

HOUSING RIGHTS – A NEW AGENDA?

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Edited by Michael Punch and Lillian Buchanan

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CONFERENCE HOSTS

Threshold is a national non-profit organisation that has been operating since 1978. It researches housing issues, advises and advocates for people experiencing housing disadvantage and campaigns for housing rights for all, with access to suitable accommodation located in sustainable communities.

The **Centre for Urban and Regional Studies**, established in 1990 at Trinity College, Dublin, aims to bring together a range of interdisciplinary expertise to better address the wide spectrum of economic, social and environmental problems facing decision makers. It engages in research and consultancy with a variety of organisations and runs programmes of seminars, symposia and public lectures. It currently has a research contract with Threshold.

FOREWORD

Ireland's experience with rapid growth over recent years has not been without its contradictions, as reflected in the continuing problems of inequality and social need. These issues are nowhere more evident than in the Irish housing system. Although some have done very well from escalating property prices, many people, particularly low-income households and other disadvantaged social groups, simply cannot access an affordable and secure home.

Against this backdrop the term 'rights-based approach' to housing has recently come into common usage within the community and voluntary sector. The declaration that everyone should have the 'right to a home' reflects this perspective. However to influence policy makers and legislators and change conditions on the ground, the approach deserves careful analysis in practical contexts.

The Conference brought together experts in housing policy and law from Ireland and other countries to look at aspects of a rights agenda in housing. The papers explore the meaning of social and economic rights, the failings of the current housing system from a rights perspective, and the policies and practices (whether in terms of legislation, social housing provision, the housing 'market', community-voluntary sector action and so on) which could begin to realise housing rights.

The papers address key questions including:

- What is meant by a 'rights based approach'?
- What are the practical advantages, and for whom, of such an approach to housing?
- How can the approach be progressed in housing?

Threshold is building on the ideas discussed at the conference. It is our view that the establishment of housing rights is essential to realising our vision of an Ireland in which everyone has a right to secure, affordable housing, appropriate to needs and located in sustainable communities.

Aideen Hayden

AIDEEN HAYDEN
Threshold Chairperson

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Housing Models, Housing Rights: A Framework for Discussion

Michael Punch and PJ Drudy

Introduction

The concept of "rights" has once again become the centre of recent debates in some quarters. Considerable interest has been attached to the meaning and practical content of this approach, both as a philosophy and as a set of actions. This is true in the community-voluntary sector, where interest among activists has emerged in how a broad conception of social, economic and cultural rights can become a useful focus for communicative or direct action. This is also true in critical social science, where the language and practice of human rights has been seen by some as having progressive political potential, providing a counterbalance or opposition to the uneven and disempowering tendencies of globalisation processes and neoliberal policies (Harvey, 2000). However, other commentators urge caution, highlighting the ease with which a rights-based approach simply becomes a sophisticated kind of demands-on-the-state reformism, with little potential to achieve real change. Nevertheless, the meaning of "rights" in the context of a basic need like housing is worthy of serious attention, and any exploration through research and/or action is surely welcome.

Although a broad conception of rights was propounded in the United Nations' 1948 *Universal Declaration of Human Rights*, an interpretive separation (or dualism) has developed in how the issue of rights is perceived and practically implemented. The concept has tended to be restricted to political and civil rights, while the application to broader social, economic and cultural issues like economic opportunities, poverty, education, collective identities and housing, arguably has less currency.

Nevertheless, the language and practice of rights have been taken up internationally through such institutions as the UN Committee on Economic, Social and Cultural Rights and Amnesty International. In the voluntary sector in Ireland similar movements are afoot, for example in recent struggles for rights for the disabled. Long-term problems with inequality and exclusion in the housing system, alongside an escalating crisis of social need and homelessness in recent years, have generated further interest in the possible application of rights-based approaches. The central question arising is will such an approach make a real difference in terms of analysis and action, as well as, critically, the housing experiences of the most vulnerable and disadvantaged.

The aim here is to provide a contextual paper as a preliminary step in exploring the application of rights-based approaches to housing research and action. This will suggest a possible framework for analysing different housing models, highlighting varying policies and housing experiences. The framework will then be used to build a discussion of the nature of Irish housing policies and some notable inequalities and conflicts, which have resulted. These can be critically assessed from a rights perspective, highlighting the principles,

objectives and outcomes evident in the contemporary housing model. It concludes with some issues for discussion, in order to explore further how a rights-based approach could lead to progressive change and how this can be achieved.

The critical questions in this regard are, firstly, what is the nature of the contemporary housing system. Secondly, what is the final objective in all this (what are we trying to achieve through action research of this kind)? Thirdly, how, if at all, can a rights-based approach provide a strategic means of getting there? Would such a strategy make a qualitative difference in housing experiences, providing a real alternative to the limits of the dominant model?

Housing models

Housing systems vary in critical ways, both geographically (different systems being in operation across regions or countries) and historically (changes in the operation of a particular system). These variations reflect a long and complex evolution and embeddedness in broader processes of political economy. Structurally, the housing system is shaped by various social relationships (private property, market relations, social ownership, etc.) and development processes. A further complicating feature is that broader problems of uneven development and social inequality also impinge, as people with different levels of economic power have very different housing experiences, ranging from exclusion or unmet need to significant capital gains. The housing system therefore presents important and challenging analytical and policy questions. In attempting to deal with housing questions, a number of commentators have proposed various abstract models constructed around some key features.

One particularly important contribution is the contrast between 'unitary' and 'dualist' housing systems (see, in particular, Kemeny, 1995; also Balchin, 1996; Kleinman, 1996; Davidson, 1999). In a unitary system, an integrated and tenure-neutral approach ensures a range of housing options is developed across the public-private spectrum. Social housing is allowed to meet general needs (and thereby may compete with private development and play a price-leading role) and is provided by a number of non-profit institutions (local authorities, co-operatives, voluntary and community associations, trades unions, etc.). Among other effects, it may be argued that this model helps to dampen price escalation and stabilise the housing system. In unitary models, the cost and availability of land may be strategically controlled in the interests of the community through public land banking, a policy that residualises or eliminates speculative activity. The Vienna Land Procurement and Urban Renewal Fund in Austria and the tradition of public land banking in Sweden offer good examples (Barlow & Duncan, 1994; Forster, 1996; Turner 1996). By contrast, in dualist models, social housing is afforded a minor role as a 'specialist' or welfare tenure to meet the needs of low-income or marginalised households. The private sector is protected from competition from non-profit providers, who generally must employ some form of means testing to allocate their stock.

Housing market 'duality' means that social housing is separated from the housing market in general, protected and regulated to keep rents low, and targeted through means-testing to the most needy groups. The consequences are that it becomes

stigmatised (the main argument for its abandonment in Sweden in 1948) and vulnerable to attacks by Conservative governments (Davidson, 1999, p.456)

Various commentators have offered similar formulations. Balchin's (1996) model identifies a threefold categorisation between social-democratic, corporatist and liberal systems, highlighting the links between broader political ideologies, welfare regimes and housing provision. Kleinman (1996) conceptualises the residualisation of social housing in terms of the 'bifurcation' of housing models, wherein private production for ownership or rental is given emphasis, while public housing is relegated to a secondary role for low-income households. Davidson (1999) provides a model based on divergent policy climates (socialist, social democratic, social liberal, social conservative and *laissez-faire* conservative), which are characterised by different tenure mixes and levels of choice.

These analyses can be taken further by exploring different tendencies in (or 'balance' between) the operation of market and non-market forces in the system. Arguably, housing systems (and policies) differ above all in the degree to which either tendency is supported and emphasised, a structural dynamic, which has a critical bearing on the interplay between housing and inequality (Drudy and Punch, 2002).

In market-dominant systems, the economic forces of supply and demand are relied on to allocate and determine the cost of access to housing. If there is excess supply, private sector agents (builders, landlords, estate agents, etc.) will probably fare badly as rent and prices are likely to fall, while those seeking homes will benefit from increased choice and lower prices. However, if there is scarcity, prices will rise, leading to a crisis of access and affordability, while some private interests will do very well from a "booming" market. In theory, the "market" should reach equilibrium, as supply equals demand.

There are some related critical features, which should be noted. In the market, housing is treated as a commodity, much like any other commodity, such as televisions or motor cars or race horses. Certain features follow from this commodification. Housing is produced to generate a profit, and its contribution is measured in *quantitative* terms (levels of return on investment, capital gain), while its real *qualitative* value (as shelter, home, factor in community development) is a secondary issue. In short, while use-value interests (like home, shelter, community) are socially important, exchange-value interests (return on investment, capital gains, etc.) are the dominant concern.

It follows that the concept of "demand", a central feature influencing provision and price, is an *economic* concept, referring to the willingness of consumers to purchase or rent at certain prices but, importantly, it also implies the ability to pay those prices. This may depend on well-paid and steady employment, the ownership of other property, or access to relations willing to provide informal loans or act as guarantor. The central imperative for private interests involved in the provision of housing is generating income or profits; housing will not be provided to those who cannot pay. Accordingly, demand does not equate with "need", particularly given the inequalities in economic power,

which prevail across different class, ethnic and gender positions. It is at this point that the links between housing and inequality become clear. The implication at the level of everyday life is the exclusion of more vulnerable households, who may not have sufficient (or secure enough) income to pay, from affordable or appropriate housing in the market.

Nevertheless, the commodification of housing is encouraged by many economists, developers, estate agents and those representing the building industry. Furthermore, in line with market ideologies, those producing or selling tend to urge purchase on the grounds that it is a "sound investment" and will surely appreciate in value, particularly if located in a "good area". When property prices are escalating, aspiring purchasers are encouraged to "get in now" before prices rise further, generating something akin to mass panic and lemming-like behaviour among some sectors of the general public. Those who already own are advised (and often believe) that they are "sitting on a goldmine", which may in turn lead them to try to reinforce their "advantage" even further by becoming multiple home-owners. As with stocks and shares profit taking is an inevitable and much-sought element in the game. A related problem is a strong segregating tendency, linked to the perceived importance of avoiding dilution of the commodity with low-priced homes, social housing, or those from lower classes or otherwise construed as "undesirables" by those in dominant or advantaged social positions.

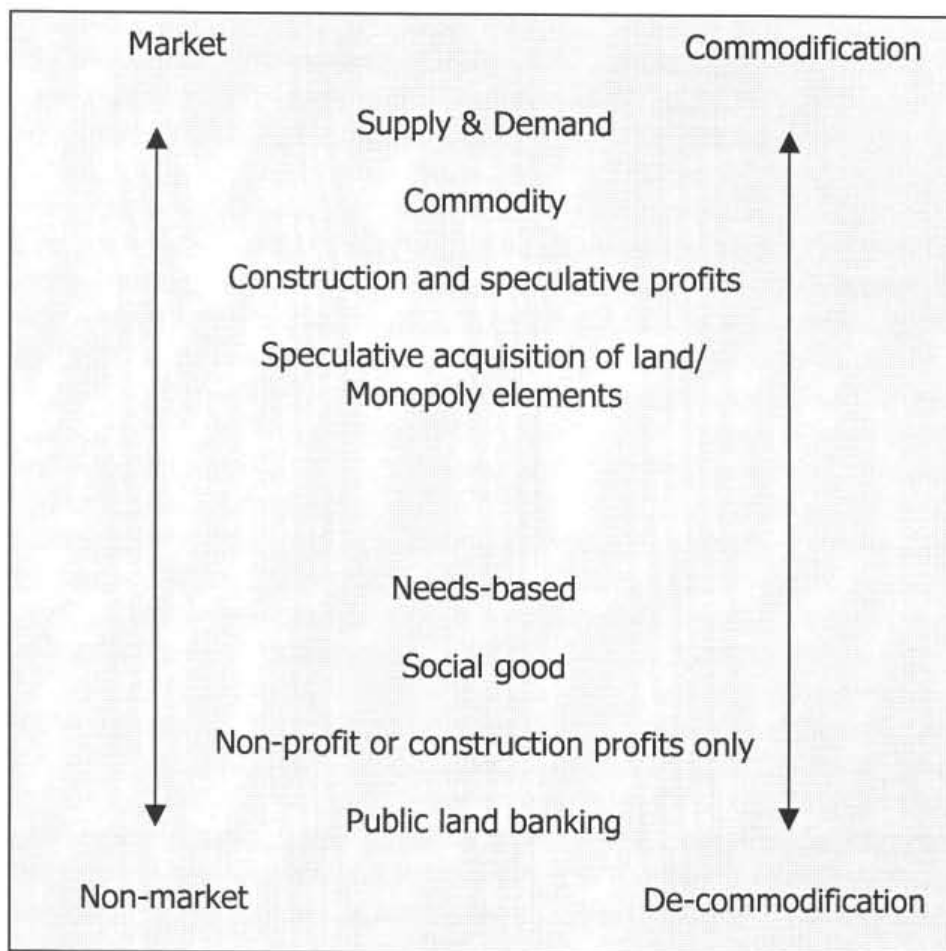
A related element in the commodification process is the acquisition of land by private individuals and developers, sometimes over many years, enabling them to control the production and prices of housing (even to "manufacture scarcity" in some cases). The availability of land is a prerequisite for housing; those who own or control it can exercise a "double monopoly" (Yamada, 1999). First there is obviously a relatively fixed supply of land, while each individual site is unique. Second, land for housing depends on the willingness of landowners to release and sell for such purposes. Excess demand for housing can lead to upward pressure on land prices. Furthermore, re-zoning or granting of planning permission by the state can lead to intense price escalation, further resulting in unearned gains (unless checks are in place such as taxation or some kind of betterment policy).

At the other end of the continuum, housing may be de-commodified significantly, emphasising non-market provision and driven by quite different imperatives. It is provided on a non-profit basis to meet housing needs, rather than investment gains. Such provision is usually encouraged through direct state actions like producing and allocating social housing and public land banking or through the actions of voluntary housing agencies, community development associations and co-operatives. Instead of being treated as a market commodity, housing is regarded as a social good like education or health. Although decommodified housing provision may still depend on private builders, which means there is an element of "construction profit", the speculative gains characteristic of commodified systems are reduced or even eliminated (Barlow & Duncan, 1994).

In short, the differences between housing systems, regionally and historically, relate to a complex range of social, economic, political and spatial forces and relations. However, housing analysis can usefully proceed by investigating the relative balance between different tendencies in terms of unitary or dualist systems and market or non-market approaches and the outcomes in terms of the housing options available to all social groups.

These different tendencies can be summarised as follows:

Figure 1. Commodification/de-commodification of housing models



Housing rights

In what way can a rights perspective add a further dimension to the analysis? Two broad considerations are as follows:

- Rights as normative standards

One view is that human rights can provide a framework of norms, standards or rules for devising and evaluating policies, programmes, interventions and outcomes. In this case, the language and practice of rights provides a means of mapping a minimal level of social, economic and cultural opportunities, which should be afforded to everyone through the general development process. Such an approach, it has been argued, could make a useful practical

link between a rights approach and the "struggle for poverty eradication". As well as providing a normative framework, "rights can help to ensure that essential elements of anti-poverty strategies, such as non-discrimination, equality, participation and accountability, receive the sustained attention they deserve" (Hunt, 2001, p.6).

Furthermore, a commitment to a rights approach could also help to counteract structural inequality and disempowerment. Indeed, one of the arguments for adopting the language and practice of rights is that within the contemporary political economy, some groups are relatively disadvantaged, lacking strong political representation or economic power. Accordingly, policies and interventions, as well as the political process itself, can be unduly influenced by powerful groups or individuals, while the interests and concerns of disadvantaged social groups (e.g. low-income, minorities, disabled, etc.) may not be protected or represented adequately (see also Quinn, 2002).

As a critical element in the production and perpetuation of poverty, these arguments could equally be applied to issues of housing need and provision. The main task would then be to devise agreed norms, policies to meet such norms (involving actions by public, private and third sector agencies) and systems to evaluate the policies, highlighting in particular the relative outcomes for powerful/disempowered or advantaged/disadvantaged groups.

- Selective vs. Universal rights

A second application of rights-approaches to housing relates to analysis of different systems. The discussion on models above can be usefully elaborated by adding a further dimension to the continuum: "universal" versus "selective" rights. In this approach, the right to housing is, in the first instance, a political statement setting out a policy concern and a strategic objective, to the extent that it "embraces the whole set of principles that constitute a national housing policy" (Bengtsson, 2001, 256).

However, in practice, different approaches exist, exhibiting a greater tendency towards either selective or universal approaches to housing rights. Under the former, the state provides a "protected" complement to market provision, and the "right to housing" policy constitutes a commitment to guaranteeing some minimal rights for low-income households. In the latter, the state takes a more interventionist role in order to ensure the housing needs of all households are adequately provided for. In this approach, housing is a right in philosophical and practical terms, in that it is built on the underlying principle that "an acceptable standard of housing is a necessary condition of full membership of the community" (*ibid*, p. 265). Of course, this dichotomy is an extension of the dualist/unitary distinction outlined above, highlighting the general policy environment and housing outcomes.

These two perspectives could be built on further to explore how rights-based approaches can become a useful part both of housing analysis and action, thereby making a real contribution to combating inequality and disempowerment (generally as well as in the specific case of housing). First,

as above, a rights-based approach would involve building a commitment to general housing access as an outcome of development and to policies which support universal housing rights. It would then be necessary to devise a set of specific norms, policies, actions and evaluative mechanisms to ensure that these principles and aims are supported and progressed. Such a housing system would tend to support developmental concerns such as meeting all social needs and reducing (rather than reinforcing) social inequality and poverty.

The question arising is how does the Irish housing system measure up in this respect?

The Irish housing system

The key issues brought together in the above discussion provide a useful focus for a critical analysis of historical and contemporary tendencies in the Irish housing system, including the articulation of market and non-market components and the outcomes in terms of inequality and housing rights. To begin with, the Irish housing system has been increasingly commodified over a number of decades through various policies and strategies. This is clear from a range of trends over many decades.

Residualisation of social housing

Although non-market provision of housing has historically played an important and substantial role, this has been undermined to some extent by a long and vigorous policy of privatising the public stock alongside a general reduction of public land banking and building programmes. The rundown of the social housing system has proceeded so far that it is now commonly perceived as a residual sector with a generally negative welfare-housing image (Redmond, 2001). However, consider some earlier trends.

There has been substantial public intervention in rural housing since the end of the 19th century, amounting to one of the most significant state-subsidised housing programmes in Europe at the time (Fraser, 1996). Local authorities and other non-profit associations have also been significant players in urban housing at various periods during the 20th century, producing good-quality residential environments (MacLaran, 1993). Indeed, local authorities were the dominant housing providers during some periods, accounting for 60 per cent of total output (49,000 units) during 1932-42, 65 percent in the mid-1940s, and 52% during 1950-57.

Over more recent decades, this public system has been cut back considerably, while private provision has been afforded a dominant position, though with public assistance. By 1975, private provision had increased to 67 per cent of total output, and by 2000 it reached 94 per cent. The residualisation effect was compounded by a long-running and vigorous privatisation policy, involving sales to tenants with a sizable public subsidy. Over 230,000 units have been sold from a stock of approximately 330,000 units over the last 70 years. Recent trends confirm this direction, as the net national gain in social housing between 1995 and 1999 was only 7,992 or 1,600 per annum. In Dublin, where housing need pressures are most intense,

the gain over the same period was only 300. Recent commitments to an expanded social housing programme under the National Development Plan suggest that there is finally an acceptance that this situation is not sustainable and that a healthier social rental system is needed in order to meet a diverse range of housing needs. It remains to be seen how robust this commitment will prove to be as the economy slows.

Market dominance

The result of these various trends is that the Irish housing system is now heavily reliant on market provision for private ownership, which is led by for-profit providers, while the supply and price of building land is largely unregulated. However, far from being a "free-market" situation, this position has been supported by a raft of public props, including housing grants, mortgage tax relief and the abolition of rates on residences and various schemes to encourage private ownership among lower-income groups. Furthermore, there is no capital gains tax on the sale of the principal residence, and a residential property tax, introduced in 1984, was abolished in 1994. These policies further underpinned the commodification of housing.

Furthermore, the overwhelming emphasis placed on private ownership has also been at the expense of developing a diverse range of rental options (whether social or private). Indeed, the rental market has remained largely unregulated, with minimum standards not being effectively enforced, while rent controls have been phased out since 1982. Problems such as rent uncertainty, minimal security of tenure, deposit retention and variable quality have contributed to a negative perception of this option, and it has also collapsed in importance in the post-war decades. In 1946, 43 per cent of households rented their homes in the market, but this declined steadily to 8 per cent in 1991. However, there has been some recovery in recent years, the sector increasing to 11 per cent by 1997, and it seems likely that the recent Census will show continued recovery.

