a housing authority with Traveller-specific and general statutory accommodation duties owed to the McDonaghs, which it had arguably failed to fulfil. Thirdly, Hogan J was cognisant of the fact that if the order sought was granted it would have a 'catastrophic' effect as the McDonaghs would be evicted from the land, and effectively rendered homeless, having nowhere else they could lawfully go and simply be without trespassing.[101] Fourthly, a contextual comparison between this case and others such as *Murray*, *Kinsella*, and *Fortune* revealed several material differences, e.g. in the latter three cases the unlawful structures were intended to be permanent whereas that was not the case here; the McDonaghs' unlawful actions occurred because they literally had nowhere else to go while the defendants in *Murray*, *Kinsella*, and *Fortune* had other options open to them besides illegality; furthermore, the McDonaghs' occupation did not jeopardise public safety or the enjoyment by third parties of any rights or amenities, in contrast to *Kinsella* and *Murray*, and while the McDonaghs belonged to a vulnerable and socially marginalised group with nowhere else to go, the Murrays, for instance, possessed significant financial means and full knowledge of the planning rules yet chose to build in cavalier defiance of them.

As a result, Hogan J concluded that the McDonaghs had raised an arguable case by way of defence to the council's application for an interlocutory injunction and that the balance of convenience lay against the granting of such relief. However, Hogan J also went out of his way to stress that his decision concerned an application for interlocutory rather than permanent injunctive relief in which case the integrity of the planning system and the right of landowners would justifiably carry great weight. Despite this *caveat*, it must again be said that the factors which Hogan J found compelling in this case – vulnerability of the occupiers, lack of alternative accommodation and the impact of eviction on the occupiers, occupation of public land owned by a local authority with legal obligations in respect of the provision of housing – were all identified by Sachs J in *Port Elizabeth* as being relevant to the inquiry to be undertaken by a court under Section 26(3) and PIE prior to the granting of a valid eviction order.

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[97] ibid [92].
[98] *McDonagh (n 7)* [93].
[99] ibid [95].
[100] ibid [113].
[101] *McDonagh* (n 7) [123]. See also the decision of Peart J in *Dublin City Council v Gavin* [2008] IEHC 444 declining to grant an injunction ordering Travellers to vacate illegally occupied local authority land on the ground of futility, i.e. the injunction would simply result in them trespassing somewhere else.

The *McDonagh* judgment has been cited in a number of cases since it was decided. The majority of these have arisen in the context of disputes between private parties and so will be considered below in the section on the horizontality of Article 40.5. However, *Tipperary County Council v Reilly* (like *McDonagh* itself) concerned a local authority and its responsibilities as both planning and housing authority.[102] Tipperary County Council sought leave to execute on foot of an order made in 2013 in respect of, *inter alia*, the vacation of unauthorised dwellings on local authority land by members of the Traveller community. Phelan J felt, in light of *McDonagh*, that she was bound when exercising her discretion under the Rules of Court - to decide whether or not to grant leave to execute – to do so 'in a manner designed to ensure only proportionate interference' with 'protected fundamental rights in the home' under Article 40.5.[103] The local authority argued the 2013 order was a proportionate interference on the basis that it stipulated that the defendants would only be required to leave their unauthorised dwellings if alternative accommodation were made available to them. However, Phelan J rejected this argument because it meant the defendants would have had to leave if *any* accommodation were offered to them, regardless of its suitability and cultural appropriateness. She concluded, in refusing the application for leave, that:

> Given the ongoing nature of public law duties, the length of time families have been residing on the site, changes in circumstances as regards conditions on site, the personal circumstances of those living on site including the particular health needs of adults and children on site, the failure to make suitable accommodation available over a protracted period and statutory requirements pertaining to the provision of traveller accommodation… I have come to the conclusion that a risk of a disproportionate interference with rights has been established in this case such that I should not exercise a discretion under O.36, r.9 giving leave to execute on foot of the 2013 Order where to do so could have the effect of permitting the removal of a family from site without a current lawful determination of the Authority's entitlement to such an order in accordance with the requirements of constitutional justice including the doctrine of proportionality. By reason of the Authority's failure to adequately address the issue of competing rights and interests and in particular the steps taken to provide traveller specific accommodation for the families living on site in discharge of statutory functions and in accordance with law, I am not in a position to determine that giving leave to execute on foot of Clause 6 of the 2013 Order at this remove would not result in a disproportionate interference with the Defendants' rights.[104]

Again, the factors informing Phelan J's decision here – the length of time in occupation, vulnerability of the occupiers, statutory housing duties of the local authority, and the (lack of) availability of appropriate alternative accommodation – echo those adumbrated by Sachs J in *Port Elizabeth* under Section 26(3) of the South African Constitution and its implementing legislation.

Section 26(3) as a horizontal 'shield'

The *Blue Moonlight* case raised the question of the scope of the duties imposed on private landowners in light of the horizontal enforceability of the right to housing under the South

[102] *Tipperary Co Council v Reilly* [2023] IEHC 600.
[103] ibid [47] and [59].
[104] ibid [60].

African Constitution, i.e. its applicability to disputes between private parties.[105] The case involved a property development company wishing to evict illegal occupiers living in a building which it had purchased for redevelopment. *Blue Moonlight* argued that as a private owner it had no responsibility with respect to rehousing those who would be rendered homeless by eviction from its property.

While the company had a duty to respect the rights of the occupiers by not interfering with them other than in accordance with a court order under Section 26(3), it did not owe positive duties of provision to the occupiers. However, the Constitutional Court held that it had a duty to be *patient* with the unlawful occupiers to allow the City authority time to source alternative accommodation:

> Blue Moonlight cannot be expected indefinitely to provide free housing to the Occupiers, but its rights as property owner must be interpreted within the context of the requirement that eviction must be just and equitable. Eviction of the Occupiers would be just and equitable under the circumstances, if linked to the provision of temporary accommodation by the City… *a degree of patience should be reasonably expected* of [Blue Moonlight] and the City must be given a reasonable time to comply.[106]

The horizontal effects of the right to housing in terms of defending against the loss of a person's home to private actors have also been seen in cases like *Jaftha* and *Gundwana*. In *Jaftha v Schoeman*, the constitutionality of provisions of the Magistrates' Courts Act 32 of 1944, that allowed the sale in execution of a person's home – thereby rendering them homeless – to recover even 'trifling' amounts of debt, was challenged.[107] The Constitutional Court regarded the impugned provisions – authorising the deprivation of a person's existing access to housing – as an interference with the negative aspect of the right to housing (which binds private as well as state actors) under Section 26(1), and therefore reviewable under the proportionality test of the general limitations clause in Section 36 of the Constitution. The Court found the provisions to fail that test and to be unconstitutional on the basis that they permitted the sale of homes without 'judicial intervention' and 'where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor' by the loss of their home.[108] As a remedy, the Court 'read in' new provisions to the legislation essentially insisting on compliance with the terms of Section 26(3) of the Constitution by requiring 'judicial oversight' through a consideration of 'all relevant circumstances' – like the size of the debt, the manner in which it was accrued, alternative means to sale in execution of the debtor's property for recovering the debt etc. – before an order for sale in execution of immovable property could be granted.[109]

Similarly, in *Gundwana*, the Constitutional Court framed mortgage repossession as a 'potential invasion of a homeowner's right under Sections 26(1) and (3) of the Constitution.'[110] It thus reiterated that 'where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, further judicial oversight by a court of law of the execution process is a must.'[111] The mortgage lender argued that the case ought to be distinguished from *Jaftha* because the borrower here agreed to her