Overall, public intervention has been given a limited and facilitative role. Social housing has been residualised to a welfare role, while private ownership has been vigorously promoted, reflecting a range of private-sector interests, which most stand to benefit from rising house prices. Accordingly, the most important public role relates to planning permissions, land re-zoning and investment in a range of collective provisions, which are essential to residential development, yet beyond the logic of the private sector to provide (e.g. sewage, water, roads, schools, etc.). However, the dual forces of market dominance and social residualisation, which have resulted in the commodification of much of the housing system, have also generated a number of difficulties. Some of these housing problems became increasingly acute in recent years, creating a crisis in particular for many people in housing need.

Recent Problems

One can identify a number of "booms" in house prices over an extended period. The most recent of these commenced in 1994, coinciding with the abolition of residential property tax, interestingly enough. The trends have

been well versed elsewhere, and it will only be necessary to make the general point here: average new house prices for the country as a whole increased by 137 per cent between 1994 and 2000 (to £133,249), while prices in Dublin increased by 170 per cent (to £174,622). The trends in second-hand prices over the same period showed increases of 173 per cent for the country as a whole and 198 per cent in Dublin. All urban areas, in particular, experienced similar pressures. Pressures also increased in the private rental system, rent levels having tracked these house price increases. For example, over the period 1998-2000, average rents in Dublin increased by 40 per cent compared to a CPI increase of less than 7 per cent. The general lack of affordable and secure rental options (whether social or private) is a considerable concern, particularly given their increasing importance both socially and economically as greater levels of vulnerability and flexibility are introduced to labour markets through broader economic restructuring processes (MacLennan and Pryce, 1996).

The various factors contributing to the recent increase in demand are clear enough and can be listed briefly, notably demographic trends, economic expansion, low-interest rates and the ready availability of significant funding. At the same time supply did not keep pace, generating the pressures noted above. A number of further factors linked to the commodification processes explored above have also been critically important, however.

There has been considerable speculative interest, unsurprising given the policies noted above and the fact that capital gains tax was reduced to a mere 20 per cent in 1997. As a result, much demand has not been linked to housing need, deriving instead from an interest in housing as an investment good, providing a safe bet for capital gains. An increasing number of purchasers are buying second residential properties or, in exceptional cases, entire blocks of houses or apartments.

The land question also remains a significant problem. Obviously, the availability and price of land zoned and serviced for residential development is a central concern. Builders, estate agents and local authorities will agree that the price of land has been a major force driving up prices. For instance, the Irish Home Builders Association estimated that average site prices in Dublin increased by 200 per cent between 1995 and 1998, accounting for 36 per cent of the average house price in 1998 compared to 21 per cent in 1995. Recent land sales suggest that this trend is likely to continue. The boom in land prices also encourages a speculative interest, while those who have acquired development land can also exert a considerable influence on the market. Of course, excessive land costs also frustrate the ability of non-profit providers to deliver substantial programmes of social housing.

The resolution of this problem has been debated for a number of decades. In the early 1970s, the Committee on the Price of Building Land (chaired by Mr. Justice Kenny) was set up to find a way of stabilising or reducing the price of building land and to ensure that the community acquired on fair terms the 'betterment' element which arises from works carried out by local authorities (e.g. servicing or zoning land). The main proposal was that local authorities

should be enabled to acquire potential development land designated by the High Court at “existing use value” plus 25 per cent. This proposal raised objections from some interest groups, in particular on the grounds that it presented an “unjust attack” on private property rights and was therefore unconstitutional. It is worth revisiting the relevant article:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen (Article 40.3.2)

The view was far from universal, however, particularly since Article 43, while restating the commitment to protecting private ownership and private property rights, also states that such rights ought to be regulated by the principles of social justice and the common good. This issue raises an interesting issue, of great importance on the debate about rights. This is the important distinction between private property rights (which are given robust protection) and universal housing rights (about which, as with other social, economic or cultural rights, the debate has yet to start in a serious way).

In any event, the matter was not resolved and no action was taken. This was particularly significant in that the 1970s and 1980s were a period of major housing development, particularly on the periphery of Dublin (e.g. the “new town” building programme). Given the events that unfolded in that era, including a series of rezoning scandals, which made vast fortunes for “fortunately” placed land owners, the failure to tackle the land question stands as a poignant failing. The losers, as ever, were the many low- and middle-income households who ended up living in massive housing estates, which lacked even basic social and public facilities for many years. Could such development have been more rationally planned and implemented at cheaper cost (thereby freeing capital for investment in facilities and amenities) if the betterment problem had been tackled robustly?

This leads to one final problem, the possibility of a monopoly-type situation prevailing, allowing “super-normal” profits to be made. In this case a relatively small number of individuals acquiring and hoarding serviced land and releasing it slowly can exert control over prices and profits from housing. Of course, the resultant “manufacture” of scarcity and development blockages feed into house prices and frustrate the ability to deliver a robust social housing programme. The exceptional price increases in the late 1990s and the startling divergence between building costs (materials and labour), the CPI, the average industrial wage and house prices suggest such a scenario.

Overall, a number of features characterise the Irish housing system, distinguishing it from other European models. In many respects, it now presents a classic example of a dualist housing model, wherein the market sector is protected from competition from non-profit providers, social housing being residualised to a welfare role. The private rental system has also suffered from a number of long-term regulatory problems and recent rent hikes, and this has also hampered its development. The housing system is otherwise strongly commodified, there being a range of public supports promoting private ownership, while the private sector now dominates housing

provision overwhelmingly. There are strong speculative pressures in evidence. The land question remains a significant problem, raising issues regarding the cost of development land and monopoly elements.

The outcomes have been uneven for different social groups, as reflected in continuing patterns of inequality and unmet social need. Indeed the system has tended to generate a range of "winners" and "losers". Some have done very well from escalating property prices and speculative investment, including landowners and private developers. The "property professions" have also enjoyed the returns from booming house and land prices, including lending agencies, auctioneers, solicitors, architects and the property-advertising machine. Although some construe homeowners as winners in the context of escalating prices, as they become increasingly "asset rich", this view is not unproblematic. The gains are notional unless they sell and trade down, involving displacement and relocation, while also feeding into unsustainable residential patterns, as the cheaper housing tends to be further from the main urban centres of employment. Furthermore, there is also an intergenerational inequality, in that the "gains" to individual owners must be offset against the problems and pressures encountered by their children in the struggle to find a secure and affordable home. In the case of first-time buyers who manage to purchase, there is also the issue of sizable and potentially unsustainable debt.

The clearest losers include the many people, particularly low-income households and other disadvantaged social groups, who simply cannot access an affordable and secure home. This is reflected in rapid increases in housing need, and the residual social-housing sector has thus far been unable to keep pace. As a result close to 50,000 households remain on waiting lists. A significant number of people (over 45,000 recipients during 2001) were in private rented accommodation receiving subsidies from the State at a cost of almost €180,000 in 2001 alone (Department of Social, Community and Family Affairs, 2001). Furthermore, about 7,000 Travellers and 9,000 refugees need accommodation, while a significant number of people (including those with disabilities, people with addiction problems and others) live in unsatisfactory institutional settings. Massive rental increases in the private sector also feed into increasing affordability and vulnerability problems. Many people have to live in poorly serviced, isolated or bleak residential environments. At the hard edge of the crisis, homelessness remains a reality of urban life.

Conclusion

Overall, the Irish housing system, as it is currently configured, could not be construed as a universal rights-based model in view of these persistent inequities and exclusions. At best, it is closer to a selective rights approach, in that while private property rights are generally well protected, favouring the most advantaged socially and economically, housing rights for other groups are weak if not non-existent. Indeed, one could somewhat cynically but justifiably argue that more energy (legally, politically and ideologically) goes to protecting the investment potential of housing rather than its developmental importance as a social good linked to one of the most basic of all human

needs. It seems fair to say that the Irish system presents at best a selective rights model; the debate, never mind the practical possibility, of a universal rights approach has scarcely begun. The critical implication is that, for many people, the ideal of a 'right to housing' remains a quixotic notion, far from the reality of their everyday lives. It is this fact of everyday life above all else that highlights the urgency of continuing to work, through research, policy innovation and action, towards the effective realisation of a right to housing for everyone.

Finally, we propose some key principles and actions for discussion, which would constitute a rights-based approach.

First, a number of rights-based principles can be proposed, which should underpin interventions in the housing system.

- Housing is a social good and a critical element in human, community and societal development; it should not be treated as a commodity, providing opportunities for speculative investment
- Housing should be a universal right: every person should have access to good quality affordable housing appropriate to needs

There are a number of practical issues, which must be tackled in order to implement a rights-based approach founded on these principles. Among these are the following.

- An assessment of housing need should be carried out by an independent multi-disciplinary group. This assessment should be both qualitative and quantitative, providing detail on the nature as well as the extent of need
- Land is the central resource required for housing. The state must ensure through a programme of public land banking that sufficient land is available for residential development
- Housing policies should be tenure neutral, rather than biased in favour of one particular housing option. For example, social housing providers should have a general-needs role and compete with private providers rather than being residualised to a limited welfare tenure
- Housing trends and the effect of policies and interventions must be subject to a continuing and rigorous monitoring mechanism
- Legislation should be enacted to ensure that housing is a universal right without qualification

These principles and issues are suggested for discussion and debate. However, we feel that such approaches are central in order to achieve a real and effective universal housing right and to realise the vision of the 1948 Declaration, wherein everyone has the right to a standard of living adequate for their health and well-being, including food, clothing, housing, medical care, necessary social services and social security.

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Legal Right to Shelter: New York City's Answer to Homelessness?

Ann Duggan

Introduction

On December 5, 1979 the New York State Supreme Court ruled in the landmark case Callahan v. Carey that a legal right to shelter for homeless New Yorkers exists under the State Constitution. In the two decades since, advocacy and litigation has continued to ensure that all homeless New Yorkers have access to that right. Now in June 2002, the number of New Yorkers in the municipal shelter system is at an all-time high: nearly 34,000 people are sleeping in shelters every night, including 14,400 children. These numbers are the greatest number of homeless people New York City has witnessed since the Great Depression.

From a 3,000 mile distance it may well seem that over twenty years of a right to shelter has not helped New York City come any closer to solving the problem of homelessness. A detailed look at the history of the right to shelter and implementation of that right during the last two decades is necessary to examine the merits of a rights-based approach to shelter.

- When in the late 1970s the escalating number of homeless New Yorkers on city streets received little response from either the City or State government, a Wall Street lawyer brought a class-action lawsuit against the City and State that established a legal right to shelter. As shelter provided a way off the streets for thousands of homeless New Yorkers and the right to shelter evolved, there were early efforts to move beyond shelter and work toward rights to housing. City and State housing initiatives in the early 1990s were very successful in reducing the numbers of homeless people in the shelters and on the streets.
- As the shelter system expanded it was reformed and there was a move to develop a 'continuum of care' with programs and services that would help homeless individuals and families secure permanent housing. Monitoring physical conditions in shelters helped to improve the standard of care in shelters. After 1994, privatisation of the shelter system was increased and there was a move to impose conditions on the right to shelter. In the late-1990s the number of homeless New Yorkers began to increase at an alarming rate and homeless shelters had become more difficult to access. As the 1990s drew to a close New York City was fast approaching a record high number of homeless people. With the twentieth anniversary of the legal right to shelter within sight, homeless New Yorkers found themselves in a battle to survive as the Giuliani Administration aggressively sought to eradicate the legal right to shelter. From the mid-1990s New York experienced severe cutbacks to housing programs.
- With less affordable housing available the number of people ending up on the streets and the length of shelter stays for individuals and

families began to increase. In October 2001, homeless advocates announced to the city's media on the steps of City Hall that New York City's homeless shelter population had reached the highest point in history.

- Criticism of the right to shelter and the role of homeless advocates includes the concerns of City and State officials, who believe that being forced to respond to advocates' complaints and court motions prevents them from working toward sound housing policy. They argued that an "unconditional" right to shelter makes it impossible for shelter operators to engage clients in programs that would help them to become re-housed. They also argued that improved shelter conditions encourage homelessness.
- In *Helping America's Homeless*, Dr. Martha Burt points to two opposing explanations of homelessness – 'structural causes' and 'individual causes' – that account for different homeless policy positions, and which explain why New York City, and the rest of the country, experienced a growing homeless population during an economic boom. Addressing 'housing' as the major cause of homelessness (the structural cause) is a proven success. Learning from past successes there is a clear need to invest in supportive and affordable housing as well as in eviction prevention programs. This provides the opportunity to downsize the shelter system while at the same time safeguarding the legal right to shelter.

History of the Right to Shelter

Establishing a Legal Right to Shelter:

In the late 1970s New York City witnessed a rapidly growing number of homeless men and women sleeping in the streets, parks, subway stations and other public places, amounting to a phenomenon unseen in the city since the Great Depression. At the time, there was no legal "right to shelter" for homeless New Yorkers, and the City's response to the crisis was woefully inadequate. There existed a rudimentary system of emergency shelters that were almost always filled to capacity, particularly in the winter. Most notorious of these was the cavernous Municipal Shelter on East Third Street at the Bowery, where conditions were deplorable and tuberculosis and other contagious diseases were commonplace. As a result thousands of homeless New Yorkers were forced to fend for themselves on the streets each year.

In 1979 a lawyer named Robert Hayes, who co-founded the Coalition for the Homeless, brought a class action lawsuit against the City and State arguing that a constitutional right to shelter existed in New York State. In particular, he pointed to Article XVII of the State Constitution, which declares "the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions." Hayes brought the lawsuit on behalf of all homeless men in New York City. The lead plaintiff in the lawsuit, Robert Callahan, was a homeless man whom Hayes had discovered sleeping on the

street during his commute to his law firm. The lawsuit, Callahan v. Carey, was settled as a court consent decree in 1981, which established the right to shelter for all homeless men in New York City and defined minimum standards for homeless shelters. The right to shelter was extended to homeless women by the 1982 Eldredge v. Koch lawsuit, also brought by Coalition for the Homeless, which was ultimately consolidated in the Callahan consent decree. The right to shelter for homeless families with children was established by the 1983 McCain v. Koch litigation. A 1986 decision in McCain by the State Appellate division found that the State Constitution, Federal and State Equal Protection Clauses, and State Social Services Law require the provision of emergency shelter to homeless families with children.

The Callahan consent decree requires the City to provide shelter and board to each homeless individual who:

- “meets the need standard” for public assistance; or
- “by reason of physical, mental or social dysfunction is in need of temporary shelter”.

The Callahan decree also established minimum standards for shelter conditions and services.

In order to enforce the provisions of the Callahan consent decree, Coalition for the Homeless was designated as compliance monitor by the State Supreme Court. Trained Coalition monitors can make unannounced inspections and have twenty-four hour access to all municipal shelters for homeless single adults. Coalition monitors record violations of provisions of the consent decree and report them to City officials. In addition, shelter residents can report violations to Coalition for the Homeless. Every six months, Coalition staff and City officials conduct joint inspections of all of the shelters covered by the Callahan consent decree. These inspections are pre-announced and result in a written report documenting all violations of the decree.

The New York State Office of Temporary and Disability Assistance (OTADA) regulates the municipal shelter system for the State government and is responsible for ensuring that shelters comply with State regulations. OTADA conducts full inspections of all shelters every six months, and copies of these inspection reports are supposed to be posted in every facility. In addition, several other government agencies regulate different aspects of the municipal shelter system, including the New York Fire Department (through fire codes) and the New York City Department of Health (through health codes), and periodically conduct inspections.

Litigation Timeline

The attached timeline provides a summary of litigation highlights from 1979 to 2000, which can be summarized in three categories:

- The 1979 Callahan lawsuit and consent decree in 1981, the 1982 Eldredge lawsuit and the 1986 McCain lawsuit together established the legal right to shelter for homeless New Yorkers.
- On the foundation of this legal right Coalition for the Homeless and the Legal Aid Society tried through litigation to establish a right to housing assistance for some of the most vulnerable homeless populations: the Mixon lawsuit sought to provide medically appropriate housing for HIV-positive homeless people; the Koskinas and Heard lawsuits sought to prevent the dumping of mentally ill people from institutions onto streets and into shelters; and the 1990 McCain consent order required the City to meet the temporary housing needs of homeless families through provision of emergency and permanent housing units for homeless families with children.
- By the mid-1990s there was a realization in the advocacy world that litigation was not as effective in establishing housing rights. The courts were becoming more conservative and clearly not willing to force the City to provide sufficient housing to meet the needs of homeless New Yorkers. By the late 1990s, the litigation changed direction and instead of moving forward with a housing agenda, it was forced into a position of defending the right to shelter. This era begins with Governor George Pataki's issuance of new State regulations that resulted in many families and individuals being denied shelter in every New York State County, except New York City, for failure to comply with shelter "program conditions". In New York City Callahan and McCain were used to secure a stay on implementation of the new regulations. This attack by the State and City on the legal right to shelter gained momentum the next year. In 1996 there were nights when homeless men were denied the legal right to a bed and were instead forced to sleep on the floor of an intake centre, and new eligibility procedures were introduced to deny shelter to families. As the 1990s rounded to a close, the attack on the legal right to shelter came to a head when the City attempted to implement a policy that would literally throw homeless people out of shelters and onto the streets for minor infractions of the rules, effectively eradicating the legal right to shelter.

Right to Shelter Saves Lives – First step along the Continuum of Care:

At the time that the legal right to shelter was established in New York City the homeless population was quite different from the homeless population today. In many respects the typical homeless New Yorker was the stereotypical street-bound dishevelled alcoholic. The most immediate need was a safe and warm place to sleep. In essence the primary role of the legal right to shelter was, and still is, to save lives. Every year hundreds of homeless Americans die outdoors, and thousands suffer injury and severe medical problems as a result of exposure to the elements. In an expert affidavit¹, Dr. James

1 Dr. James O'Connell presented affidavits during the winter of 1999 in support of the Coalition for the Homeless' legal challenge to the Giuliani Administration's plan to eliminate the legal right to shelter for homeless New Yorkers. Dr. O'Connell is President of the Boston Health Care for the Homeless Program (BHCHP) and Medical Director of the Andrew House Dual Diagnosis Detoxification Unit of the Bay Cove Substance Abuse Center.

O'Connell, who has spent more than fifteen years treating injuries and medical problems among the homeless in Boston, attests:

One of the major vulnerabilities to cold and heat is the co-existence of severe and chronic medical impairments. Such impairments, which include diabetes, severe hypertension, advanced heart failure and metastatic cancer, are extraordinarily difficult to diagnose in the shelter setting. Since 1985, I have spent three to five nights each week in shelters. In some instances it has taken years to detect severe medical impairments. For this reason, certain homeless persons may appear healthy when, in fact, they are highly susceptible to heat and cold-related injury...

Absolute temperatures are not the key to cold-related injury...An individual's ability to remain outdoors in cold weather without sustaining severe cold-related injury depends on both environmental and individual factors that are difficult to predict...[the risk of sustaining cold-related injuries] exists not only during the coldest months of the year...In my experience, the most severe cold-related injuries have occurred in temperatures above 32 degrees. Indeed, even in cities like Los Angeles, where the ambient temperature rarely goes below 32 degrees, cases of death due to hypothermia have been reported...Environmental and individual factors can create situations in which even short periods of exposure are dangerous...The commonly-held belief that cold-related injuries occur only at absolute temperatures of 32 degrees or lower ignores the experience of most clinicians and hospital emergency rooms. Indeed, the second worst case of non-fatal hypothermia recorded by Massachusetts General Hospital occurred to a homeless man on October 6, 1993 when the daytime temperatures were in the 50's. This man survived, but now lives in a nursing home at great public expense...The best safeguard against cold or heat-related injuries – indeed the only safeguard that takes into account everything that is known about protecting homeless individuals from the elements – is safety-net shelter.

Shelter providers and advocates for the homeless understand that shelter by itself is not the answer to homelessness, no more than programs that feed people on the streets are the solution to hunger and poverty. However both the provision of shelter and food are responses to immediate needs and provide the foundation for long-term solutions. Both provide opportunities to outreach to street-bound homeless individuals and begin to address the needs of those individuals. Decent and safe shelter is the first step of a longer journey to permanent housing and self-sufficiency for homeless New Yorkers. According to Robert M. Hayes, co-founder of the Coalition for the Homeless, who participated in the drafting of the Consent Decree: "the fundamental design of the Callahan decree was to establish a bedrock protection with the intention to preserve human life."²

Implementation of the Right to Shelter

In *Helping America's Homeless*, Dr. Martha Burt and colleagues categorize homeless policy as being a response to one of two interpretations of the causes of homelessness. One school of thought is that homelessness is caused by 'structural factors'; this argument focuses on the impact of changing housing markets for low-income families and singles, changing employment opportunities for people with a high school education or less, and changing institutional supports for persons with severe mental illness

2 Affidavit of Robert M. Hayes, co-founder of Coalition for the Homeless, January 2001, in support of the Coalition for the Homeless' legal challenge to the Giuliani Administration's plan to eliminate the legal right to shelter for homeless New Yorkers.