[105] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33 (CC).
[106] ibid [97] and [100] (emphasis added).
[107] *Jaftha v Schoeman, Van Rooyen v Stoltz* (CCT74/03) [2004] ZACC 25 [40]
[108] ibid [43] and [48].
[109] ibid [56]-[60] and [64].
[110] *Gundwana v Steko Development CC and Others* (CCT 44/10) [2011] ZACC 14 [51].
[111] ibid [41].

house being used as security for the debt. However, the Court held that such agreement could not validly encompass the enforcement of the debt without a court order and could not comprise a waiver of the constitutional right to protection against eviction without court sanction.[112] The Court did stress that judgment creditors were entitled to execute upon the assets of judgment debtors as a normal part of economic life, but that where those assets included someone's home the courts needed to have regard to the 'drastic consequences' this could have.[113] Accordingly, if it is possible to satisfy the debt through other means, then they should be considered before execution orders are granted: 'It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing.'[114]

Article 40.5 as a horizontal 'shield'

In *Irish Life and Permanent PLC v Duff*, the plaintiff lender sought repossession of a family home due to the borrowers having fallen into significant arrears with their mortgage repayments.[115] Hogan J held that case law which sanctioned a mortgagee seeking repossession of a defaulting mortgagor's dwelling without obtaining a court order had to be re-evaluated 'in the light of Article 40.5 of the Constitution', otherwise the:

> assurance of security and protection inherent in the guarantee of 'inviolability' would be fundamentally compromised if peaceable possession of a dwelling could be taken by a lender at almost any time other than by means of a court order without express notice to the borrower… *merely* because the borrower was in default, *even* if this were to be contractually agreed.[116]

Equally, the protection of Article 40.5 would be compromised if it was left solely to a lender to decide whether a borrower was actually in default. Accordingly, he held that 'notice, foreseeability and independent determination of the objective necessity for yielding up of possession which is inherent in the judicial process' were all mandated by Article 40.5.[117] Similarly, 'judicial intervention' and oversight in accordance with Section 26(3) was found to be required in the *Jaftha* and *Gundwana* cases where lenders tried to recoup unpaid debts by selling off the borrowers' homes.[118] However Hogan J also made clear that Article 40.5 could not be relied on to resist repossession of a home on foot of a court order, no more than it could to 'justify the unlawful construction of a dwelling on another's land or the construction of a dwelling without planning permission.'[119] It must be said that neither could Section 26(3) of the South African Constitution be invoked to resist a court order for possession or eviction provided that it was made after having considered all the relevant circumstances. Moreover, if cases like *Jaftha* or *Gundwana* (i.e. where lenders sought the sale in execution of homes in order to recover very small amounts of debt) arose in Ireland, it would be possible under the judicial oversight guaranteed by Article 40.5 to challenge the

[112] ibid [46] and [49]. See Fredman (n 20) 288.
[113] ibid [53].
[114] ibid [54].
[115] [2013] IEHC 43.
[116] ibid [48] (emphasis original).
[117] ibid [44]. Section 3 of the Land and Conveyancing Law Reform (Amendment) Act 2019 now obliges a court in deciding whether to make a possession order to consider whether the making of such an order would be 'proportionate in all the circumstances.' Factors which have to be taken into account include the circumstances of the mortgagor and their dependents.
[118] *Jaftha* (n 107) [61].
[119] *Duff* (n 115) [50].

justifiability of removal, by, for example, identifying alternative ways, less intrusive to the enjoyment of one's dwelling, of recovering the debt where they are available. The authors of *Kelly* have commented that *Duff* 'has substantive implications, as it protects security of possession [like *Jaftha* and *Gundwana*, I argue] by creating an additional hurdle for those trying to sell real property that secures unpaid debt.'[120]

Another notable feature of *Duff* is that it represents a further example (see also *Sullivan v Boylan*, discussed earlier) of the horizontal application of Article 40.5 in a dispute between two private parties.[121] There has long been authority for the principle that (at least certain) rights under the Irish Constitution are capable of horizontal enforcement against private actors.[122] It is interesting, therefore, to consider the implications of horizontality in terms of the overlap between Article 40.5 and the right to housing. Constitutional rights, including the right to housing, are expressly horizontally applicable under the South African Constitution.[123] This has raised the question of the extent of the duties placed on private parties by the right to housing in South Africa. In *Blue Moonlight* it was said that private landowners had a *duty of patience* in respect of seeking to evict people from their property in order to give the State a reasonable amount of time to source alternative accommodation for the occupiers.[124] Might Article 40.5 – given that it is horizontally enforceable against private actors – itself impose (or require, or at least justify, the legislative imposition of) such a duty on private landowners? There is surely a strong argument to be made that the Oireachtas would be entitled to limit private property rights – which as has been repeatedly pointed out are not absolute[125] – by, for example, legislatively imposing a *duty of patience* on private actors seeking to assert their property rights in a way which could result in the loss of a person's dwelling. Where the Oireachtas seeks to strike a balance between conflicting constitutional rights – Article 40.5 versus Article 43 and Article 40.3 for instance – the courts have suggested they will be deferential to the balance struck.[126] Therefore, its horizontality could have significant implications for Article 40.5's wielding as a 'shield' to try and preserve the security of possession of a person's dwelling. This may be of particular relevance to the private rental sector and the eviction of private tenants by private landlords where a person is deprived of their 'dwelling'.[127] Article 40.5 could be relevant to protecting the secure occupation of private tenants in two ways. First, in light of *McDonagh*, it is arguable that a landlord's decision to evict – because it entails the deprivation of one's dwelling – must be subject to a proportionality analysis by an independent tribunal.[128] Secondly, the Oireachtas could reintroduce an eviction ban for a defined period and argue that it is a necessary and

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[120] Hogan and others (n 8) 2051. Crummey (n 8) at 18 argues that Hogan J's reference to a requirement for judicial determination of the 'objective necessity' for repossession connotes substance as opposed purely to procedure, i.e. mortgagors have a 'right to a justification of a particular kind, not just a particular process.'

[121] For a defence of the horizontal application of Article 40.5 see Crummey (n 8) 16-20. See more generally Sibo Banda, 'Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance' (2009) 31(1) DULJ 263.

[122] *CIE v Meskell* [1973] IR 121. Though note that O'Donnell J (as he then was) has commented at 313 in *NHV v Minister for Justice* [2018] 1 IR 246, that *Meskell* provided little '*theoretical justification*' for the principle of horizontal enforcement of rights between individuals. Similarly, Hogan and others (n 8) have observed that the horizontality of Article 40.5 seems largely to have been assumed without detailed discussion in the case law: see para 7.5.55. For recent judicial discussion of the horizontality of constitutional rights, see *McGee v Governor of Portlaoise Prison* [2023] IESC 14 and *ESB v Sharkey* [2024] IEHC 65.

[123] Section 8(2) of the Constitution of South Africa. For a comparative analysis of horizontal constitutional rights in Ireland and South Africa see Aoife Nolan, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12(1) *International Journal of Constitutional Law* 61.

[124] *Blue Moonlight* (n 105) [40] and [100].

[125] Hilary Hogan and Finn Keyes, 'The Housing Crisis and the Constitution' (2021) 65 The Irish Jurist 87. See more generally, Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021)

[126] *Tuohy v Courtney* [1994] 3 IR 1, 47.

[127] Crummey (n 8).