(epitomized by drastic reductions in the use of long-term mental hospitalisation), and the effects of persistent poverty and racial inequalities. The second school of thought is that homelessness is caused by 'individual factors'; this argument focuses on personal problems and inadequacies, since homeless populations routinely report many more such problems than the general public. Individual factors include adult and childhood victimization, mental illness, alcohol and/or drug abuse, low levels of education, poor or no work history, and 'too-early childbearing'.

Expanding and Reforming the Shelter System:

While Callahan and McCain secured a legal right to shelter the real battle began with implementation of that right. The use of large cavernous facilities to house homeless New Yorkers like the Municipal shelter on East Third Street continued after the legal right to shelter was established. Throughout most of the 1980s, New York City's homeless population grew at an enormous rate. In 1987, there were 28,737 men, women and children residing in the municipal shelter system on a nightly basis. As the number of homeless single adults in the system escalated to almost 10,000, the adult shelter system became even more dominated by large, warehouse-style shelters directly operated by the City. Most of these facilities were old armories, which sheltered as many as 1,000 men. They offered minimum services to shelter residents and cleanliness, but health and safety conditions were appalling. Although the Koch Administration had fought against the right to shelter litigation, the Koch ten-year housing plan, passed during his final year in office, was an acknowledgement that lack of affordable housing had caused a homelessness crisis in the city.

Between 1988 and 1992 a handful of small-scale, transitional shelters were developed and operated by not-for-profit organizations. In 1992, under the Dinkins Administration, *The Way Home*, a report by the New York City Commission on the Homeless outlined a model for municipal homeless services called a "continuum of care". This model would allow homeless New Yorkers to transition from the streets and shelters into permanent housing and independent living via a continuum of services provided by both government agencies and not-for-profit organizations. The report viewed the right-to-shelter as the essential starting point from which the city's streetbound homeless population could be engaged. The report also recommended replacing warehouse-type shelters with smaller facilities with the necessary support services to move homeless New Yorkers into permanent housing. Endorsed by the Coalition for the Homeless and a number of other organisations, this report made way for the creation of several transitional shelters between 1992 and 1994. At the same time the Dinkins administration responded to court orders which mandated the downsizing of some of the city's most infamous 1,000-bed shelters by expanding the number of shelters in the system without a significant expansion in the total number of beds. By 1994, the City continued to operate twenty shelters while not-for-profits operated fifteen shelters. Most of these new transitional shelters were small-scale (usually less than 50 beds), newly constructed or renovated, had on-site services for homeless people with special needs, and emphasized transitional programs to effectively move shelter residents into permanent housing. But

two-thirds of the beds in the system remained in large-scale facilities directly operated by the Department of Homeless Services (DHS), the agency created in 1994 to administer the City's homeless services.

In the early 1990s, the city witnessed dramatic reductions in the number of single adults sleeping in shelters and on streets. Supportive housing initiatives, particularly the landmark New York/New York Agreement which provided housing for homeless people with mental illness, housing assistance for people living with AIDS, and the Koch Administration's ten-year housing plan, reduced the single adult homeless shelter population by 37 percent between 1988 and 1994. But just when homeless policy seemed to be getting on the right track and the continuum of care was working, the philosophy of 'personal responsibility' took hold. This caused the reformation of the welfare system nationwide, and in New York City a new City Administration swung to embrace the 'individual factor' explanation of homelessness and implemented policy accordingly.

NYC Homeless Policy 1994-2001

Privatisation of Shelters:

In 1994 when Rudolph Giuliani took office his administration began implementing changes that were outlined in a report, *Reforming New York City's System of Homeless Services*. The main objective was to speed-up the privatisation of the shelter system. Although the administration claimed much of the plan was based on the New York City Commission on the Homeless report, the homeless service system quickly began to move away from the continuum of care model. While privatisation was accelerated, it concentrated on contracting the majority of the City-operated facilities to not-for-profits, without downsizing the large congregate facilities or developing smaller transitional programs. The transition process was poorly planned and a number of the organisations awarded contracts to operate shelters had little or no experience working with homeless individuals. Many new service providers were insufficiently instructed about basic legal requirements and implemented their own rules, several of which violated existing legal requirements, including the consent decree, State regulations, local building and fire codes, and even DHS' own policies. As a result, several shelters (including some large facilities) experienced a rough transition period.

In addition there were problems with the contracting process. Inadequate contract budgets resulted from inaccurate information about operating costs provided by DHS to the new shelter operators. This, in turn, meant that these organisations could not provide the revolutionary services and programs that were core to the plan's success.

The Coalition for the Homeless witnessed a dramatic increase in the number of complaints from shelter residents during this transition period. Eventually as the new shelter providers gained experience and knowledge, the residents and advocates alike came to recognize that the not-for-profit organizations were better equipped to manage cleaner, safer facilities, and when shelter

residents were appropriately placed, the program services could also be considered an improvement.

However, it also became clear that the privatisation model of the Giuliani administration was an intention to break away from the continuum of care model and was designed to impose conditions on the right to shelter – conditions that would eventually threaten to eradicate the legal right to shelter. Many shelter residents were (and still are) forced into inappropriate programs and bounced back and forth between shelter placements. In some cases, failure to comply with the rules of a particular program result in a shelter resident being evicted from a shelter and ending up on the streets.

At the outset the Giuliani Administration claimed that the privatisation of homeless services would:

- Save money
- Increase housing placements for shelter residents (by utilising the housing resources of private organizations)
- Enable shelter residents to leave the shelter system more rapidly because privatisation would create improved programs in shelters such as substance abuse treatment, mental health services and employment programs.

In October 1997 the Coalition for the Homeless released a report *Losing The Way Home: Privatization and the Municipal Shelter System*, which analysed these claims. The report details how the Giuliani Administration literally abandoned the effective privatisation model of the early 1990's and instead amounted to a privatisation of the warehouse style shelters.

Despite budget reductions in the mid-1990s, higher costs per bed and for taxpayers resulted when providers sought out alternative funding sources. Also these budget reductions were largely due to some operations staff in shelters being replaced by residents who were paid as little as 65 cents an hour for menial work that took the place of real job training. The number of homeless New Yorkers was escalating, and it was clear that without a housing plan to stem this trend, shelter capacity – and therefore shelter costs – would ultimately have to increase.

The increased housing placements did not come to pass and instead DHS records showed that the average length-of-stay was increasing. The new programmatic model did not improve residents' employment skills; in fact some of the new programs resulted in longer shelter stays. Even more troubling was a new difficulty in accessing shelter for homeless people who did not 'fit' the program structures.

Right to Shelter under attack

In October of 1999 the *New York Times* reported that the Giuliani Administration was set to implement a policy that would force all homeless shelter residents to perform workfare in exchange for shelter. The City planned to implement the new requirement by January 1, 2000, with the

intention of evicting any families or individuals who would not comply with the new requirements for periods of 180 days. As an added insult, any families who were evicted could lose their children to the foster care system. A week-long storm of criticism followed this disturbing news, including statements from elected officials condemning the plan as "a throwback to the days of Dickens." A New York Times editorial criticised the plan as, "self-defeating to drive people onto the streets, recreating the conditions so rightly deplored just a few years ago".

In order to move forward with this plan the City had to receive clearance from the court to modify the Callahan consent decree. The advocates came out fighting to save the right to shelter, and Coalition for the Homeless challenged the City's motion to modify the consent decree. With oral arguments in the case scheduled for January 2000, a coalition of shelter providers, advocacy groups, and social service organizations citywide began to voice strong opposition to the Giuliani plan. The human services community was united in its belief that legal right to shelter was the bedrock of the continuum of care and organisations came together to form a campaign to save the right to shelter. A coalition of family shelter providers publicly announced that its member groups would not implement the new plan. (See www.right2shelter.org)

The plan to eradicate the legal right to shelter came hot on the heels of welfare reform, which had also been developed around a concept of personal responsibility and punitive control. When welfare reform was implemented in New York City, thousands of needy households had their welfare cases terminated for arbitrary reasons and had their applications for Food Stamps (minimum food benefits) and Medicaid (low-income health insurance) illegally denied. Workfare itself amounted to the use of poor people to perform menial tasks for less than minimum wage. For thousands 'workfare' meant working in the City's parks department, where training that would help to secure permanent employment or plans to lift people out of poverty were non-existent.

In February of 2000 the State Supreme Court issued a decision prohibiting the Giuliani Administration from implementing State regulations that would curtail the right to shelter established in the Callahan consent decree. The Judge affirmed the importance of the consent decree in preventing the death and injury of homeless individuals and he acknowledged the risk involved in trusting a person's right to shelter on bureaucracy: "the simple bureaucratic error which might send an individual out into the street...might be the error which results in that individual's death."³

Kenneth L. Kusmer, Professor of History at Temple University, addresses the question of "putting the homeless to work" in *Down and Out, On the Road: The Homeless in American History*. In a recent interview for an edition of the Coalition for the Homeless' newsletter, *Safety Net*, Kusmer notes that the

3 Callahan v. Carey, Index No. 42582/79, Eldredge v. Koch, Index No. 41494/82, (Supreme Court of the State of New York, New York County, 2000).

desire to make the homeless work as a test of worthiness is a repetitive issue that historically dates back to the late 19th Century. Kusmer describes the punitive element that mandatory work requirements incorporate as fundamentally flawed and explains that any effort to make the homeless work just for the sake of working, no matter what the work is, is going to fail because it does not address the source of the problem. The source of the problem, as he sees it, is that economic change creates the basis for the problems of poverty and homelessness, and he describes the current economic change as a transition from industrial to post-industrial society.

The philosophy of personal responsibility that shaped the Giuliani Administration's homeless policy in many ways echoed national policy on welfare. Indeed under Giuliani homelessness was seen less as a housing issue and much more as a criminal justice issue. Intensified police sweeps of individuals sleeping on the streets and the introduction of 'quality of life crimes' gave the street-bound homeless more chance of being arrested and thrown in jail than of being housed.

Cutbacks in Housing:

From the mid-1990s, cutbacks in housing investments and the failed policies of the Giuliani administration took a heavy toll on poor New Yorkers. At the same time that ways to eradicate the legal right to shelter were being crafted, the number of homeless men, women and children sleeping in municipal shelters every night was spiralling out of control. Throughout the late 1990s, advocates for the homeless predicted the onset of a second wave of mass homelessness in the city and vigorously campaigned for renewed investments in affordable and supportive housing. In October 2001, the predictions of the advocates came to pass when the total homeless shelter population, at 29,498 children and adults, surpassed the highest level in New York City's history. Those numbers continued to grow throughout the winter months and in May 2002:

- The total number of New Yorkers sleeping in shelters each night was nearly 34,000 marking an increase of 60 percent since 1998.
- This figure includes 14,500 children.
- Families with children comprise the largest growing segment of the homeless population. The number of homeless families in the New York City shelter system has increased by 78 percent in the past four years to 7,879 families.

Recent testimony of Coalition for the Homeless before the New York City Council⁴ summarised the Giuliani Administration's homeless policy:

- Dramatic reductions in City capital funding for the development of supportive and affordable housing
- Steadfast opposition to City Council attempts to initiate and expand rental assistance and other permanent housing alternatives

4 Testimony of Coalition for the Homeless Before the New York City Council; General Welfare and Finance Committees Preliminary Budget Hearings, March 14, 2002.

- Repeated cuts in funding for homelessness prevention efforts, in particular anti-eviction legal services
- Expansion of the shelter system and rapid increases in shelter expenditures.

The impact of cutbacks in housing by all three levels of government are examined in a housing report published by the Coalition for the Homeless in July 2000: *Housing a Growing City: New York's Bust in Boom Times*. The attached summary of the report's major findings highlights population growth, decline in housing production, widening affordable housing gap and declining housing investments as contributing factors to New York City's current housing and homelessness crisis, that has affected hundreds of thousands of New Yorkers. Over a recent nine-year period (1988-1995) more than 333,000 different men, women and children resided in the New York City shelter system, representing nearly one of every twenty New Yorkers.

Shelter Monitoring:

Litigation in Callahan and McCain continued throughout the 1980s and 1990s in addition to close monitoring of the shelter system by Coalition for the Homeless and the Legal Aid Society in fulfillment of the Coalition's role as court appointed compliance monitor (The Legal Aid Society is current counsel to the Coalition for the Homeless). To the present day the waiting room of the Coalition for the Homeless' New York City office is regularly filled with homeless individuals and families who turn to the Coalition for help when their rights are being violated in the shelter system. Complaints and reports of shelter residents detail incidents of abuse, denial of shelter, illegal activity by shelter personnel, unsanitary and dangerous physical conditions in facilities and inappropriate shelter placements, to name but a few of the routine violations that occur in the municipal shelter system. It is common practice for Coalition advocates to attempt resolution of such cases by bringing the matter to the attention of the administrative staff at DHS. The Coalition's shelter inspector also conducts surprise inspections of facilities and reports all violations of the consent decree observed during inspections to DHS. If, after a number of efforts to resolve an issue, appropriate corrective action plans are not implemented to rectify the matter at hand, the Coalition refers the case to legal counsel, and in extreme circumstances resolution of an issue may necessitate the court's intervention.

One recent example of a matter that required court intervention involved extensive roof leaks at a male veterans' shelter. In bad weather, rain would pour into the sleeping area and the residents were literally wading through water to get to bed, and lockers that contained the few belongings they owned were being flooded. The obvious dangers such a violation poses for residents include health risks and loss of property. Also, because resolving the matter necessitated weeks of advocacy and finally court intervention, before DHS would undertake an appropriate corrective action plan, the shelter residents interpreted the message that being homeless also makes you worth *less*.

When evaluating the purpose of shelter inspections, even when the violations cited seem minor, such as missing sheets or no lock on a locker, it is

important to understand the significance of these violations for even one shelter resident. For the woman or man who has no lock on a locker that contains everything that s/he has been able to salvage from life before the shelter, there exists a feeling of complete vulnerability and insecurity, and the acute sense that the shelter administrators do not think your belongings are worth the bother or the price of a lock to safeguard. Similarly, walking into a shelter late at night to find that residents do not have sheets on their beds is a good indication of the standard of care and services provided to shelter residents, particularly in City run shelters. It is difficult to see how staff in a facility will be organised or interested enough to provide appropriate counselling or job-training if they are having difficulty meeting one of the most basic standards of the consent decree. When the physical standards in a shelter do not even meet the basic requirements of the Callahan consent decree, the general sense among the resident body is one of low self-esteem and failure. By contrast, in shelters where the administrative staff ensures clean and safe physical surroundings, one is more likely to find comprehensive training or counselling programs. Clean and well-run facilities tend to provide good programs and are more successful in helping shelter residents find permanent housing. The shelters that are frequently cited for Callahan violations are also the facilities where one is likely to find residents who have spent a long time in the shelter system.

Research⁵ on different patterns of shelter utilisation identifies three major categories of shelter users who have distinct service needs. Transitional shelter users represent 81 per cent of all shelter residents. They have low incidence of medical, mental health and addiction problems, and their shelter usage is short. Housing assistance is the most effective way of addressing their housing needs. Episodic shelter users represent 9.1 percent of shelter residents, and they also have short shelter stays, but their shelter usage is much more frequent. Residents in this group also experience much higher incidence of health, mental health and substance abuse problems. Because they often bounce back and forth between institutions, including prisons, hospitals and mental health facilities, discharge linkages between shelters and these institutions as well as access to affordable housing is required. Finally, 9.8 percent of shelter residents are categorized as chronic shelter users, who consume almost 50 percent of shelter resources. The residents in this group also have the highest incidence of disability, including mental illness and serious medical problems. The most effective and long-term housing solution for this group is permanent housing with on-site services. Constant monitoring of the worst facilities does result in gradual improvements in physical conditions and social services. Shelter monitoring is an essential means of ensuring that this last category of shelter residents does not completely disappear in the system.

While current day shelters in New York City are cleaner and safer than the shelters of the 1980s, there are still facilities at what is described as the 'front-

5 Randall Kuhn and Dennis P. Culhane (1998). Research was based on City shelter database information and analysed patterns of shelter utilisation for 73,263 single adults who resided in the municipal shelter system for single adults during the period 1992-95.

end' of the system with notorious reputations that often deter homeless New Yorkers from entering the shelter system:

- For homeless single men there is only one entry point, which is located in an 850-bed facility, the third largest facility in the system. From this point of entry a homeless man may be placed in one of three assessment centres before he is matched (or often mismatched) to a program or general shelter. All of the assessment centres are located in large congregate facilities that have the worst safety records. The reputation of one of these facilities is so bad that it frequently causes homeless men who are attempting to access shelter to return to the streets. Coalition monitors still receive daily complaints from these facilities, and surprise visits and inspections always result in the documentation of several Callahan violations.
- In many respects the 'front-end' of the family shelter system is worse. Again there is only one entry point to the shelter system for homeless families, the Emergency Assistant Unit (EAU), which is located in the Bronx. As noted by former Deputy Commissioner for Legal Affairs and General Counsel of the New York State Department of Social Services Susan V. Demers⁶, the Department of Homeless Services is under court order to ensure a same-day shelter placement for all homeless families. However it is common practice for families to spend several days waiting for the temporary placement; families often spend all day at the EAU before being sent to old dilapidated welfare hotels as late as 1:00 am or 2:00 am. Very early the next morning they are forced to return to the EAU, carrying all their belonging on and off buses, to sit and wait for placement. Also not uncommon is the practice of forcing families to sleep overnight at the EAU, which is in direct violation of court orders. This inhumane treatment of homeless families has been documented by several media stories⁷ that detail the damage to children's health and education when they are forced to sleep on plastic benches and concrete floors, while missing days and sometimes weeks at school. Once a family secures a ten-day placement, the agony of awaiting the outcome of the eligibility screening begins. DHS investigators analyse the family's circumstances and more often than not will determine that a family is ineligible. The family is then forced to leave the shelter placement and return to the EAU to start the shelter application process all over again. This bouncing around in the system often leads to days out of work and job loss for parents. Being found eligible for shelter often necessitates the intervention of advocates for the homeless. Sadly, no matter how young, almost every child who enters the EAU knows, and dreads, the meaning of the word ineligible.

6 Demers. S. V. "The Failures of Litigation as a Tool for the Development of Social Welfare Policy", *Fordham Urban Law Journal*, April, 1995.

7 Jennifer Egan's "The Hidden Lives of Homeless Children", *The New York Times Magazine*, March 24, 2002, is a comprehensive report on homelessness as it is experienced by young children and their families.

Despite conditions at the entry points that can effectively dissuade individuals and families from entering the shelter system, a record number of homeless people reside in the municipal shelter system. Comparison with other U.S. cities shows that this phenomenon is not unique to New York City. A study of twenty-seven cities by United States Conference of Mayors in 2001 found that a:

...weak U.S. economy means more people in need...Hunger and Homelessness rose sharply in major American cities over the last year...Requests for emergency food assistance climbed an average of 23 percent and requests for emergency shelter assistance increased an average of 13 percent (and were sharpest in Trenton (26 percent), Kansas City (25 percent), Chicago (22 percent), and Denver (20 percent)).... requests for homeless families alone increased by 22 percent, with 73 percent of the cities reporting an increase.⁸

This report confirms that shelter usage is also increasing in cities without a legal right to shelter, simply because homelessness is increasing. In all of the cities surveyed by the report, a dearth of affordable housing is identified as the leading cause of homelessness.

Criticisms of The Right To Shelter

The legal right to shelter does attract some criticism, mostly from city and state officials who hold the view that Callahan is contributing to the homeless problem, rather than helping to solve it.

In a paper for the *Fordham Urban Law Journal*, "The Failures of Litigation as a Tool for the Development of Social Welfare Policy", Susan V. Demers⁹ argues that the persistent watchdog role of the homeless advocates has made it impossible for the administrators of the homeless system and elected officials to work toward sound policy on housing. Demers outlines the thesis that litigation is largely counterproductive to the development of a coherent and feasible social welfare policy, and it interferes with the constitutionally derived separation of powers. In her analysis of the Callahan consent decree, she argues that the decree and the frequent motions by the plaintiffs to enforce various provisions of the decree forced the state and the city to spend excessively on improving conditions in shelters that largely related to cleanliness and numbers of bathroom fixtures. In the meantime:

...the ability of the city and state to develop homeless policy in a deliberative and rational manner was impeded by the need to respond to frequent motions for enforcement of the Consent Decree. Determining what types of facilities and programs would truly meet the needs of the residents of adult shelters became a lower priority than ensuring that, for example, there were forty toilets working in the Fort Washington Armory.¹⁰

8 *Status Report on Hunger and Homelessness in America's Cities 2001*, The United States Conference of Mayors.