[128] Conor Crummey, 'Evictions into homelessness could be unconstitutional' *The Irish Times* (Dublin, 1 April 2023) <https://www.irishtimes.com/opinion/2023/04/01/evictions-into-homelessness-could-be-unconstitutional/> accessed 23 May 2023. See also Crummey (n 8).

proportionate interference with property rights in order to protect the inviolability of the dwelling in the context of an acute housing shortage where eviction is very likely to result in homelessness. The invocation of Article 40.5 in this fashion to insulate legislation from a property rights-based challenge would fit within Dixon and Landau's 'defensive social rights' paradigm which also captures State reliance on social rights as defensive shields.[129]

However, it must be noted that there is judicial disagreement as to whether *McDonagh*'s requirement for a proportionality analysis applies in the context of disputes between private parties. Thus, in *Cluid Housing Association v Anthony Whelan and Sylvia Whelan*, Bolger J declined to apply a proportionality analysis in the context of an appeal against an injunction ordering the defendants to vacate the plaintiff's property because even though it was an approved housing body, it did not owe any statutory duty to the defendants to provide them with accommodation.[130] Similarly, in *Verwey v Hogan*,[131] the absence of any housing obligations being owed by a private citizen seeking a planning injunction in respect of unauthorised dwellings meant, according to Twomey J, that the *McDonagh* requirement to consider the proportionality of an injunction 'in light of the prospects of [a] person getting accommodation elsewhere' was not applicable in such circumstances.[132]

Meanwhile in *Pepper Finance*, Whelan J, although acknowledging the constitutional protection of a person's dwelling, held that 'the principle that any person at risk of losing his home should be able to have the proportionality of his eviction determined by an independent tribunal does not apply where possession is sought by a private individual or enterprise.'[133] However, on appeal to the Supreme Court, Hogan J left open the possibility that 'Article 40.5 *might* have a relevance in possession proceedings of this kind'.[134]

By contrast to *Cluid*, *Verwey*, and *Pepper Finance*, in *Murtagh v Cooke*, Phelan J (on the authority of *McDonagh v Clare County Council*) conducted a proportionality analysis as part of the balance of convenience inquiry to determine whether a private corporate landlord was entitled to obtain interlocutory relief requiring the defendant trespasser to vacate its property where they were living.[135] Phelan J said that she was satisfied she could 'refuse to make an interlocutory order which… offends against the doctrine of proportionality by reason of the extent of interference with Article 40.5 rights when balanced with competing interests and where the order is neither necessary nor sought in pursuit of a legitimate purpose.'[136] On the facts, she granted the relief sought, notwithstanding the defendant's vulnerability as a recovering addict who would be made homeless by eviction, on the basis, *inter alia*, that he had been given significant notice and time in which to look for alternative accommodation, that the property in question was private property (in contrast to *McDonagh*), and the plaintiff was entitled to the vindication of their constitutional property rights, not owing any (statutory) duty to provide for the accommodation needs of strangers or trespassers.

It appears that whereas Phelan J treated the non-existence of accommodation provision responsibilities as a factor to be weighed in the proportionality analysis of whether to grant an injunction, the judges in *Cluid*, *Verwey*, and *Pepper Finance* (in the Court of Appeal) saw it

[129] Dixon and Landau (n 9).
[130] [2022] IEHC 302, [61].
[131] [2023] IEHC 574.
[132] ibid paras [1] and [17].
[133] *Pepper Finance Corporation (Ireland) dac v Persons Unknown in occupation of 21 Little Mary St, Dublin 7 and 31 Richmond Avenue, Fairview, Dublin 3* [2022] IECA 170 [97].
[134] *Pepper Finance Corporation (Ireland) DAC v Persons Unknown in Occupation of the Property known as 21 Little Mary Street, Dublin 7* [2023] IESC 21, [66] (emphasis original).
[135] *Murtagh v Cooke* [2022] IEHC 436
[136] ibid [75].

as a justification for declining to conduct a proportionality analysis in the first place. However, if Article 40.5 is horizontally applicable (as was held in *Sullivan* and *Duff*), then interferences with the inviolability of the 'dwelling' occasioned by the actions of private actors (in seeking injunctive relief, for example) should, I argue, be subject to the same judicial scrutiny (via a proportionality analysis) as vertical interferences perpetrated by the State, regardless of the (non-)existence of housing provision duties. Otherwise, the extent of Article 40.5's horizontal protection of the dwelling would be effectively cabined by the unlikelihood of a private actor possessing a legal obligation to provide housing. Importantly, a requirement to perform a proportionality analysis whenever the deprivation of a person's Article 40.5 'dwelling' is at stake would not in and of itself undermine the integrity of the rule of law or the planning system given the weight which ought properly to be attached to those considerations in any such analysis. However, it would ensure that any significant interference with a constitutional right vital to the dignity of the individual – the inviolability of the 'dwelling' – receives adequate judicial scrutiny.

The added value of a 'right to housing'

Notwithstanding the increasing similarity between Article 40.5 and the negative element of the right to housing in Section 26(3), there is no doubt that the former falls short of the protection provided by the positive dimension of the right to housing. There are at least three ways, then, that the adoption of an express constitutional right to housing could bring added value, which I now briefly discuss.

As mentioned previously, in the *Port Elizabeth* case the Constitutional Court stopped short of declaring that local authorities had an unqualified constitutional duty to provide alternative accommodation to people evicted from their homes.[137] However, in *Blue Moonlight Properties* (also discussed earlier), the Court held that local authorities were constitutionally obligated to provide emergency accommodation to all those facing eviction, regardless of whether they were being evicted from public or private land.[138] Central to the Court's reasoning in this regard was the obligation on the State under Section 26(2) of the Constitution to take 'reasonable' measures to progressively realise the right of access to housing under Section 26(1).

The City authority had contended that it was not obliged to accommodate people evicted by private land owners as it did not cause the eviction through its own actions. The Court concluded that the City's policy of only offering housing to those evicted from public land was 'unreasonable' as regardless of whether people were evicted from public or private land, the risk of homelessness was the same: 'To the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner.'[139] It therefore held the City's emergency accommodation policy was unconstitutional to the extent that it failed to apply to people evicted by private land owners. The effect of the Court's decision was to make the provision of alternative (emergency) accommodation a condition precedent to the granting of an eviction order in circumstances where people would otherwise be rendered homeless.

Even though the Irish courts in *McDonagh* and *Reilly* have listed the availability of alternative accommodation as a relevant factor in the proportionality analysis of any deprivation of a

137 *Port Elizabeth* (n 47) [28].
138 *Blue Moonlight* (n 105).
139 ibid [95].

person's dwelling, it is unlikely they would be prepared to emulate the South African courts and hold that alternative emergency accommodation *must* be made available before someone can be removed from their home. This is because Article 40.5, unlike Section 26(3), is not supported by an express right to housing accompanied by a correlative State duty as found in Section 26(1) and 26(2). Thus, the addition of a right to housing to the Irish Constitution could bring 'added value' by providing the courts with a clear justification for holding that the proportionality of the deprivation of anyone's dwelling hinges on whether or not alternative (emergency) accommodation is available to those at risk of homelessness. To those who would argue that the current absence of provisions equivalent to Section 26(1) and Section 26(2) from the Irish Constitution is a basis for saying Article 40.5 cannot at all be regarded as analogous to Section 26(3), I contend that while it is admittedly difficult to construe Article 40.5 at present as going so far as to condition the proportionality of any deprivation of a dwelling on the availability of alternative accommodation, it is not a stretch to argue that Article 40.5 requires any deprivation of a dwelling to be subject to a proportionality analysis which could include the availability of alternative accommodation as a factor, albeit not a dispositive one.

Relatedly, an express right to housing, if horizontally applicable, could place duties – like the duty to be patient articulated in *Blue Moonlight* – on *private* property owners, such as landlords, to respect the fact that their property is also someone else's home or 'dwelling'. This could entail being required to afford the State a reasonable period of time to ensure alternative accommodation is available for evictees otherwise facing homelessness before seeking to vindicate their property rights. A constitutional right to housing would strengthen the courts' licence to develop a horizontal constitutional duty of reasonable patience as part of striking a balance between it and the vindication of private property rights. While this is something they have not yet appeared willing to do, despite the apparent horizontality of Article 40.5 itself, a right to housing would offer an additional, fortifying basis for doing so.[140] Alternatively, a right to housing could provide enhanced justification for the Oireachtas legislatively imposing such duty of patience, or indeed adopting other measures which proportionately interfere with private property rights in order to tackle the housing and homelessness crises.