9 From 1988 to 1994, Susan V. Demers served as Deputy Commissioner for Legal Affairs and General Counsel of the New York State Department of Social Services in the Administration of Governor Mario Cuomo. From 1984 to 1988, she served as Associate Commissioner for Legal Affairs and Deputy General Counsel. This article was completed in April 1995.

10 Demers (1995) op. cit.

Demers also criticises the series of court orders in McCain, where no trial had ever been held or ruling given on the merits of the plaintiffs' underlying claims. McCain court orders, for example,

...placed more and more types of facilities and hotel rooms out of the City's reach as accommodations for sheltering homeless families...and committed the city to developing permanent housing and types of preferred temporary housing for homeless families, to giving homeless families placement priority in housing managed and developed by various city agencies and to meeting time frames for ceasing to use hotels and motels to shelter homeless families.¹¹

Referencing the court's 1985 determination that under no circumstances "shall provision of overnight accommodations in the city respondents' welfare offices (including Income Maintenance Centres and Emergency Assistance units) constitute the provision of emergency housing"¹² and subsequent order entered in October 1985 that required the immediate placement of eligible homeless families in appropriate accommodation, Demers argues that this micro-management style amounted to the court substituting its (and plaintiffs') views of the appropriate standards to be applied for those of executive agency officials, whose responsibility it was to develop standards for providing shelter to homeless families once they had "undertaken" to do so. And in addition to executive officials being distracted by various complaints, motions and court orders from the job of creating sound policy to solve homelessness, the funds that could be used to implement the 'sound policies' are used instead to respond to the courts, and in some cases to pay fines, which she argues harms the interests of the people the litigation seeks to protect.

The homeless men and women who are represented in Callahan would have been better served by the careful and rational development of housing with services programs that meet their needs. The millions of dollars spent on improving conditions in armories are only in recent years being redirected to developing, in consultation with advocates for the homeless and service providers, more appropriate types of housing.¹³

Mark Hurwitz, Assistant Commissioner of the New York City Department of Homeless Services, echoed some of Demers' arguments at a Columbia University forum in 2001. He raised the point that supportive housing "*is preferable to most homeless people, and to communities. And it is cost effective: Studies show that public cost of homelessness can be reduced by placing homeless people into supportive housing.*" He posed the question, "*Why does government invest relatively so much in shelter?*"¹⁴ In explanation he considers, as Demers does, how the legal right to shelter allegedly harms the interests of the very people it seeks to protect and help: Government will always follow the path of least resistance. New York City is a city of neighbourhoods and local government must contend with neighbourhood politics when designing programs for homeless individuals and families. Without exception, neighbourhoods strongly oppose the siting of programs for homeless people in their 'backyard'. But because there is a court order

¹¹ *Ibid.*

¹² Order, Freedman, J. Oct. 5, 1985, *Lamboy* (Index No. 41108/85).

¹³ Demers (1995) op. cit.

¹⁴ Homeless Law and Policy seminar at Columbia University, Mark Hurwitz, April 2001

mandating shelter, local government can overcome public resistance against the development of a homeless shelter in any given neighbourhood.

Hurwitz framed his considerations of the repercussions of Callahan with the question, "What are we willing to sacrifice in order to keep access high?" The consent decree compels the City to provide shelter for all homeless individuals, and as an administrator of the shelter system, Hurwitz criticises what he describes as...the non-negotiable position of the Coalition that there must be someplace to go, even for the most hard-to-serve, unmotivated person. Therefore as a homeless person, "*you may come in (to a non-program shelter) if you are drunk or high; you do not have to pay, no matter how much income you have. You do not have to save; you do not have to see a caseworker; you do not have to look for housing; you do not have to cooperate with a treatment plan.*"¹⁵ He indicates that this can be preferable for some people as it allows them more personal freedom than would be tolerated by their own families. He contrasts this scenario to program shelters that require clients to sign contracts and follow strict guidelines and an "independent living plan." As an Assistant Commissioner who served in the Giuliani Administration this interpretation of what shelter means and the need for conditions on the right to shelter is very much in keeping with the City's homeless policy for the last eight years.

Hurwitz goes on to argue that the right to shelter has created a vicious cycle in which investment in shelter creates demand for shelter: supply drives demand. Moving beyond Demers' argument that the Callahan motions forced city and state spending to improve physical conditions in shelters, Hurwitz states that these improvements contributed to an increase in the homeless census. He maintains that while demand for shelter is driven by external factors normally cited, including housing costs, income, poverty, substance abuse and mental illness, it is also based on attractiveness of shelter compared with other alternatives.

A more in-depth analysis of this latter argument is offered by Brendan O'Flaherty in *Making Room: The Economics of Homelessness*¹⁶. O'Flaherty views Callahan and McCain less as cases that establish a right to shelter and more as cases that, "establish a principle of judicial oversight on the quality of New York shelters...the litigation is not over whether there will be shelters, but about what kind." He suggests that the growth in number of single adults in shelters in the early eighties can be partly attributed to better shelters but argues that there is no evidence that all the litigation has made shelters safer, and safety was a priority concern for homeless men in the late 1970s. More importantly, he argues that the 'nicer shelter – higher numbers' theory cannot explain the concomitant rise in street populations. Analysis of the shelter population shows that the increase in shelter census was not just an onslaught of new people; longer shelter stays played a major role in expanding the shelter system. *Making Room* focused on six cities (New York,

15 *Ibid.*

16 O'Flaherty, B. *Making Room: The Economics of Homelessness*, Harvard, 1996.

O'Flaherty is the Associate Professor of Economics and Public Affairs as well as the Director of the Graduate Program in Public Policy and Administration at Columbia University.

Newark, Chicago, Toronto, London, and Hamburg), and in all six the numbers of families with children being housed in shelters and hotels grew substantially during the 1980s. The book examines the popular argument that increases in the family shelter census are related to families in the system being placed at the top of lists for subsidised housing. While acknowledging that some people are certain to be attracted to the shelters system by the better placement prospects, Flaherty questions how the better placement rates in New York City that lasted just "a few months in early 1990 could keep people flooding into shelters in 1993".

Conclusions

What Has Worked:

In *Helping America's Homeless*, Dr. Martha Burt concludes that creating sound housing policy requires looking at homelessness as a structural problem:

The key to persistent homelessness in the United States appears to be the persistent and worsening mismatch of housing costs to available household resources. With this mismatch as the structural backdrop, personal vulnerabilities combine and interact to increase the risk that a given person will be extremely poor, and also become homeless. But remember that all the vulnerabilities we could amass to explain the probability of homelessness, plus extreme poverty, could account for only 32 percent of the variance in whether a person had or had not ever been homeless. Without the poverty and the affordable housing crisis, the same vulnerabilities would not produce homelessness. With them, it is to some degree a random process that determines which individuals and which households will experience the one crisis too many that will push them into homelessness.¹⁷

This finding echoes earlier studies by Jim Baumohl, Bryn Mawr College and Mary Beth Shinn, NYU :

Every study that has looked has found that affordable, usually subsidized housing, prevents homelessness more effectively than anything else. This is true for all groups of poor people, including those with persistent and severe mental illness and/or substance abuse...Although social services are valuable for other reasons, it is not clear how much they contribute to preventing homelessness once access to subsidized housing is controlled...Income supports are also related to housing stability, probably because the affordability of housing is a joint function of income and housing costs.¹⁸

New York City was getting it right in the early 1990s. The 1990 New York/New York Agreement that successfully reduced the homeless population in shelters and on the streets is an example of a response to homelessness that clearly interpreted cause as 'structural' and that incorporated 'individual' factors in determining 'who' to house. Likewise, the Koch ten-year housing plan which created 150,000 units of housing for poor and middle-income households is an example of a successful government response to New York's housing needs.

17 M. Burt, L. Y. Aron, E. Lee, J. Valente, *Helping America's Homeless: Emergency Shelter or Affordable Housing?*, p.322, Urban Institute, 2001.

18 *Rethinking the Prevention of Homelessness*, The 1998 National Symposium on Homelessness Research

Current Concerns:

Protecting the Legal Right to Shelter: As mentioned earlier, the 1999 attempt to eradicate the legal right to shelter failed. However the City does have the right to appeal that court decision and shortly before Giuliani left office in December 2001, the wheels were set in motion to pursue an appeal. The decision whether to move ahead with the appeal or not must be made this summer, so currently leaders in the advocacy and human services world are in communication with members of the new Bloomberg Administration in an effort to dissuade them from going forward with the appeal and effectively wasting precious time that needs to be spent housing New Yorkers.

A related threat for homeless individuals who are currently residing in shelters is a sinister administrative push to force people into program shelters *en masse*. It is a continuation of the Giuliani-era homeless policy that has little to do with ensuring that programs are available to serve the needs of homeless New Yorkers, and has much more to do with placing conditions on the legal right to shelter. In the past few months Coalition for the Homeless monitors have been required by shelter residents to intervene in cases on an almost daily basis, because they are matched up to inappropriate programs, and in some cases have been forced to choose between retaining their employment or keeping a shelter bed. This past month we have worked with residents who were forced out of shelters and onto the street, including a 53 year old employed homeless man.¹⁹

In short there is still a very important role to play in protecting the right to shelter. Callahan and McCain have provided the foundation for the Continuum of Care model, and despite coming under aggressive attack during the last decade, the legal right to shelter has literally saved hundreds of thousands from freezing to death on the streets.

Continuum of Care: However, the larger part of the work will be in advocating for the missing piece of the Continuum of Care – Housing. There is a need for the new Bloomberg Administration to curb expenditure on the ever-expanding shelter system. A current plan to close one of the largest shelters in the city provides the opportunity to downsize the system while investing wisely in supportive housing. Instead, the City plans to replace the old shelter with two new shelters that will cost an estimated \$300-\$350 million over two decades. Not only would supportive housing be more cost-effective; it would send the right message. It is disheartening to learn that the DHS has negotiated a 22-year contract on one of these facilities because it does not give much hope for a change in the City's homeless policy.

¹⁹ Ironically, this shelter resident is an employee of the New York City Human Resources Administration, the City's main welfare agency. On three occasions within the past month City officials have attempted to place the client in program shelters, including two substance abuse facilities where the clients are mandated to stay in the shelter during the day and attend treatment groups. Aside from the fact that as an employed person this program is not suitable, the client in question does not have any form of substance abuse history.

Impact of September 11th: The economic impact of the September 11th attacks compounded trends already present in the local economy as early as last spring. With more than 100,000 jobs lost in New York since September alone, New York households – in particular renter households – have been forced to get by with fewer and fewer resources. Low-wage workers in the service industries are at the greatest risk of losing their homes, and community-based organisations and legal services groups have been besieged with requests for help from families and individuals faced with eviction due to job losses or reduction in incomes. Without appropriate funding for eviction prevention and rental subsidies many of these households are at risk of ending up at the doors of the EAU or in the single adult shelters, creating another wave of homelessness within the next several months.

The Way Forward:

The way forward is simply to protect the legal right to shelter that has already saved hundreds of thousands of lives, and to build upon this foundation to create a real continuum of care. New York needs more of what has worked in the past as outlined by the following extract from the Coalition for the Homeless' State of the Homeless 2002 report, *Three State and City Initiatives that Will Reduce Homelessness*

1. A New "New York/New York Agreement": The landmark *New York/New York Agreement* of 1990 was largely responsible for the dramatic reductions in homelessness among single adults in the early 1990s. This State-City initiative provided supportive housing for mentally ill homeless individuals, and alongside other supportive and affordable housing programs it *reduced the adult shelter population by 37 percent* between 1988 and 1994. Governor Pataki and Mayor Bloomberg must negotiate a new NY/NY Agreement to develop 9,000 units of supportive housing (7,500 units for mentally-ill individuals and 1,500 units for the neediest homeless families).

2. Rental Assistance for Homeless Families and Individuals: Compared to the exorbitant cost of emergency shelter – \$36,000 for a homeless family, \$23,000 per year for an individual – *rental assistance* can cost as little as \$7,700 per year. The State and City must expand rental assistance programs to help the *rising number of working homeless households* move from shelters to permanent homes, and expand homelessness prevention efforts. The Governor and Mayor must combine efforts to provide rental assistance to help 3,000 families and 2,000 single adults to move to permanent apartments, and invest \$12 million in Federal TANF funds in homelessness prevention.

3. A Ten-Year Affordable Housing Investment Plan: The success of the City's last ten-year housing initiative in creating jobs, revitalizing neighborhoods, producing 150,000 affordable apartments, and reducing homelessness has been well-documented. In the midst of rising homelessness and the urgent need to rebuild New York, the City must embark on *a new ten-year initiative as outlined by the Housing First! coalition*. In the short term, the City must preserve existing commitments to affordable housing investments.

Two decades of modern mass homelessness has at least given ample opportunity to research the question of what causes homelessness and more importantly what steps can be taken to end homelessness. There is complete consensus among academics, providers, advocates and government officials about what works to move single adults and families out of shelters. Supportive housing works for single adults. It was extremely successful in the early 1990s. Similarly, housing assistance is the proven way to help homeless

families become rehoused. It is only with renewed investments in these types of affordable housing by all levels of government that that we can begin to eradicate modern mass homelessness.

Residential Tenancy Law: Rights and Remedies

Áine Ryall

Introduction and Overview

The aim of this paper is:

1. to present a "rights-based" critique of the current law governing private residential tenancies, and
2. to consider the extent to which a "rights-based" approach would improve and strengthen particular aspects of the new (forthcoming) residential tenancy legislation.

To this end, the paper draws on the concept of the right to adequate housing articulated in Article 11 of the International Covenant on Economic, Social and Cultural Rights and on the two General Comments in which the UN Committee on Economic, Social and Cultural Rights has interpreted and clarified the normative content of this right.¹ Particular emphasis is placed on the complex issue of "illegal eviction" (i.e. where a landlord proceeds to evict a tenant without first serving a valid notice to quit and/or obtaining a court order) and on the adequacy of the remedies available to tenants under Irish law in the event of illegal eviction. Last year alone, Threshold dealt with 197 queries concerning illegal eviction. This figure reveals that illegal eviction is a serious problem for tenants, particularly those who attempt to make a home at the lower end of the private rented market. The importance of adequate and effective legal protection for tenants is clear when one considers the critical role now played by the private rented sector as a provider of social housing.

The paper is organised as follows: Part I considers the scope of the right to adequate housing set out in Article 11 of the Covenant, with particular reference to the private rented sector. Part II lists the rights that tenants currently enjoy under Irish residential tenancy legislation and considers whether or not these rights are effective in practice. In other words, does the law provide an effective remedy where a landlord acts in breach of one or more of these rights? Part III explains the proposed new legislative measures concerning security of tenure and dispute resolution and considers the extent to which the new measures will supplement and reinforce existing rights. Part IV suggests that if the new legislation is to deliver an effective enforcement structure, two elements are of critical importance. First, the new legislation should provide expressly that it is an offence for a landlord to evict a tenant without a court order. Secondly, workable provisions must be put in place (within the framework of the new legislation) to protect tenants from retaliatory action by their landlords where tenants seek to enforce their rights. It is submitted that these two basic measures are essential if both new and existing tenants' rights are to be meaningful in practice. While the main focus

1 General Comment No. 4: *The right to adequate housing* (1991) and General Comment No. 7: *The right to adequate housing: forced evictions* (1997). See further, Fact Sheet No. 21: *The Human Right to Adequate Housing* available at www.unhchr.ch/housing and Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon, 1998) especially at 329-351.

of the conference for which this paper was prepared is a "rights-based" approach to housing, in my view, the parallel role of remedies - where the right to housing is threatened or undermined - also merits careful analysis.

I. The International Covenant on Economic, Social and Cultural Rights

Article 11(1) of the Covenant provides:

[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The UN Committee on Economic, Social and Cultural Rights, which is the body responsible for monitoring the implementation of the Covenant, has promoted a broad concept of the right to housing in the following terms:

... the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. *Rather it should be seen as the right to live somewhere in security, peace and dignity.*²

The Committee has interpreted the right to "adequate" housing recognised in Article 11(1) as incorporating the following core elements:³

- (a) legal security of tenure;
- (b) availability of services, materials, facilities and infrastructure;
- (c) affordability;⁴
- (d) habitability;
- (e) accessibility;
- (f) location;
- (g) cultural adequacy.

For present purposes, it is proposed to concentrate on the central issue of security of tenure.⁵ According to the Committee:

[n]otwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.⁶

It is important to note here that the Committee merely refers to "a degree of security of tenure". It does not elaborate further on the precise level of security of tenure that is required in the case of, for example, tenants living in the private rented sector. The Committee has, however, placed special emphasis on the related issue of "forced eviction". This concept is defined as:

2 General Comment No. 4, at para. 7. Emphasis added.

3 General Comment No. 4, at para. 8.

4 In the particular context of affordability, note the following extract from General Comment No. 4 at para. 8(b):

In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases.

5 See generally, Morgan, J., "The casualization of housing" (1996) 18 *Journal of Social Welfare and Family Law* 445.

6 General Comment No. 4, at para. 8(a).

...the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, *without the provision of, and access to, appropriate forms of legal or other protection.*⁷

It appears from this definition that the possibility of forced eviction is not ruled out completely, once "appropriate forms of legal or other protection" are in place.⁸ The Committee has attempted to clarify the circumstances in which forced eviction is permissible, and has provided an element of general guidance on the nature of the legal protections, or procedural safeguards, that are required in order to ensure compatibility with the relevant provisions of the Covenant. The Committee has acknowledged that eviction may be warranted in certain circumstances, such as, for example, "persistent non-payment of rent or damage to rented property without any reasonable cause."⁹ However, State Parties must ensure that evictions are carried out "in a manner warranted by a law which is compatible with the Covenant."¹⁰ In accordance with Article 2(1) of the Covenant, State Parties are obliged to use "all appropriate means" including, in particular, the adoption of legislation, to protect the rights recognised in the Covenant. The Committee has emphasised that "legislation against forced evictions is an essential basis upon which to build a system of effective protection."¹¹ While the Committee is mainly concerned with forced evictions carried out by State Parties or public authorities, it has confirmed that State Parties are also required:

... [to] ensure that legislative and other measures are adequate to prevent, and if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies.¹²

The "appropriate safeguards" envisaged by the Committee include, but are not limited to, the following:

- (a) an opportunity for genuine consultation with those affected [by the eviction];
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) information on the proposed evictions ... ;
- ...
- (g) provision of legal remedies; and
- (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.¹³

7 General Comment No. 7, at para. 3. Emphasis added.

8 Note, however, the following strong statement in General Comment No. 4 at para. 18:

... the Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

9 General Comment No. 7, at para. 11.

10 *ibid.*

11 General Comment No. 7, at para. 9.

12 At para. 9.

13 General Comment No. 7, at para. 15.

The guidance provided by the Committee regarding the nature of the "appropriate safeguards" that should be put in place *via* domestic legislation is cast in very general terms. The State Parties therefore enjoy a degree of flexibility as regards the detail of the domestic measures adopted to protect tenants from illegal eviction. However, at the very minimum, the Covenant (as interpreted by the Committee) requires State Parties to ensure that procedural safeguards apply where a landlord seeks to evict a tenant, and that appropriate mechanisms are put in place to ensure that tenants who are "illegally evicted" from their homes have access to effective legal remedies. The Committee has also expressly recognised the importance of civil legal aid in order to ensure effective access to remedies.

At a more general level, the Committee has consistently emphasised the important link between the right to adequate housing and the provision of appropriate legal remedies to ensure that the right is effectively protected in practice. Consider the following extract from General Comment No. 4:

The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial and other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.¹⁴

This passage clearly confirms the importance that the Committee attaches to the existence of appropriate *remedies* as a means of ensuring that the various components of the right to adequate housing (including security of tenure, affordability and habitability) are realised in practice. Against this background, the next section considers the general effectiveness of the rights and remedies available to tenants living in the Irish private rented sector, with particular emphasis on the problem of illegal eviction.

II. Tenants' rights under existing legislation and their effectiveness in practice

One of the most frequent critiques levelled at Irish residential tenancy law is that it offers very little to tenants by way of substantive rights. In particular, there is no general right to security of tenure for tenants living in the private rented sector. A tenant's entitlement to remain in occupation of what is, in effect, their home, is contingent on whether or not the landlord is willing to allow the tenant to remain in occupation. A limited degree of security of tenure applies where a tenant enters into a fixed term lease. However, the usual term of such leases is 6 months or 12 months. Leases for longer periods are rare in practice.

¹⁴ General Comment No. 4 at para. 17.

Lack of security of tenure has a direct impact on the ability of tenants to enforce their (limited) rights. It is generally accepted that a periodic tenant (i.e. a tenant who does not have the benefit of a fixed term lease) will be reluctant to complain too vigorously to his/her landlord for fear of provoking retaliatory action such as notice to quit or a rent increase. This is especially the case at the lower end of the market. Tenants with low incomes who attempt to make a home in the private rented sector often experience difficulties in securing good quality, reasonably priced accommodation. Some landlords are reluctant to accept tenants who are claiming rent supplement, thereby further reducing the pool of accommodation available to these tenants. Tenants who lack security of tenure and have limited funds to spend on accommodation costs will be very reluctant to complain to the landlord (or the local authority) about poor standards or fire safety issues. It is essential, therefore, that the proposed new legislation takes account of this practical reality and the vulnerable position of certain tenants. Currently, Irish residential tenancy law does not provide any measure of legal protection for a tenant where a landlord serves notice to quit in direct response to a tenant taking action to enforce their rights ("retaliatory eviction").

Where a tenant is "illegally evicted" by their landlord, the only available remedy is to bring a civil action in the courts seeking an injunction and/or damages. Civil legal aid and advice is not generally available in the case of "disputes concerning rights and interests in or over land" (Civil Legal Act, 1995, section 28(9)(a)(ii)). The costs and delay associated with court action means that this remedy is of limited impact in practice. The easiest solution from the tenant's point of view is often to simply find somewhere else to live as quickly and as cheaply as possible. The absence of an accessible, effective remedy in cases of illegal eviction means that there is little to deter a landlord from taking the law into his/her own hands and evicting a tenant without observing due process.

Relatively recent statutory intervention has granted a number of important rights to tenants.¹⁵ First, a tenant has a statutory right to a minimum period of notice to quit. Section 16(1) of the Housing (Miscellaneous Provisions) Act, 1992 provides that a notice to quit is not valid unless it is in writing, and is served at least 4 weeks before the date on which it is to take effect. Secondly, a tenant has a statutory right to a rent book. The relevant regulations provide that the rent book must contain certain specified information. By virtue of the rent books regulations, a tenant has a right to know who his/her landlord is, and the landlord's business address. The most important function of the rent book is to serve as a record of the general terms of the tenancy, and of the rent and other payments made to the landlord. Thirdly, a tenant has a right to minimum standards of rented accommodation. However, the relevant regulations (S.I. No. 147 of 1993) are drafted in very general terms and prescribe hopelessly low standards for rented accommodation. Fourthly, a landlord is prohibited from seizing a tenant's

15 For an overview see Ryall, A., "Recent Developments in Residential Tenancy Law" (Part I) (1997) 2 *Conveyancing and Property Law Journal* 51; (1998) 3 *Conveyancing and Property Law Journal* 4 and "Review of Housing Legislation since 1992", in Harvey, (ed.) *Private Rented Housing - Issues and Options* (Dublin: Threshold, 1999).

goods in respect of rent due. Overall, these rights are very basic and do not impose significant obligations or constraints on landlords.

Enforcement of the rent books and minimum standards regulations is vested in local authorities.¹⁶ With a view to facilitating effective enforcement, landlords are required to register rented dwellings with their local authority. Statistics published by the Department of the Environment and Local Government in the *Annual Housing Statistics Bulletin* paint a very bleak picture of enforcement activity (see Appendix). The main difficulty with the most recent enforcement statistics is that the available figures are incomplete as few local authorities have submitted data to the Department. This state of affairs means that it is impossible to get a clear picture of the true level of enforcement activity on the ground. What is clear, however, is that the degree of enforcement activity varies considerably as between the different local authorities and that criminal prosecutions are initiated against defaulting landlords in very few cases.

On the specific issue of standards in rented accommodation, it is worrying to note the high percentage of properties inspected that fail to meet the requirements of the minimum standards regulations.¹⁷ As noted above, these standards set down very basic requirements. The fact that 53% of the 3,685 dwellings inspected in the year 2001 failed to meet these basic requirements is nothing short of shocking. It is also noteworthy that last year Threshold received 789 queries concerning the minimum standards regulations and 610 queries concerning the question of repairs. These figures confirm that, notwithstanding the existence of the standards regulations since 1993, poor standards remain a serious problem. Again, the situation is more acute at the lower end of the market. Where a landlord refuses to carry out repairs that fall within the scope of the minimum standards regulations, a tenant's options are limited to making a complaint to the local authority or initiating a civil action in the courts for breach of contract. Neither option offers the potential for a quick remedy. Where a tenant is dissatisfied with a local authority's response to a complaint, the tenant may complain to the Ombudsman.

As regards the obligation to register rented dwellings, current figures confirm that this obligation is not taken at all seriously by landlords. As at 31 December 2001, 29,456 units were registered with local authorities. According to the 1997 Labour Force Survey, there were 131,600 units in the private rented sector. This is the most reliable official figure available at present pending the availability of the housing module from the 2002 census. In any event, it appears clear from the available data, and from observation, that only a small minority of landlords have actually registered their properties as required by law.

16 For an overview see Ryall, A. "Residential Tenancies: Control and Enforcement" (1999) 4 *Conveyancing and Property Law Journal* 33 and "Residential Tenancies: Trends in Compliance and Enforcement" (2000) 5 *Conveyancing and Property Law Journal* 30.

17 On the practices of, and barriers to, private landlords undertaking repairs and improvements see *Repair and Maintenance by Private Landlords* (London: Department of the Environment Transport and the Regions, 2000).

As regards disputes over deposits, the Small Claims Procedure currently provides an accessible and relatively informal dispute resolution mechanism whereby tenants may challenge a landlord's refusal to return a deposit at the end of a tenancy. It appears from observation and anecdotal evidence that the Small Claims Procedure operates reasonably effectively, although problems have arisen in enforcing orders issued by the District Court in some cases. The threat of small claims proceedings has proven to be of great value where a tenant is negotiating with a landlord for the return of a deposit. This point serves to illustrate that where landlords and tenants are aware that an accessible and effective dispute resolution process exists, there is a far greater tendency for landlords to respect tenants' rights.

Subject to certain exceptions, the Equal Status Act, 2000 prohibits discrimination in the provision of accommodation on specified grounds. Information and advice on the application of the Act is available from the Equality Authority and the Director of Equality Investigations investigates complaints of alleged discrimination.

In sum, apart from the specific areas of deposit retention and alleged instances of discrimination, the remedies available to tenants do not generally offer effective legal protection. It is clear from observation, and from the limited statistics available, that current mechanisms for enforcing the rent books, standards and registration regulations are not operating effectively in practice. Tenants are often deterred from pursuing complaints due to the complete lack of legal protection against retaliatory eviction. More significantly, where a tenant is of limited means, there is no effective legal remedy in the case of illegal eviction.

III. Proposed new measures concerning security of tenure and dispute resolution

In October 2001, the then Minister for Housing and Urban Renewal announced the establishment of the Private Residential Tenancies Board. The idea of creating this specialised Board came from the detailed recommendations presented by the Commission on the Private Rented Residential Sector in July 2000.¹⁸ The Commission's report had highlighted the shortcomings of court proceedings in dealing with landlord-tenant disputes, especially in terms of cost and delay. One of the main tasks of the new Board is to provide an alternative, expert and accessible forum for dealing with such disputes.

The Board is the central pillar in a comprehensive package of reforms announced in early 2001.¹⁹ These reforms include measures designed to improve security of tenure and rent certainty for tenants, and other regulatory

¹⁸ *Report of the Commission on the Private Rented Residential Sector* Department of the Environment and Local Government, July 2000.

¹⁹ For an overview see Ryall, A., "Residential Tenancy Law: An Assessment of the Recommendations of the Commission on the Private Rented Residential Sector" (2001) 6 *Conveyancing and Property Law Journal* 5 and "Reform of Residential Tenancy Law: A Critical Appraisal of Recent Government Proposals" (2001) 6 (2) *Conveyancing and Property Law Journal* 31.

matters. The legislation required to give effect to the proposed reforms is currently being drafted and is due to be in place in 2003. Meanwhile, the Board has been established on an *ad hoc* basis. Once the Board is formally established by statute, it will be mandatory for landlords and tenants to bring certain disputes before the Board rather than the courts. Examples include: disputes relating to termination of a tenancy by a landlord, disputes over deposits, non-compliance with the rent books and standards regulations and alleged failure of either landlord or tenant to comply with obligations under a tenancy agreement (e.g. repairs, non-payment of rent and anti-social behaviour). There will be a limited right of appeal to the courts on points of law only. Presumably, the reference to disputes concerning "termination of a tenancy by a landlord" is broad enough to encompass situations where a landlord evicts a tenant without serving notice to quit and/or obtaining a court order (i.e. illegal eviction.) It appears, therefore, that under the proposed new legislation the Board will have jurisdiction to deal with illegal eviction cases. This development clearly holds the potential to fill the current "remedies gap" in the event of illegal eviction.

The proposed dispute resolution procedure to be applied by the Board will involve a two-stage process. First, an informal and confidential mediation/conciliation stage. Where the parties fail to reach an agreement during this informal stage, the matter will proceed to "a Tribunal-like hearing by the Board into the facts of the case."²⁰ At present, there is little concrete detail available as to the practice and procedure that will apply to cases brought before the Board. For example, what fee will be payable in order to avail of the dispute resolution services offered by the Board? What time limits will apply to claims? Will legal or other representation be permitted, and, if so, what rules will apply regarding liability for costs? The answers to these questions are not readily apparent for the time being. At a more general level, the success, or otherwise, of the new Board will depend on its ability to process disputes fairly and efficiently, without recourse to unnecessary legalism and bureaucracy. It goes without saying that the Board must be provided with sufficient staff and resources in order to perform its various functions effectively and to gain the confidence of both landlords and tenants.

As regards the package of reforms of which the Board forms part, it must be acknowledged that, overall, the proposals offer very little to tenants in terms of security of tenure and rent certainty. The proposals are obviously the result of a difficult compromise between conflicting landlord and tenant interests. Essentially, the forthcoming legislation will provide that a tenant whose tenancy is not terminated during the first six months will have the right to continue in occupation for a further period of three years (i.e. a tenancy for four years in total, including the initial six-month "probationary period"). However, a landlord will still be entitled to recover possession of the dwelling in certain carefully specified circumstances, for example, breach of agreement by the tenant, or where the landlord wishes to sell or substantially refurbish the premises or change its business use. Successive four year tenancies are envisaged. Graduated periods of notice to quit, ranging from four to sixteen

20 Commission Report at para. 8.4.3.2.

weeks, depending on length of tenancy, are also proposed. As regards rent certainty, rents are not to exceed market rate, and it is proposed to limit rent increases to once a year, except where there has been a substantial improvement to the rented dwelling.²¹

It is difficult to predict the impact of the proposed reforms in practice. A period of transition and uncertainty is likely to follow the introduction of the new rules while landlords, tenants and their advisers gradually become more familiar with the new legislative framework. The proposals regarding security of tenure, notice to quit and rent regulation are very moderate and are unlikely to prompt landlords to leave the private rented market *en masse*. From a tenant's perspective, the possibility of a three-year tenancy (following satisfactory completion of the six-month introductory period) offers an element of short-term security of tenure. The main impact of this measure will be to reduce the scope for "arbitrary eviction" once a tenant has successfully served the six-month introductory period. It remains to be seen whether landlords will allow tenancies to continue beyond the proposed six-month probationary period. It would be unfortunate if a practice were to develop whereby six-month tenancies became the norm, and landlords simply served notice to quit before a tenant reached the six-month threshold in order to avoid the application of the new statutory protections.

It is disappointing to note that the Commission did not recommend that the 1993 minimum standards regulations should be revised upwards with a view to strengthening the very basic requirements that currently apply. In the absence of a specific recommendation on this issue from the Commission, it is very unlikely that the forthcoming legislation will reinforce the existing standards regulations. It should also be noted here that the Board is likely to have jurisdiction to deal with disputes over "non-compliance with the standards and rent books regulations".²² It remains to be seen what specific powers the Board will have to encourage/force landlords to comply with the statutory requirements. It is not clear from the Commission's report whether the Board or local authorities will have responsibility for the general enforcement of the regulations (i.e. investigation, inspection and prosecution). In any event, the fact that a tenant will have the option of bringing a complaint about standards before the Board is likely to result in a higher level of compliance with the regulations (assuming, of course, that an effective structure is put in place to facilitate the rapid enforcement of any orders made by the Board).

IV. Effective remedies in cases of illegal or retaliatory eviction

The scope of the forthcoming legislation

The question arises as to what specific provision will be made in the forthcoming legislation to protect tenants against illegal and/or retaliatory eviction. As noted above, it appears that the new Board will have jurisdiction over disputes involving "termination of a tenancy by a landlord." Presumably,

²¹ The detailed recommendations made by the Commission are set out in paras. 8.3-8.10 of its report.

²² Commission Report at para. 8.4.3.1.

this will include cases where a tenant alleges that s/he has been illegally evicted. However, it is not at all clear whether the Board will have the power to compel a landlord to reinstate a tenant who is found to have been illegally evicted (i.e. an injunction-type remedy) or whether the Board's jurisdiction will be limited to granting damages. Also, it is not clear whether the Board will have jurisdiction to hear urgent applications from tenants at short notice. For example, where a landlord has threatened to forcibly remove a tenant, will it be open to a tenant to make an emergency application to the Board? Will the Board have the power to make an order restraining a landlord from proceeding with a threatened eviction in such circumstances? The Commission's report did not expressly address the issue of illegal eviction and made no specific recommendations regarding the Board's potential role and powers in cases of illegal eviction.

The Commission report did address the complex issue of retaliatory eviction, (at para. 8.5.4 of its report) although only in very general terms:

Safeguards, such as applying a burden of proof on landlords, will also need to be introduced to protect tenants from eviction in circumstances where the tenant has made a complaint or taken other action in pursuit of compliance with the provisions of the statutory regulations applying to the sector.

It is very likely therefore that the forthcoming legislation will require landlords to satisfy a burden of proof when issuing notice to quit in certain cases, as *per* the Commission's recommendation. This is a very significant proposal that clearly holds the potential to strengthen tenants' rights. However, the report does not provide further detail on the nature of the "safeguards" envisaged. It remains to be seen what specific provision the new legislation will make to protect tenants from retaliatory eviction. Careful drafting will be required if such a provision is to operate successfully in practice.

Specific proposals

Illegal eviction should be a criminal offence

It is submitted here that the forthcoming legislation should expressly provide that it is an offence for a landlord to evict a tenant without first obtaining a court order (or an order from the Board once the new legislation is in place). A well-publicised criminal offence, together with an appropriately stiff penalty, holds the potential to operate as an effective deterrent and to reduce the incidence of illegal eviction. Such an offence exists in a number of other jurisdictions. A potentially useful precedent is to be found in the residential tenancy legislation in operating in the State of New South Wales (NSW), Australia. Section 72 of the Residential Tenancies Act, 1987 (as amended) provides as follows:

(1) A person shall not, except in accordance with a judgment, warrant or order of a court or an order of the [Consumer, Trader and Tenancy] Tribunal, enter residential premises or any part of such premises of which another person has possession:

(a) under a residential tenancy agreement, or

(b) as a former tenant holding over after termination of a residential tenancy agreement,

for the purpose of recovering possession of the premises or part of the premises.

...

(3) A court before which proceedings for an offence under this section are brought may (in addition to any other penalty) order the person who committed the offence or any person on whose behalf that person acted to pay to the person against whom the offence was committed such compensation as it thinks fit.

It should be noted, that in addition to creating a specific offence in the case of illegal eviction, section 72(3) expressly provides that a court may also order "such compensation as it thinks fit" to a tenant who has been illegally evicted.

A range of criminal sanctions for the offences of (i) unlawful deprivation of occupation (ii) harassment and (iii) eviction without due process of law, are also in place in England and Wales pursuant to the Protection from Eviction Act, 1977 (as amended).²³ It should be noted that this area of the law is currently under review by the Law Commission (England and Wales) as part of a broader review of housing law.²⁴

Measures dealing with retaliatory eviction

The legislative scheme in place in NSW also contains a specific provision dealing with the issue of retaliatory eviction. It provides an interesting precedent that could be adopted in the forthcoming Irish residential tenancy legislation. In NSW, an application for an order for possession of rented premises (following the service of notice to quit) is determined by a specialist tribunal – the Consumer, Trader and Tenancy Tribunal (formerly "the Residential Tribunal").²⁵ Section 65(2) of the Residential Tenancies Act, 1987 (as amended) provides, in relevant part, that the Tribunal may refuse to make an order for possession if it is satisfied:

- (a) that the landlord was wholly or partly motivated to give notice of termination by the fact that:
 - (i) the tenant had applied or proposed to apply to the Tribunal for an order,
 - (ii) the tenant had complained to a governmental authority or had taken some other action to secure or enforce his or her rights as a tenant ...

However, it is important to note that under the NSW provision, the onus of proving that the landlord was motivated by a desire to retaliate rests on the tenant. This may prove to be a difficult onus to discharge in practice.

Another useful precedent is to be found in the Protection from Eviction Act, 1977 (as amended) which applies in England and Wales. Section 1(3) provides as follows:

23 For a useful overview see Morgan, J., *Housing Law* (London: Blackstone, 1998) at paras. 7.2 and 7.5.

24 See *Reform of Housing Law: A Scoping Paper* Law Commission, March 2001 at paras. 86-93 and the recent Consultation Paper *Renting Homes 1: Status and Security* Law Commission Consultation Paper No. 162 (London: Stationary Office, 2002). Both documents are available at www.lawcom.gov.uk

25 See generally, the Consumer, Trader and Tenancy Tribunal Act, 2001. For a general overview of NSW residential tenancy law see *The Renting Guide: Your rights and responsibilities as a tenant or landlord* Department of Fair Trading: NSW Consumer Protection Agency, February 2002. The Guide is available at www.fairtrading.nsw.gov.au

If any person with intent to cause the residential occupier of any premises -

- (a) to give up occupation of the premises or any part thereof; or
- (b) to refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof;

does acts calculated to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence, he shall be guilty of an offence.

This section creates an offence where *inter alia* a landlord resorts to threats/harassment with a view to discouraging a tenant from pursuing a statutory right or other remedy.²⁶ As noted above, this area is currently under review by the Law Commission.

Conclusions and recommendations

1. A "rights-based" approach to residential tenancy law ensures that greater emphasis is placed on the central issue of security of tenure.
2. A "rights-based" approach serves to underscore the importance of effective remedies in cases where tenants' rights are threatened or undermined.
3. At the very minimum, a "rights-based" approach requires that legislative measures are put in place:
 - to establish procedural safeguards (or due process provisions) where a landlord seeks to terminate a tenancy and/or evict a tenant;
 - to protect tenants from illegal eviction and/or retaliatory eviction;
 - to provide accessible and effective remedies in the event of illegal eviction and/or retaliatory eviction;
 - to protect tenants from unreasonable rent levels or rent increases;
 - to provide accessible and effective remedies where rented premises are substandard; and
 - to protect tenants from discrimination in the context of access to housing;
4. Current regulations governing rent books, minimum standards and registration of rented dwellings are not effectively enforced.
5. Irish law does not provide an accessible and effective remedy in the event of illegal eviction and/or retaliatory eviction.
6. The establishment of the new Private Residential Tenancies Board holds the potential to improve the current situation dramatically. However, much will depend on the jurisdiction and powers of the Board and on the adequacy of the resources made available to it.

²⁶ For a recent analysis of the practical impact of the provisions of the Protection from Eviction Act, 1977, see Marsh, A., et al., *Harassment and Unlawful Eviction of Private Rented Sector Tenants and Park Home Residents* (London: Department of Environment, Transport and the Regions, 2000).

7. The forthcoming legislation should expressly provide that illegal eviction is an offence.
8. The forthcoming legislation should include strong measures aimed at deterring and punishing retaliatory eviction. Retaliatory eviction should also be an offence.
9. Enforcement of the various statutory requirements should be given greater priority by local authorities as a matter of urgency. In the absence of an active enforcement programme on the part of local authorities, landlords have no incentive to comply with their statutory obligations. Time and again attention has been directed at the embarrassingly low level of enforcement activity, yet the situation on the ground has not improved.

Appendix

Enforcement of Statutory Requirements 1994-2001

Standards Regulations

Year	Dwellings inspected	Dwellings not meeting the requirements of the regulations	legal action initiated
1994	6,017	2,765 (45%)	15
1995	6,048	2,109 (34%)	22
1996	3,846	814 (21%)	16
1997	5,501	1,902 (34%)	8
1998	5,145	2,710 (52%)	0
1999*	4,118	1,130 (27%)	4
2000*	4,986	2,184 (44%)	17
2001*	3,685	1,964 (53%)	49

* indicates provisional figures

Rent Books Regulations

	Investigations carried out	Results	
		remedied	ongoing
1994	2,202	2,013	190
1995	4,869	545	187
1996	2,526	170	1
1997	3,540	46	50
1998	3,402	38	0
1999*	56	71	32
2000*	3,420	166	0
2001*	2,326	135	1

* Indicates provisional figures

Source: *Annual and Quarterly Housing Statistics Bulletins 1995-2001*
Department of the Environment and Local Government (Dublin: Stationary Office)

Social Housing: Time To Put It Right

Simon Brooke

Introduction

First I should make it clear that when I refer to social housing I mean rented housing provided either by a local authority or a housing association (sometimes called the voluntary housing sector). Generally, the development of social housing in Ireland has been characterised by rationing rather than by rights, with an emphasis on policies that determine who gets social housing rather than an emphasis on the rights of tenants or potential tenants.