Finally, a suitably drafted constitutional right to housing would re-orient the State's role away from just being a protector of private property rights, to also being a provider of housing for those in most desperate need, such as the homeless. In this way a right to housing could function as a 'sword' to complement Article 40.5's 'shield'.

Conclusion

In sum, then, in light of the Supreme Court's decision in *McDonagh*, Article 40.5, in guaranteeing secure possession of a person's 'dwelling', arguably necessitates an independent *proportionality* assessment of any decision (whether made by the State or a private actor) which will have the effect of depriving a person of their home. However, given the diluted protection of Article 40.5 in cases of illegal occupation and/or unauthorised development, and the weight of countervailing public interest considerations –such as the integrity of the planning system or constitutional property rights– applicable in such circumstances, it would

[140] In *Murtagh* (n 135), for example, Phelan J at [79] said: 'The Plaintiff/Respondent's rights as property owner are safeguarded under the Constitution (under Articles 40.3 and 43) and its enjoyment and use of its property is damaged by unlawful acts of trespass. The Plaintiff/Respondent, as private property owner, is under *no legal duty* to provide for the accommodation needs of strangers and is under no obligation to trespassers' (emphasis added).

seem less likely that findings of disproportionality will be made in those kinds of cases, absent special factors like those present in *McDonagh*, i.e. the extreme vulnerability of those being deprived of their home. Meanwhile, in South Africa, Section 26(3) stipulates that a person cannot be evicted from their home without a court order which has considered *all relevant circumstances* and the courts have found that interferences with the negative aspect of the right to housing must be subject to *proportionality* review to test their constitutional compliance.

This article has argued that the guarantee of the inviolability of the 'dwelling' in Article 40.5 of the Irish Constitution is starting to perform a similar role to the negative dimension of the right to housing as elaborated in Section 26(3) of the South African Constitution. In so doing it has highlighted the shared foundational value commitment of both provisions, i.e. the 'dwelling' or 'home' as a safe, secure, and private zone in which the dignity of the human person is protected. The article has also identified how both Irish and South African courts have relied on Article 40.5 and Section 26(3) respectively to craft shields forged from requirements for judicial oversight in order to defend people's *existing* access to housing.

Only time will tell whether the judgment of Hogan J in *McDonagh v Clare County Council* is built on incrementally by the Irish courts to *further* strengthen the Constitution's protection of the 'dwelling', or indeed whether a constitutional amendment incorporating a right to housing is approved by the people in a referendum. In that regard, the Housing Commission has recommended a form of wording for a constitutional amendment that has clear parallels with the right to housing as provided for in Section 26(1) and 26(2) of the South African Constitution, i.e. a right of *access* to adequate housing accompanied by a qualified positive State duty.[141] The failure of the Commission to recommend a clause equivalent to Section 26(3), however, arguably leaves room for the courts to continue to develop Article 40.5 so that it mirrors Section 26(3)'s role as a defensive social right.

[141] The Report of the Housing Commission, including its proposed wording for a constitutional amendment, is available in full here: <https://assets.gov.ie/294025/7b5ba258-2dff-44f8-b5d4-df36cbda096a.pdf> accessed 23 July 2024. South Africa's experience of a constitutional right to housing featured prominently in presentations made to the Conference on a Constitutional Amendment on Housing organised by the Housing Commission in May 2022. Some of those contributions are available here: <https://assets.gov.ie/226757/b798eaed-d6c7-4816-a147-c2070847d02a.pdf > accessed 2 February 2024.