It is striking that there has been very little debate about the rights of social housing tenants, in spite of vastly improved housing management practices in many areas, with a commitment to tenant participation. In addition, when the current proposals relating to the private rented sector are realised, a tenant in a bedsit will have substantially greater security of tenure than a local authority or housing association tenant. It may be that when this legislation is finally passed, the spotlight will turn to social housing, but there is no reason to wait for that.

What is a 'rights approach' as it applies to social housing?

The starting point here is the concept of citizenship. This stretches back to the ancient Greeks, and it has been debated extensively by different commentators, particularly over the last decade. Citizenship, for the purposes of this paper, means the status that is derived from membership of a particular society, a membership that is defined in terms of a collection of rights and duties. Stronger rights and duties mean stronger citizenship and consequently less exclusion and isolation. The emphasis of this paper is on rights rather than duties, but the latter are not ignored entirely as will be seen.

Currently these rights are distributed extremely unequally within the Irish housing system. For example, an owner-occupier has a very high level of security of tenure (although not absolute - mortgages must be paid), whereas social housing tenants have virtually no legal security of tenure. Owner occupiers have a considerable degree of freedom over the use of their home, so for example they may take in lodgers, carry out improvements, build extensions, sell at market value, pass on to their children when they die. Social housing tenants have none of these rights.

On the other hand social housing tenants pay a rent, which by being related directly to the household income, is always affordable, whereas mortgage payments are related to interest rates and so a fall in household income may lead to financial hardship. Finally some social housing tenants who can afford it are able to buy their home at a substantial discount, whereas discounts available to owner occupiers (e.g. first time buyers grant) are far less generous. It should be noted here that a great many social housing tenants do not have an income high enough to qualify for a mortgage even at a discount, so this right is of no value to them.

Overall however, the balance of rights lies very firmly with owner-occupiers. The aim then of taking a rights approach to social housing is to ensure that rights are applied more equally between housing tenures, by increasing the rights of social housing tenants, and therefore strengthening and extending the concept of citizenship.

What sort of rights should social housing tenants have?

Rights mean little if they are not enforceable, so the package of rights proposed here should have legislative backing. A tenants' charter would include the following (they are presented in outline form only):

Security of tenure

All tenants would have a tenancy that could only be brought to an end by the landlord in prescribed circumstances. Grounds for possession would include the following:

- Rent arrears
- Nuisance, including racial harassment, anti-social behaviour and some illegal activity
- Having obtained the tenancy from another tenant on payment of a premium
- Having obtained the tenancy by giving false information
- The dwelling is going to be demolished or refurbished (in which case suitable alternative accommodation would have to be provided)
- Breaking certain conditions of the tenancy agreement

Security of tenure is the foundation of the tenants' charter. All other rights are in practice unenforceable in the absence of security of tenure.

The right to quiet enjoyment

This means the right of a tenant to peacefully inhabit their rented home without undue interference from the landlord.

The right of children and prescribed relatives to succeed to a tenancy in the event of the tenant's death.

This is already established practice by many local authorities.

The right to exchange

If two tenants want to swap their homes and it will not result in overcrowding they should have the right to do so.

The right to take in lodgers

If it does not result in overcrowding, a tenant should have the right to have a lodger, so long as the landlord is informed.

The right to make improvements

Tenants should have the right to make improvements to their home as long as the improvements conform to building regulations and other relevant requirements, and the permission of the landlord is obtained before the improvement works are carried out.

The right to consultation about proposed changes to housing management

If, for example, the landlord is planning to close a local estate office or amend the tenancy agreement, tenants should be consulted first and their views taken into consideration before the decision is made.

The right to repair

Landlords should have a legal duty to carry out prescribed repairs within a defined timescale.

The right to certain information

This might include regular rent statements, a tenancy agreement, information about the transfer system etc.

Why should social housing tenants have legal rights?

The first and perhaps primary reason for advocating a package of legal rights for social housing tenants is to redress the imbalance of rights referred to above and extend the concept of citizenship more widely and equally.

Secondly, as many commentators have observed, renting (whether private or social) is treated as a second best option in Ireland. There are many reasons for this, not least of which is the unceasing promotion of owner occupation as the 'natural' form of housing tenure by successive governments. I take the view that the unequal distribution of rights between different housing tenures makes a significant contribution to this relative unpopularity; and therefore that increasing the rights of social housing tenants will go some way towards reducing it.

Thirdly, an important aspect of legal rights is that they are enforceable in court. A tenant who believes that she or he has been denied legal rights may apply to court for redress, although it is important to note that the threat of legal action will frequently achieve a desired result. It is of course also important to note that for a legal right to be genuinely enforceable, people must have access to affordable legal advice and representation.

Fourthly, the very fact of placing a set of rights on a legislative basis gives those rights a significant status. It is a concrete demonstration of the importance the state attaches to the issue, and an unambiguous statement that through legislation the rights are legitimised.

Fifthly, giving tenants rights allows for a more honest debate about duties. Rights and duties go hand in hand, and it is extremely difficult to justify an attempt to impose responsibilities without at the same time offering attendant rights. It is in my view far more likely that responsibilities will be met, if they are balanced by a package of enforceable rights.

Finally it is important to note that legal rights alone are not enough. If they are to lead to real change, the policy and practice of the local authority or housing association and its interpretation of the legislation must reflect a commitment to implement the spirit as well as the letter of the law.

Arguments against legal rights

Advocating a rights approach to social housing may not receive unanimous support. One argument that is used is based on the 'if it ain't broke, why fix it?' principle. If tenants are not complaining, if tenants are not being arbitrarily evicted, if tenants are in practice given all sorts of rights, like passing a tenancy on to a child, then what is the problem? Why bring the law into it? Why complicate matters?

At first sight this might appear to be a compelling line of argument, but the main thrust of this counter-argument in favour of legal rights is to address an imbalance of rights rather than to tackle widespread malpractice. However, there may be local authorities or housing associations, which in the absence of a legally binding tenants' charter, might be tempted to take an administratively convenient approach rather than a tenant centred approach. The presence of a tenants' charter backed up by the threat, whether implicit or otherwise, of legal action should ensure this is not the case.

Another possible argument against a tenants' charter is that legal rights are open to abuse. This of course is quite true, but the abuse is likely to be carried out by a very small minority, and should not in itself devalue the principle of legal rights.

Tenant purchase

A discussion of the rights of social housing tenants cannot ignore tenant purchase, the most substantial right of them all. Currently most local authority tenants have the right to buy their home at a discount of up to 30% of the market value plus €3810. Housing association tenants do not have this right. Not surprisingly, it has been extremely popular and about two-thirds of all houses built by local authorities have been sold to tenants.

However, from the point of view of extending citizenship (and indeed for other reasons) tenant purchase has a serious weakness. Unlike all the other elements of the proposed tenants' charter this right does not apply to all tenants; only those who can afford it. So whilst the effect is to confer very substantial financial benefits to some tenants, it explicitly excludes the poorest households who might be thought to be most in need of generous financial assistance. Whilst proposing the abolition of tenant purchase would suggest a very weak grasp of political reality, there may be ways in which it can be modified. One possible way forward would be to phase out the discount, and at the same time introduce a new scheme that would enable far more tenants to have a financial stake in their home. This equity tenant scheme might work by giving tenants a right to purchase a proportion of the capital value of their home, which they would be able to realise on moving by selling back to the local authority or housing association.

Finally, there are precedents for successful housing rights campaigns in Ireland. The Land League, formed in 1879 in response to widespread evictions of tenant farmers, led to the passing of the Land Act in 1881. This legislation introduced the famous Three Fs: Fair rent, Fixity of tenure and Free

sale. If it was good enough for tenant farmers in 1881 it ought to be good enough for social housing tenants in 2002.

Housing Rights - The U.K. Experience

Caroline Hunter

Housing Rights – Current Debates

The issue of housing rights, and more particularly, a right to housing have recently become a topic of debate because of two developments in the U.K. First, the European Convention on Human Rights (ECHR) was incorporated into U.K. law by the Human Rights Act 1998. Secondly, the Law Commission is currently reviewing the whole law relating to security and status of tenants in England and Wales.

The Human Rights Act 1998

The incorporation of the ECHR has two main elements to it. First the courts must, so far as possible, interpret legislation in a way that is compatible with the Convention, and may refer legislation back to Parliament if it is found to be incompatible (sections 3 and 4). Secondly, and perhaps more importantly, all public authorities must act in accordance with the Convention, and may be sued for any breach of it (section 6).

The impact, in terms of cases fought in the courts on the basis of the ECHR has been enormous (housing is the second most litigated ECHR matter), but the impact in terms of establishing a “right to housing” and furthering “housing rights” generally has been much smaller. This is perhaps unsurprising given the terms of the ECHR. The most relevant provision in relation to housing is article 8, which provides that: “Everyone has the right to respect for his private and family life, his home and his correspondence”.

The existing Strasbourg jurisprudence clearly establishes that Article 8 does not amount to a right to a home.¹ Thus arguments in the courts that Article 8 provides some break on evicting people from their homes,² or in some way provides for a duty on authorities to house people³ (beyond that in the homelessness legislation, discussed below) have been rejected.

The incorporation of the ECHR into U.K. law does not seem to have made any great impact on the current position in U.K. law in terms of housing rights, although it perhaps provides a useful model as to how international treaty obligations can be incorporated into national law.

The Law Commission.

The U.K. has a plethora of housing law relating to tenants, and in particular to the security of tenants (one important element of any housing rights). This has built up historically. When Lord Woolf considered the problems of civil

1 See *Xv. Federal Republic of Germany* (1956) 1 YB. 202; *Chapman v. U.K.* (2001) 10BHRC 48. Cf *Mazarri v. Italy* (1999) 28 EHRR CD 175.

2 See e.g. *Poplar HARCA v. Donoghue* [2001] EWCA Civ 595; [2001] 3 W.L.R. 183 (upholding the eviction of an intentionally homeless family from an assured shorthold tenancy) and *R. v. Bracknell Forest B.C., ex. McLellan* [2001] EWCA Civ 1510; (2001) 33 H.L.R. 86 (upholding the introductory tenancy scheme as compatible with the ECHR).

3 See e.g. *Hackney L.B.C. v. Ekinici* [2001] EWCA Civ 776; [2002] HLR 2.

litigation in England and Wales in 1996 he concluded, in relation to housing cases, that any "reform of court procedures can have only a limited impact in an area where the main source of difficulty is the complexity of the substantive law itself."⁴

The law was referred to the Law Commission for review. The terms of that referral were to modernise the law by simplifying it. Interestingly the terms also required the Law Commission "to produce a scheme that would help to promote flexibility in the rented sector of the housing market."⁵ It is perhaps because of these terms of reference and the fact that the commission have to work within current government policy that a debate on including a right to housing, or indeed strengthening housing rights, has not figured largely in the Commission's papers.

Four principles underpin the approach of the Commission:

"Security of tenure: certain categories of occupier should have a high degree of security guaranteed by the State, others should have much less;

Due process in possession proceedings: occupiers should be notified that proceedings may be brought against them, and possession should only be recovered following an order made by a court.

A consumer perspective: the provision of accommodation should be seen as a form of consumer service provision to which principles of consumer protection should apply.

Human rights: housing law must conform to our obligations under the Human Rights Act 1998."⁶

These may provide some useful discussion as to how we should approach any discussion of housing rights, but they do not, in my view, provide a set of principles which amount to the development of a "right to housing".

Thus although there is much that is interesting in the current debates in the U.K., we are not in a position where the right to housing has become a focus. That is not to say that our current bundle of housing rights do not provide an interesting case study of some of the problems and pitfalls which may arise. In this context I want to move on in the rest of this paper to consider homelessness law in the U.K. At its most fundamental, a right to housing provided by the state may be considered as one which provides housing to all those who are homeless, and the U.K. has had a homelessness law which has sought to do this, at least for some groups, for 25 years.

Homelessness Law

Duties towards the homeless were first imposed on local housing authorities by the Housing (Homeless Persons) Act 1977. This Act (introduced to Parliament as a private member's bill) was the culmination of a campaign to

4 Lord Woolf (1996) *Access to Justice: Final Report*, HMSO: London, at p. 198.

5 Partington M., Law Commissioner, *Renting Homes: (1) Status and Security. Proposals from the Law Commission*. [2001] *Journal of Housing Law*, p. 42.

6 *Ibid.*

impose duties on housing authorities (as opposed to social service authorities) to house the homeless, which had begun in the 1960s.⁷

The 1977 Act did not impose a duty on local authorities to house everyone who claimed to be homeless. Rather a series of hurdles had to be surmounted, graphically described by Watchman and Robson⁸ as an "obstacle race", before a duty to house came into play. The 1977 Act was consolidated into the Housing Act 1985, Part III, without any significant amendment to the provisions. Some amendment was made in 1986 following the case of *R v Hillingdon L.B.C., ex p. Puhlhofer* [1986] A.C. 484, without affecting the basic principles of the Act. These provisions were eventually replaced by the Housing Act 1996, Part VII still maintaining these hurdles. If those hurdles are surmounted then the authority comes under a duty to "secure that suitable accommodation is made available to the applicant" (1996 Act, s.193).

The 1996 Act made it explicit that this was not a duty to provide "permanent" accommodation. The duty was limited to two years, and homeless applicants could not be given full security of tenure. Access to long-term social housing through local authority waiting lists was controlled through another part of the Housing Act 1996, Part VI.

Homelessness

The most obvious hurdle that applicants have to surmount is that they must be homeless. Notwithstanding suggestions prior to the 1996 Act that the definition would revert to one of pure "rooflessness",⁹ the definition in Part VII, has like its predecessors retained a wider concept of homelessness than this. Homelessness is defined by the 1996 Act, s.175 in three different ways:

1. A person is homeless if s/he has no accommodation anywhere in the world which s/he and her/his family unit have a legal right to occupy;
2. Even if a person has the necessary legal right s/he is homeless if s/he cannot secure entry to it (e.g. because of an illegal eviction by a landlord) or it consists of a moveable vehicle or vessel (e.g. a caravan or houseboat) and the person has nowhere which s/he is legally permitted to station it;
3. Even if a person has accommodation which s/he has the legal right to occupy it is not to be treated as accommodation unless it is accommodation which "it would be reasonable for her/him to continue to occupy". This brings in questions amongst others of the physical standard of accommodation. It is not reasonable for those fleeing domestic violence to continue to occupy accommodation: 1996 Act, s.177 (1).

7 See Thompson L. (1988) *An Act of Compromise* London: SHAC/Shelter, Chap. 2 and Loveland, 1995, *Housing Homeless Persons: Administrative law and Process*, Oxford: Clarendon Press Chap. 3, for a history of the Act's origins and passage through Parliament.

8 Watchman P and Robson P (1980) "The Homeless Persons Obstacle Race: 1 and 2" *Journal of Social Welfare Law*, pp. 1-15 and pp. 65 – 82.

9 See Department of Environment (1994) *Access to Local Authority and Housing Association Tenancies: A consultation paper* London: DOE.

This provides a fairly broad and comprehensive definition, although many local authorities are very stringent in its application particularly in relation to how poor the accommodation must be before it is no longer reasonable to continue to occupy it.

Problems with homelessness law

Notwithstanding this fairly comprehensive definition of homelessness, this does not mean that every homeless person gets housed, or indeed that those that get accepted are adequately housed. I think it is useful to focus on three particular issues.

The deserving and undeserving

As mentioned, homelessness law has always provided a series of obstacles which applicants must overcome if they are to be housed. Once it is established that an applicant is homeless then the remaining obstacles almost all relate to concepts of how "deserving" applicants are. Thus since 1996, we have had a series of measures which have excluded "persons from abroad," primarily immigrants (including asylum-seekers) from assistance under the Act.

The Act also differentiates between those who are in "priority need", to whom the substantive duty is owed, and those who are not. The priority need categories have remained unchanged since 1977 and are (1996 Act, s.189):

1. pregnant women;
2. persons with dependent children;
3. the vulnerable. This category is the most contested, since to qualify for housing single people must bring themselves within it. Section 189(1)(c) refers to "a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason". The leading case on the meaning of vulnerability (*R. v. Waveney D.C., ex p. Bowers* [1983] Q.B. 238) defines it as meaning "less able to fend for oneself so that injury or detriment will result where a less vulnerable man will be able to cope without harmful effects". A further layer was added to that definition in *R. v. Lambeth L.B.C., ex p. Carroll* (1987) 20 H.L.R. 142, where it was suggested that it meant "less able to fend for oneself when homeless or in finding or keeping accommodation". Many authorities adopted this formulation in deciding whether an applicant was vulnerable. In *R. v. Camden L.B.C., ex p. Periera* (1998) 30 H.L.R. 317, the reference to finding and keeping accommodation was held to be the wrong approach. The *Bowers* test was said to be correct and that it must appear that the inability of the applicant to fend for him/herself whilst homeless will result in injury or detriment to him/her which would not be suffered by an ordinary homeless person who was able to cope.
4. those who are homeless as a result of emergency such as fire, flood or other disaster.¹⁰

¹⁰ Note that the categories have now been extended to encompass some of the single homeless by the Homelessness (Priority Need for Accommodation) (England) Order (SI 2002/2051).

This has led to the exclusion of many single people from any substantive assistance. The increasing number of street homeless during the 1980s and 1990s in many conurbations reflected the fact that the homelessness legislation simply did not provide any adequate rights for this group. This led to the government setting up a Rough Sleepers Initiative. The evidence from that initiative has shown that more than half of rough sleepers had mental health or alcohol problems, one in five having drug problems and over a third having combined mental health and substance abuse problems.¹¹ It is clear that limits to the groups that are assisted will lead to many being excluded, notwithstanding the fact that these are those exhibiting the greatest housing need.

The final obstacle to substantive assistance in the homelessness legislation throws into sharpest relief the concept of deserving and undeserving. This is the exclusion from substantive assistance of the "intentionally homeless". By section 191(1) of the 1996 Act a person becomes homeless intentionally if s/he "deliberately does or fails to do anything in consequence of which s/he ceases to occupy accommodation which is available for her/his occupation and which it would have been reasonable for her/him to continue to occupy". Section 191(2) provides some form of defence, i.e. that an "act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate".

The most common causes of intentional homelessness arise due to rent or mortgage arrears,¹² abandonment and, increasingly, anti-social behaviour. In 2000/01, just under 4 per cent of all applicants were found to be in priority need, but intentionally homeless, representing nearly 9000 households.¹³ Although relatively small, this group has led to disproportionate amounts of litigation, and such a decision is clearly incredibly significant for many applicants, often closing off avenues into any form of social housing.

Indeed these concepts of fault have become increasingly important in determining whether families gain access to social housing in the U.K. There is a growing concern with anti-social behaviour that is reflected not only in finding that families evicted for rent arrears or some form of anti-social behaviour are intentionally homeless, but also that they should be excluded from a permanent allocation of housing. New legislation in England and Wales (the Homelessness Act 2002), brought into force in January 2003, makes the position very clear, allowing local authorities to exclude from permanent housing under Part VI of the Housing Act 1996 those who are guilty of seriously unacceptable behaviour, defined in relation to that for which they could be evicted.

While a concern with the effect of anti-social behaviour on the victims is very understandable, it remains the case that many of the perpetrators suffer from

11 Randall G. and Brown S. (2000), *An evaluation of the rough sleepers initiative* London: DETR.

12 Although mortgage arrears are often looked upon less harshly than rent, see Loveland, 1995, *op cit.* Chap. 7

13 DTLR (2002) *More than a roof: a report into tackling homelessness* London: DTLR, p. 8.

problems themselves, which often have not been addressed.¹⁴ Any right to housing will have to balance these issues and decide where a line is to be drawn.

Types of accommodation

As indicated above, even for those applicants who are accepted as homeless, in priority need and not intentionally homeless, the 1996 Act does not give a right to permanent housing. Although the new Homelessness Act will lift the two-year limitation on the duty, it does not change the proposition that permanent housing is achieved through an allocation under Part VI of the Act. While for many applicants this is not significant, with a permanent offer following quickly on from an acceptance of the homelessness application, in some areas where there are severe shortages of social housing this leads to long waits in temporary forms of accommodation.

Of these perhaps the worst form of accommodation is bed and breakfast. Since 1995/6 the numbers of homeless applicants in temporary accommodation has risen sharply, and they now number over 75,000. Of those, by June 2001 there were 11,340 household placed in bed and breakfast accommodation, of which 7,900 were in London.¹⁵ It is in areas of high demand for housing, leading to high prices, that authorities have struggled the most to avoid the use of bed and breakfast. In October 2001, to try and respond to the issue, the government set up a Bed and Breakfast Unit, which has established targets for reducing the use of B & B.

The necessity for such a unit serves to illustrate the problems of having a fairly concrete right for homeless families which local authorities are required to fulfill. Without the means to increase the supply of affordable housing, authorities are inevitably driven to fulfilling their duties through whatever accommodation is available. Although the 1996 Act refers specifically to accommodation being "suitable", this has not been sufficient to prevent many families having to spend months and sometimes years in bed and breakfast accommodation that was patently not suitable.

Enforcement of rights.

The final issue that the duties towards the homeless raise is one of enforcement. As is clear from the discussion above the rights of homeless persons are very conditional. In addition to being satisfied that the applicant is homeless, the authority must also be satisfied that the applicant is within one of a group of "priority need" categories and also did not make themselves intentionally homeless. This requires the local authority to make a number of subjective judgments, e.g. as to whether an applicant is "vulnerable" or whether the applicant deliberately did something in consequence of which he ceased to occupy accommodation which it was reasonable for him to continue to occupy. It is for the authority to be "satisfied" on these issues before the duty arises.

14 See Hunter C., Nixon J. and Shayer S. (2000) *Neighbour Nuisance, Social Landlords and the Law*, Coventry: Chartered Institute of Housing, suggesting that 72% of perpetrators suffered from some form of vulnerability.

15 Bed and Breakfast Unit Newsletter, Issue No. 1, November 2001.

This framing of duties in a subjective form provides a limit on the nature of any judicial intervention. Challenges to decisions of local authorities have had to be made through judicial review proceedings in the High Court. Such proceedings do not allow the judge to substitute his own view for that of the authority but only to test the procedures by which the decision has been arrived at and ultimately to ask whether the decision reached was one to which no "reasonable authority" could come.

The 1996 Housing Act made a significant change to how applicants could challenge the homelessness decisions of local authorities. First all authorities were required to offer an internal review to applicants of their decisions (Housing Act 1996, s.202). Secondly, applicants could then appeal the internal review to the county court, but only on a point of law, which effectively means the same basis as judicial review in the High Court (Housing Act 1996, s.204). Appeal is dependent on having first used the internal review mechanism.

I have been involved in a study with colleagues about the use of the internal review mechanism in homelessness cases.¹⁶ The primary research was carried out at two sites, "Southfield" and "Brisford", and included interviews with 94 homeless applicants and postal surveys to local authorities in 1998 and 2001, which achieved, respectively, 54% and 57% response rates.

There was a very low take-up of the right to an internal review. For the homeless it might be suggested that there is a great incentive to use the internal review mechanism, since a rejection by the local authority means continuing homelessness. The statistics from local authorities suggest, however, that very few applicants take the opportunity to challenge negative decisions. Extremely low levels of activities are the norm. In the first survey, 68 per cent of respondents had received fewer than five requests for a review in the previous six months, which was slightly reduced to 60 per cent in the second survey. One respondent said that of about 1500 applications in six months only 55 (3.6 per cent) requested a review, another respondent with an equal level of activity had received only 10 requests. (On average half of all applications are rejected).¹⁷

The interviews with homeless applicants indicate that there are many barriers to challenging adverse decisions. These include both factors relevant to the bureaucratic decision-making and those applicable to the individual applicant.

16 My colleagues are Simon Halliday of Oxford University and David Cowan of Bristol University. The study has been funded by the Nuffield Foundation, which is a charitable trust established by Lord Nuffield. Its widest charitable object is 'the advancement of social well-being'. The Foundation has a special programme of grant-making in Access to Social Justice. The Foundation has supported this project to stimulate public discussion and development of practice and policy. The views expressed are however those of the authors and not necessarily those of the Foundation. We hope to publish detailed results from the study in 2002/3 and I must express my gratitude to both colleagues involved in the project for carrying out the initial analysis of applicants' views on which I have drawn for this paper.

17 DTLR (2002) *More than a roof: a report into tackling homelessness* DTLR: London

One issue relates to knowledge and information. Local authorities are required to give applicants information about the right to review. Notwithstanding this a number of applicants were unaware of their rights. This may arise because of particular bureaucratic problems, which lead to the applicant never receiving the letter containing the information about reviews. Secondly the applicant may receive the letter but not read it, this may well be triggered by language difficulties, but it may also reflect the importance of verbal communication. Where applicants have verbally been informed of a negative decision, they may not feel that it is necessary to read any subsequent correspondence. Finally, applicants may read the letter but fail to understand it. The legal nature and complexity of letters provide a real barrier to understanding. There was some evidence, however, that in the research site, which gave a separate, and more detailed information pack about the right to review, this problem was to some extent overcome.

Cost in purely monetary terms did not present a real barrier. There is no fee for seeking an internal review, and most applicants who did seek legal advice obtained it for free, since they fell within the financial limits for legal aid for advice (which can include making a written case to the local authority). However, there was a personal cost in the effort of going through the process. Some did not do so because of what might be termed "application fatigue." Thus one applicant commented:

"I'm so fed up with it, I'm really fed up with it. I'm not gonna appeal, I just can't go through it again. It's too much it takes too much out of me, physically, emotionally and mentally and I'm not going to appeal."

Homelessness applicants were very likely to be involved with other welfare agencies because of the complex and difficult circumstances which have led to their homelessness application. Thus it is not just the drain on energy in making the homelessness application, which has to be taken into account, but also other difficulties with the welfare bureaucracy.

In what is essentially a discretionary based system, the legal image for some applicants was of a fixed rule-bound decision making process. Here challenging the decision becomes pointless because the authority has applied the "rules" and there is no other decision that can be reached. This view can be encouraged by assessment officers framing their decisions in this way, both orally and in writing.

The review is conducted by the organisation, which has already made a negative decision about their case. There was a clear view amongst applicants that there was no point in pursuing an appeal because the authority had already made up its mind. However, more important than the actual lack of independence in engendering sceptical views was the experience of applicants in the initial stages of decision-making. Many applicants enter the process with unrealistic expectations. Many applicants believe that the authority should and will house them simply because of their own sense of need. These hopes are often dashed, and can contribute to the scepticism about internal review. This may manifest itself as a scepticism about the particular internal review process or in a more general scepticism about the

likelihood of receiving assistance from the welfare system as a whole. In this latter situation a refusal of housing triggers a loss of hope in receiving assistance from "the system".

As can be seen from the brief survey above, the reasons why applicants did not enter the first stage of challenging an adverse decision about their rights are varied. Any system which seeks to incorporate a practical and justiciable right to housing will have to confront these forms of barriers and ensure that applicants, who are likely in the main to have the least personal resources (not simply in monetary terms), are able to pursue any claims once they have been rejected.

Conclusions

The U.K., perhaps largely for historical reasons, has not tended to incorporate broad constitutional rights into legislation. While the Human Rights Act 1998, shows that there can be ways forward on this, there has been no move to incorporate a "right to housing" in U.K. law.

This is not to say that the U.K. does not have a very well developed structure for protecting the housing rights of citizens, of which the most significant is the legislation relating to homelessness. This is not, however, without significant problems. In particular issues relating to those who may be excluded from assistance have to be addressed. Further in areas of housing shortage fulfillment of the duties towards the homeless may be in sub-standard accommodation. Finally it is necessary to consider issues of how applicants are going to be assisted in enforcing any rights they have. The use of internal review mechanisms shows that there can be considerable barriers to challenging adverse decisions.

A Right to Housing: Is it more than a mere right to shelter in market societies like Ireland?

Padraic Kenna

In Ireland, we have recently experienced huge change and growth in housing output and costs. Yet we seem to be no nearer in resolving the problems of access to adequate housing for all and the persistent homelessness of some Irish people continues at constant levels. Indeed, it can appear that new housing problems are emerging such as unaffordability, social segregation and stratification in housing and property ownership. The public discourse on housing in Ireland is dominated by the proponents and stakeholders of the market system. This ethos also pervades the public service to a large extent and housing policies are designed to promote the market. Of course there are also many public measures, which mitigate the excesses and failures of the market in the key areas of planning, social housing etc. There are many dedicated NGOs and individuals who are creating worthwhile alternatives to the market in social and supported housing, community development, anti-poverty measures and other valuable work. However, there is a consistent inability to challenge and counter the hegemony of market-based norms and values in the construction of the housing policy discourse in Ireland. Introducing the paradigm of human rights into this area can offer new and effective pathways to engage these market based dominant norms, which exclude any meaningful discussion about the future of housing policy beyond numbers of units and house prices.

In this brief presentation I will consider three issues:

- What do we mean by a right to housing?
- How does it apply and to whom?
- How do we progress it?

What do we mean by a right to housing.

The right to housing is increasingly becoming part of the language of debate on housing policy. Many NGOs are putting forward a demand for a Housing Rights Bill as a remedy to the failure of Irish housing policy to address the needs of a range of groups in society. The right to housing is being put forward as a counter to the dominant ideology of the market in Irish housing policy. However, within our contemporary form of democratic politics, with its emphasis on social partnership programmes, and the importance placed on the doctrine of the separation of powers by the judiciary, there is something of an impasse in this area. In this article, I hope to show that rights to housing are already part of our growing international commitments, have a place in our Constitution, and have a major relevance, not just for homeless people, but for a growing number of Irish citizens. Indeed, our approaches in advancing this right must include all those constituencies where the absence of such rights to housing are being felt, and which are denied by the Irish State.

Background.

While in Ireland we are familiar with the struggle for civil and political rights, such as the right to political expression, self-determination, democratic institutions, freedom of expression and others, awareness of socio-economic rights is not so well developed. Socio-economic rights can be traced from the development of the *Universal Declaration of Human Rights* (UDHR) of 1948, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) of 1966, and the *European Social Charter* of 1961, (revised in 1996). Indeed, there is an increasing cross over between civil and political rights and socio-economic rights within the jurisprudence of the *European Convention on Fundamental Rights and Freedoms* (ECHR) 1953, and other legal instruments in this area. The whole area of such socio-economic rights, including the right to housing is finding its way into the EU *Social Policy Agenda*, and particularly within the new anti-poverty, social inclusion and social solidarity approaches. The rights-based approach, including a right to housing is being developed among many European States within the EU *Charter of Fundamental Rights*, and there are some interesting developments in this area within European case law.

Of course, the development of human rights generally can be traced back further to the republican constitutions of France, and the United States, which, indeed, provided the inspiration for our own Constitution. After the second World War the nations of the world, including Ireland, set out in the Universal Declaration of Human Rights the first clear articulation of all these rights, socio-economic as well as civil and political. The story of that historical breakthrough, where henceforth human rights would become the currency of international standards and comparisons, offered an inspiration for all the people of the world, regardless of the political regime in place or the level of industrial development. Indeed, at the time the US was a major promoter of the development of all these rights.¹

We are all aware of how the Cold War froze the debate on the inter-divisibility of these human rights, leading to an ideological division between civil and political rights claimed by the "West" as theirs, and the priority given to socio-economic rights in socialist States. Indeed, the two UN Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights arose from that historical artificial division of human rights. However, the Cold War is now more than a decade in the past, and it is today legitimate to place socio-economic rights firmly within the human rights debate in our liberal democracies, sitting alongside the civil and political rights publicly cherished by political leaders.²

Indeed, it is not possible to have full citizenship rights, social solidarity or social inclusion without socio-economic rights, such as the right to housing.

1 See Eide, A. et al. (ed.), (2001) *Economic, Social and Cultural Rights – a Textbook*. 2nd ed. Dordrecht: Martinus Nijhoff Publishers.

2 See UN Doc A/CONF 157/24 (1993) *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna.

While the Cold War consigned socio-economic rights to the edges of our education and political discussions, we must ensure, now however, that we are not promoting in this new climate any of the fossilised housing solutions of mass produced, high density, poor quality, segregated and badly managed housing. The right to housing now being recognised and promoted by housing rights advocates involves more than the provision of a basic and minimalist unit of State housing for all citizens.

United Nations.

Let me now outline briefly the range of international instruments where a right to housing can be found. It is important to note that rights to housing are to be found within the range of socio-economic rights, reflecting the integral nature of rights to housing with human development, health, the development of children and all groups of people.

The main Article concerned with a right to housing in the UDHR of 1948 is Article 25.³

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

As we have seen above, the artificial separation of civil and political rights from socio-economic rights led to two Covenants, and the *International Covenant on Economic, Social and Cultural Rights* addressed the right to housing in Article 11.⁴

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent”

Monitoring States parties obligations under these Covenants the UN Committee on Economic, Social and Cultural Rights (UNESCR) has clarified further these elements of these rights. *General Comment No. 4. on the Right to Adequate Housing*⁵ has been set out “as a means of developing a common understanding of the norms by establishing a prescriptive definition”. The General Comment spells out the elements of housing policy which States must address in the housing available to its citizens. Viewed in their entirety, these entitlements form the core guarantees, which, under public international law, are legally vested in all persons.

3 *Universal Declaration of Human Rights*, UNGA Resolution 2200A (XX1) UN Doc A/810 (1948).

4 UN Doc. A/6316 (1966) *International Covenant on Economic, Social and Cultural Rights*. UNGA Resolution 2200A (XX1) Entered into force 3 January 1976.

5 UN Doc.E/1991/23. UNCESCR. *General Comment No. 4. The Human Right to Adequate Housing*. Geneva: United Nations.1991.

1. Legal security of tenure

All persons should possess a degree of security of tenure, which guarantees legal protection against forced eviction, harassment and other threats. Governments should consequently take immediate measures aimed at conferring legal security of tenure upon those households currently lacking such protection. Such steps should be taken in genuine consultation with affected persons and groups.

2. Availability of services, materials and infrastructure

All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, clean drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.

3. Affordable housing

Personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Housing subsidies should be available for those unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States to ensure the availability of such materials.

4. Habitable housing

Adequate housing must be habitable. In other words, it must provide the inhabitants with adequate space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors. The physical safety of occupants must also be guaranteed.

5. Accessible housing

Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other vulnerable groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups.

6. Location

Adequate housing must be in a location that allows access to employment options, health care services, schools, childcare centres and other social facilities. Housing should not be built on polluted sites

or in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

7. Culturally adequate housing

The way housing is constructed, the building materials used and the policies underlying these must appropriately enable the expression of cultural identity and diversity. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed.

These extensive entitlements extracted from *General Comment No. 4*. reveal some of the complexities associated with the requirements of the right to adequate housing. They also show the many areas which must be fully considered by States to satisfy the housing rights of their population. Any person, family, household, group or community living in conditions in which these entitlements are not fully satisfied, could reasonably claim that they do not enjoy the right to adequate housing, as enshrined in international human rights law.

*General Comment No.7. The Right to Adequate Housing – forced evictions.*⁶

Following from General Comment No. 4, and with increasing reports of forced evictions, this Comment was issued by the Committee in 1997.

The term "forced evictions" as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights⁷.

Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.⁸

The UNCESCR considers that the procedural protections that should be applied in relation to forced evictions include:

- an opportunity for genuine consultation with those affected;
- adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;

6 UN Doc. E/1998/22 Annex IV.

7 *Ibid.*, para. 3.

8 *Ibid.*, para. 10.

- information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- all persons carrying out the eviction to be properly identified;
- evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- provision of legal remedies; and
- provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.⁹

Article 11 of the ICESCR sets out the obligation on the States Parties "to recognise" the right of everyone to an adequate standard of living including...adequate housing.¹⁰ The obligation of States to recognise the right to housing manifests itself in several key areas. Firstly, all countries must recognise the human rights dimensions of housing, and ensure that no measures of any kind are taken with the intention of eroding the legal status of this right. Second, legislative measures, coupled with appropriate policies geared towards the progressive realisation of housing rights, form part of the obligation "to recognize." Any existing legislation or policy that clearly detracts from the legal entitlement to adequate housing would require repeal or amendment. Policies and legislation should not be designed to benefit already advantaged social groups at the expense of those in greater need. Specifically, housing rights issues should be incorporated into the overall development objectives of States. In addition, a national strategy aimed at progressively realising the right to housing for all, through the establishment of specific targets should be adopted. Thirdly, a genuine attempt must be made by States to determine the degree to which this right is not in place, and to target housing policies and laws towards attaining this right for everyone in the shortest possible time. In this respect, States must give due priority to those social groups living in unfavourable conditions by according them particular consideration.¹¹

Other UN international instruments that set out rights to housing include:

- The UN *Convention on the Rights of the Child* (1989).
- The UN *Convention Relating to the Status of Refugees* (1951).

⁹ *Ibid.*, paras. 15-16.

¹⁰ Alston & Quinn, "The Nature and Scope of States Parties Obligations under ICESCR," 9 *HRQ* 156-229 (1987).

¹¹ *Ibid.*

- The UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990).
- The *Declaration on the Rights of Disabled Persons* (1975) of UNGA resolution 2542 (XXIV) on 11 December 1975.
- The *Vancouver Declaration on Human Settlements* (1976) adopted by the United Nations Conference on Human Settlements in 1976.
- The UN *Global Strategy for Shelter to the Year 2000* adopted by the UN General Assembly in resolution 43/181 on 20 December 1988.
- The UN World Conference on Environment and Development (UNCED) of Rio de Janeiro in 1992, which adopted *Agenda 21*.
- The 1961 ILO *Recommendation No. 115 on Worker's Housing*.

As well as being included in the various treaties and declarations, the right to adequate housing has also been addressed in many resolutions adopted by all types of United Nations decision-making bodies. While such resolutions are not legally binding at an individual level, they articulate internationally accepted standards. This method of recognition reveals the sustained global attention and support given to the right to adequate housing, at least in principle, by the international community. At a national level, at least 40% of the world's Constitutions refer to housing or housing rights.¹²

All of this shows that there is a consistent and progressive development of housing as a right permeating the international and national legal, and constitutional arenas. While there are no guarantees that the mere inclusion of housing rights within a Constitution will lead to this right being implemented, the positing of this right alongside other constitutional rights represents an important legal foundation for further action towards ensuring the effective realization of the right to housing.

Europe.

At European level, there are significant advancements in rights to housing within the *Revised European Social Charter* (RESC), the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) and the *EU Charter of Fundamental Rights* (ECFR), as well as some social policy measures.

The *European Social Charter* 1961 (ESC) emanated from the Council of Europe, established in 1949, and contained 19 economic and social rights, "*all expressed in obligations upon the contracting parties to pursue a certain policy which will lead to the progressive realisation of these rights.*"¹³ The Charter (and revised Charter) provides a number of international norms in relation to housing rights for people with disabilities, families, migrant workers and elderly persons, and has been ratified by Ireland.¹⁴

- Article 15 - physically and mentally disabled persons
- Article 16 – family to social, legal and economic protection

12 Leckie, S. (2000) *Legal Resources for Housing Rights*. Geneva: COHRE.

13 Betten & Grieff, *EU Law and Human Rights* (1998), p. 42.

14 Original Charter signed and ratified by Ireland in October 1961.

- Article 19 – migrant workers
- Article 23 – the right of elderly persons to social protection
- Article 30 - protection against poverty and social exclusion

A new Article 31 in the Revised Charter of 1996 creates an obligation to give effect to a right to housing:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- to promote access to housing of an adequate standard;
- to prevent and reduce homelessness with a view to its gradual elimination;
- to make the price of housing accessible to those without adequate resources.¹⁵

However, in a Declaration contained in the instrument of ratification and in a letter from the Permanent Representative of Ireland to the Council of Europe, dated 4th November 2000 the Government of Ireland opted out of Article 31 on the right to housing.

In view of the general wording of Article 31 of the Charter, Ireland is not in a position to accept the provisions of this Article at this time. However, Ireland will follow closely the interpretation to be given to the provisions of Article 31 by the Council of Europe with a view to their acceptance by Ireland at a later date.

Article 30 of the RESC - protection against poverty and social exclusion, has, however, been ratified by the Irish State, and gives an undertaking that rights to protection from poverty and social exclusion will promote access to housing.

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

- a. to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance.¹⁶

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) has been associated in Ireland with high profile cases decided at Strasbourg relating to civil and political rights, but is now beginning to have very important implications for housing rights. The ECHR has added significance following the commitments by the Irish Government in the Belfast/Good Friday Agreement, with steps towards an equivalent level of protection of human rights between the two parts of Ireland. This could mean that the provisions of the Covenant, as already in force in Northern Ireland under the UK *Human Rights Act 1998*, might be developed in the Republic.¹⁷

¹⁵ Council of Europe. *Revised Social Charter*, Article 31.

¹⁶ Council of Europe. *Revised Social Charter*. Article 30. Council of Europe. (1999).

¹⁷ Government of Ireland. *European Convention on Human Rights Bill 2001. Explanatory Memorandum*. p. 3.

The most relevant sections of the Convention to housing issues are:

- Article 6 - The right to a fair hearing: civil and criminal matters,
- Article 8 – The right to respect for home life, privacy, the home and correspondence,
- Article 13 – The right to an effective domestic remedy,
- Article 14 – No discrimination in relation to Covenant rights,
- Article 1 of Protocol No. 1. The right to peaceful enjoyment of possessions.

There is a developing body of case law on housing related issues to complement the case law of the European Court of Human Rights. Indeed, the Supreme Court in the major case on Irish housing policy in 2000, on the constitutionality of the Planning and Development Bill 1999¹⁸ considered in depth the compatibility of the Bill with the provisions of Article 1 of Protocol 1 of the Convention. Recent UK cases in relation to housing arising from the *UK Human Rights Act* 1998, are rising key issues in relation to housing rights, such as the right to an independent and impartial appeals system in relation to decisions on eligibility for public housing assistance.¹⁹

EU Regulations in the 1960s and 1970s ensured that non-national workers and their dependents were entitled to the same social benefits, including access to housing, as nationals of Member States, on the principle of non-discrimination. Regulation 1612/68²⁰ points out in the preamble that:

Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country;

Council Directive 2000/43/EC of June 2000²¹ which promotes the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin and specifically:

Shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...(h) access to and supply of goods and services which are available to the public, including housing.²²

18 *Re: Article 26. Planning and Development Bill 1999*. [2001] 1 ILRM 81.

19 *Adan v. LB Newham* [2001] EWCA Civ. 1916.

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

21 Council Directive 2000/43/EC. OJ. L. 180/22. 19.7.2000.

22 *Ibid.* Article 3 (1).

In order to comply with the Directive Member States shall take the necessary measures to ensure that:

Any laws, regulations, and administrative provisions contrary to the principle of equal treatment are abolished.²³

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19th July 2003...²⁴

Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European parliament and the Council on the application of this Directive.²⁵

This Directive places a clear obligation on Irish authorities to examine and amend if necessary, any laws, regulations and administrative measures in relation of the supply of housing by 2003.

The EU *Charter of Fundamental Rights* (ECFR) was “jointly and solemnly proclaimed” at Nice by the Presidents of the European Parliament, the Council and the Commission in December 2000. The Charter does not include a specific right to housing, but only to housing assistance as set out in Article 34, relating to social and housing assistance. Nevertheless, it is a significant step in the recognition of housing related rights within the EU.

Article 34 - Social security and social assistance

...3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the procedures laid down by Community law and national laws and practices.

Ireland.

Although the founders of the Republic in 1916 promised to cherish all of the children equally, there is no specific right to housing in the 1937 Irish Constitution, *Bunreacht na hEireann*. There are a number of unenumerated rights contained in Article 40.3., which have been interpreted to grant a number of personal rights to individuals, arising from the “Christian and democratic nature” of the State.²⁶ However, the conflict between the rights of property owners and the rights of citizens to adequate housing and other social benefits, has largely been decided in favour of property owners, except in very limited circumstances.²⁷

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

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

23 *Ibid.*, Article 14.

24 *Ibid.*, Article 16.

25 *Ibid.*, Article 17.

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

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

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

The latent personal rights of the citizen protected under Article 40.3.1. of the Constitution, have been held to include rights to bodily integrity, the right to earn a livelihood, the right to individual privacy, the right to maintenance and others.²⁸ It is here that we might hope to find a personal right to shelter or housing. In the landmark case of *Ryan v. Attorney General*,²⁹ which opened up a wide interpretation of these unenumerated rights contained in that Article, there was no specific mention of a right to housing, but Kenny J. held that:

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

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

...every man (sic) has the right to life to bodily integrity, and to the means which are necessary and suitable for the proper development of life. These means are primarily food, clothing, shelter, rest, medical care and finally the necessary services.³⁰

There have been a few further references to these constitutional rights in relation to homeless people and Travellers. Notably, Costello J. in a High Court *ex-tempore* judgement in 1994,³¹ held that:

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

However, in December 2001, the Supreme Court appeared to roll back the flow of judicial development of such human rights from natural law interpretations of the Constitution, and the expansion of such unenumerated rights. In the case of *TD v. Minister of Education and others*,³² involving a claim for constitutional protection of the rights of homeless children in the areas of education and care, the Supreme Court decided that:

No such right is expressly recognised by the Constitution and, to the extent that it exist, it must be as one of the unenumerated personal rights guaranteed under Article 40.3.1. of the Constitution in accordance with the construction of that article adopted by the High Court and this court in *Ryan v. Attorney General* [1965] IR. 294.

Chief Justice Keane, delivering the Supreme Court judgement then questioned the decision in *Ryan v Attorney General*, and expressed the fear

28 See *Report of the Constitutional Review Group*, p. 246.

29 [1965] IR. 294.

30 Irish Commission for Justice and Peace, *Re-righting the Constitution*, (1998), p. 49.

31 *O'Brien and Others v. Wicklow UDC and Wicklow County Council*. Unreported High Court. 10/6/1994.

32 Supreme Court. December 17th 2001.

of continuing the tradition of innovative judicial legal development of such rights.

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

In this recent landmark decision,³³ the scope of the protection of the Constitution to unenumerated rights appears to have been limited to those which have been "*unequivocally established by precedent, as for example in the right to travel and the right to privacy, some degree of judicial restraint is called for in identifying new rights of this nature.*" This decision appears to have limited the development of constitutional rights in Ireland to established precedents only, and these do not include any specific rights to housing. Indeed, there appears to be a resistance among some in the Supreme Court to the development of such rights, while at the same time the State has undertaken to incorporate these rights into its laws and policies at international level. This was expressed by Keane, C.J.

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

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

The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.³⁴

In recent times, in the case of *Amanda Hamilton*³⁵, the granting of a warrant for possession under Section 13 of the Housing Act 1970³⁶ was challenged as being incompatible with the duties of the local authority to house homeless people, which the plaintiff would, indeed, become, once evicted. The Court held that constitutional right to bodily integrity was not a matter for the District Court to consider in such a hearing. It also held that there was no automatic entitlement to legal aid in such proceedings,³⁷ but a hearing must take place before a Judge in order to make the order for possession.³⁸

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

34 *Bunracht na hEireann, The Irish Constitution*. Article 45.4.1.

35 *Dublin Corporation v. Amanda Hamilton* [1999] 2 IR 486.

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

37 *Byrne v. Judge Scally and Dublin Corporation*, Unreported. High Court. 12/10/2000.

38 *Kerry County Council v. McCarthy*, Unreported, Supreme Court, 28/4/1997.

Clearly, the scope for expanding rights to housing under our existing constitutional law through litigation approaches is limited.³⁹ In any case the absence of legal aid in these cases renders the testing of such rights very rare. Organisations like FLAC and the Coolock Law Centre have worked to flesh out the reality of rights within the areas of welfare rights, while others have sought establish the constitutional protection available to children in need of care and education. It is only in the area of Travellers rights to accommodation that the litigation approach has yielded some clearly established judgements on the right to housing.⁴⁰

The major obstacles encountered have been the argument that the allocation of resources to address socio-economic rights is properly the *fiat* of the Oireachtas and not the judiciary. Secondly, that the doctrine of separation of powers would be breached were the enforcement of such socio-economic rights to be directed by the Courts. Remarkably, there are no questions as to why the State has agreed at an international level to give effect to these rights, and to ensure that information about these rights is disseminated to all citizens and the judiciary. Using the doctrine of separation of powers to inhibit a development of socio-economic rights alongside civil and political rights, when indeed, they often overlap, is unfortunate. However, it demonstrates the need to develop a broad debate on whether our rights as Irish citizens are merely formal or indeed substantive.

How does it apply and to whom?

While we can all identify with the basic requirement of shelter as an expression of rights to housing, we have seen that such rights actually mean a lot more. Of course, the basic right to shelter is a minimum core requirement of the implementation of such rights. But in order to properly understand the full implications of rights to housing in Ireland we must examine the Irish housing system, including its housing laws and policies.

Housing Policy in Ireland.

The overall aim of Irish housing policy is to **enable** every household to have available an affordable dwelling of good quality, suited to its needs in a good environment and as far as possible at the tenure of its choice.⁴¹

There are also some supplementary objectives.⁴²

- to promote home ownership.
- to promote a diverse and well-managed rented sector.
- to ensure that households without sufficient resources have suitable and affordable housing available to them.

39 For detailed examination of the use of litigation strategies to bring about social justice in Ireland and a discussion of the "common good" and inherent social justice elements of the Irish Constitution see Whyte, G. (2001) *Social Inclusion and the Legal System*, Dublin: IPA

40 See *O'Brien v. Wicklow UDC*. Unreported, High Court, 10/6/1994. See also Hughes. E. The Provision of Emergency Accommodation for Travellers, *Conveyancing and Property Law Journal*, Vol. 5, No. 4 – 2000, pp. 90-92.

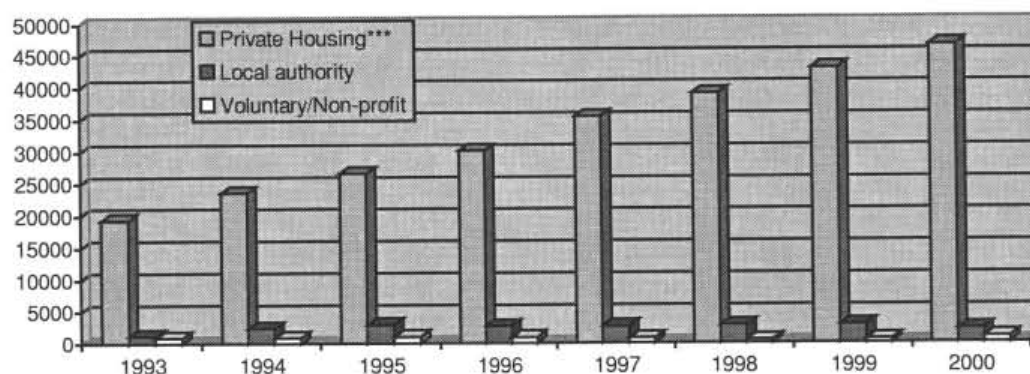
41 DoE&LG., *Statement of Strategy 1998 – 2001*, (1999).

42 DoE&LG., *Social Housing. The Way Ahead*, (1995).

- to promote conservation and improvement of housing.
- to reduce social segregation in housing.
- adequate response to need of homeless people.
- provision of suitable housing and sites for Travellers.

Enabling every household to have a good quality affordable dwelling has involved the facilitation of output of new homes to a peak in 2001 with more than 51,000 new units. However, the proportion of social housing within this provision has recently diminished within this enabling policy approach. Indeed, some 93-4% of new housing provided in 2000 was private, despite the existence of some 30-40,000 households on local authority waiting lists. The pattern of reliance on private housing and home ownership is evident from the chart below. Little wonder that Ireland is portrayed by the Economist as having the highest rate of homeownership among the top 14 "developed nations" of the OECD.⁴³

Chart 1. New Housing Output by Sector.⁴⁴



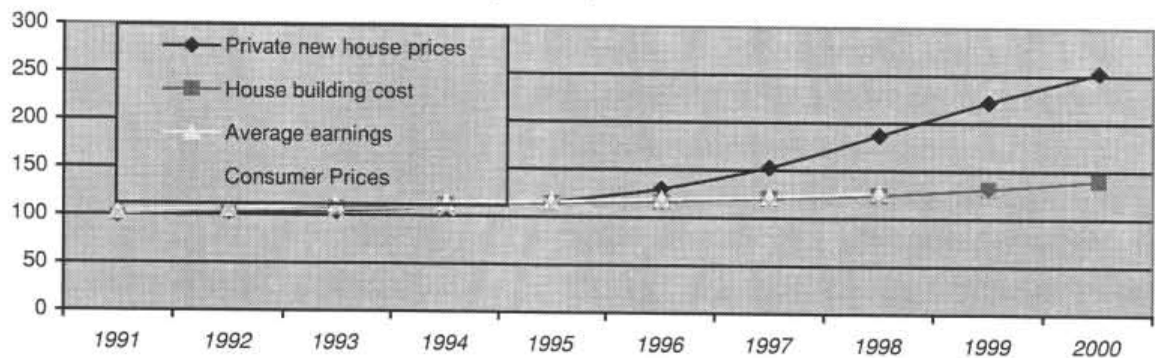
The rising costs of this new housing has not been matched by rising incomes, and indeed, the level of increases of building costs, consumer prices and incomes have not been consistent with the prices of new homes as the following chart shows.

⁴³ *The Economist*. March 30th – April 5th 2002., p. 65.

⁴⁴ Sources. CSO Statistical Abstracts and Department of Environment and Local Government (DoE&LG) Annual Housing Statistics Bulletins.

*** This includes some 35 per cent each year built as one-off houses in non-urban areas, possibly many self-build, according to a report to the Bi-Annual National Housing Conference in Galway in 2001, by the Department of Environment and Local Government. Note also that the Bacon Reports and the Commission on the Private Rented Sector pointed out that some 25% of new homes produced for sale become investment properties and part of the private rental sector, which is greatly supported by the State through tax incentives, urban renewal etc.

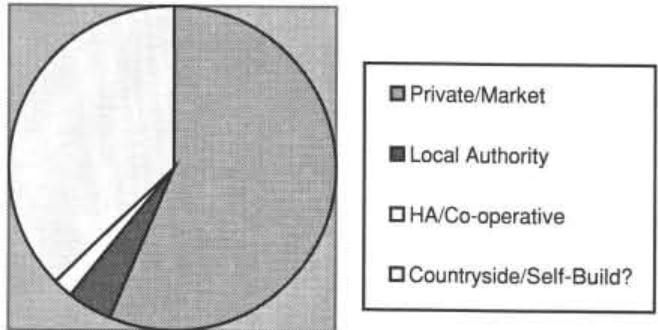
Chart 2. Comparison of New House Prices, Building Costs, Average Earnings and Consumer Prices (1990s)*⁴⁵



The level of demand and costs for new owner-occupied housing has excluded many on low and middle incomes. The National Economic and Social Forum – a Government funded policy body has expressed its concern.⁴⁶

The ever-widening increase in income inequalities and resources is nowhere more evident today than in the case of housing. Ireland's population is now more divided than ever between those who can afford to buy expensive private housing and a growing minority who are finding it increasingly difficult to access secure, good quality and affordable accommodation. The housing crisis has now put home ownership beyond the reach of most people on average incomes. This in turn is adding to the pressures of an already over-stretched social housing sector.

Chart 3. New Dwellings by Sector – Year 2000.⁴⁷



To address some of the problems of low levels of social housing provision and counteract segregation in new housing the *Planning and Development Act 2000* Part V⁴⁸ created the concept of the Housing Strategy, where each authority would compile a document setting out existing and future housing need, level of supply and measures to counteract social segregation in its area. The method of calculating the level of need for social and affordable housing among those excluded from the housing market was set out in a

45 DoE&LG. Annual Housing Statistics Bulletin 2000. *Base 1st Quarter 1991 = 100
46 National Economic and Social Forum, (September 2000) *Social and Affordable Housing and Accommodation: Building the Future*, Forum Report No. 18. Dublin: NESF. P. vii.
47 DoE&LG. *Housing Statistics Bulletin*. (Total dwellings estimated at 49,812). Recent reports suggest that up to 25% of new homes purchased in the market are investment properties and become part of the private rented sector, an area of housing provision not considered in most Strategies.
48 Planning and Development Act 2000. Section 94.

Model Housing Strategy, prepared by the Department of the Environment and Local Government.⁴⁹ Strategies have now been produced for all areas and these demonstrate the level of exclusion from the market of new households.

Table 1. Numbers who cannot Access the Housing Market.⁵⁰

<i>Carlow</i>	<i>27 – 28.9%</i>
<i>Cavan</i>	<i>20%</i>
<i>Clare</i>	<i>22 – 25%</i>
<i>Cork City and County</i>	<i>33.9 – 36.7%</i>
<i>Donegal</i>	<i>20 – 21.7%</i>
<i>Dublin City</i>	<i>34 – 39%</i>
<i>Dun Laoghaire/Rathdown</i>	<i>53 – 57%</i>
<i>Fingal</i>	<i>45%</i>
<i>Galway City</i>	<i>19.6 – 23%</i>
<i>Galway County</i>	<i>20.9 – 24.9%</i>
<i>Kerry</i>	<i>24.4 – 28.1%</i>
<i>Kildare</i>	<i>27.7 – 32.2%</i>
<i>Kilkenny</i>	<i>3.9 - 15.6%</i>
<i>Laois</i>	<i>N/a</i>
<i>Leitrim</i>	<i>21.8 – 24.5%</i>
<i>Limerick County</i>	<i>12.5 – 25.9%</i>
<i>Limerick City</i>	<i>30%</i>
<i>Longford</i>	<i>48 – 51%</i>
<i>Louth</i>	<i>23 – 29%</i>
<i>Mayo</i>	<i>20 – 22.7%</i>
<i>Meath</i>	<i>22.4 – 24.6%</i>
<i>Monaghan</i>	<i>25 – 26%</i>
<i>Offaly</i>	<i>14.7 – 16.8%</i>
<i>Roscommon</i>	<i>22.6 – 24.7%</i>
<i>Sligo</i>	<i>29.9 – 31.07%</i>
<i>South Dublin</i>	<i>45%</i>
<i>Tipperary NR</i>	<i>19.6 – 20.4%</i>
<i>Tipperary SR</i>	<i>24.6 – 25.7%</i>
<i>Waterford</i>	<i>24.5 – 26.5%</i>
<i>Waterford City</i>	<i>More than 20%</i>
<i>Westmeath</i>	<i>29.9 - 31.6%</i>
<i>Wexford</i>	<i>More than 20%</i>
<i>Wicklow</i>	<i>51.35 – 55.87%</i>

49 See DoE&LG, (2000) *Housing Supply, op cit.* The analysis of the housing market with house price inflation declining over the period to 7.5%, and lower for some counties. Calculations are based on 5% APR, 25 year mortgage and 90% LTV, with "affordable housing" costs amounting to no more than 35% of net income. Section 93(1) Planning and Development Act 2000. "A person who is in need of accommodation and whose income would not be adequate to meet the payments on a mortgage for the purchase of a house to meet his or her accommodation needs because the payments calculated over the course of a year would exceed 35% of that person's annual income net of income tax and social insurance."

50 Based on an examination of all the local authority Housing Strategies produced in consequence of the Planning and Development Act 2000, and incorporated into Development Plans for each authority available at 8th April 2002. See DoE&LG, (2000) *Housing Supply, op cit.*

All of this shows that State housing policy is geared primarily to the support of the market, but that new measures have been taken to underpin the market at a time when it is failing to meet the housing needs of many thousands of Irish citizens. Of course, the right to housing includes a right to an affordable home.

The "Enabling Approach" and Irish Housing Policy.

This "enabling" approach in housing policy is becoming increasingly common among all the countries of the world. Housing policy in Europe has shifted from mass solutions to individual solutions, within the overwhelming market system, even in Spain, Ireland and Portugal, which are rapidly industrialising and expanding housing provision to meet demand. This largely involves providing support to people as consumers of housing. Such support involves mortgage subsidy, low start mortgages, starter homes, subsidised sites, first time buyers grants, housing benefit, and other subsidies at an individual level. In Ireland, however, there has been a continued policy of State provision, albeit amounting to only 6% of the 50,000 new units built in 2000.

The enabling approach involves a major shift away from direct State provision. In recent times, housing policy and legislation among almost all countries, including many hitherto large-scale State providers, has adopted a bifurcated approach. Both law and policy have developed along two paths, which appear to diverge further over time. The primary policy consideration is to facilitate the market to operate effectively, ensuring exchange of housing, land planning use, access to mortgage finance, sustainable equity etc. The other part of housing law and policy *"relates to the circumstances of the disadvantaged, who are badly housed or homeless, whose prospects of future betterment are uncertain, and whose residential segregation, in many cases, compounds social and economic inequality...Housing policy as defined in this way is thus mainly concerned with social housing (including its privatisation)."*⁵¹

Thus, housing law and policy in Ireland and within EU Member States has divided into two strands. On the one hand are the sets of measures, which relate to concentrations of poverty and social disintegration, collapse of communities and homelessness.⁵² On the other hand the maintenance of owner-occupation as a route to social stability and the normalisation of property ownership, have become the predominant forces in housing policy.

Despite the rhetoric about the fight against social exclusion, the reality is that the European political economy is now founded in practice on the acceptance at a more or less permanent level, of a continuing divide between the haves and the have-nots, in each country. In housing policy, this underlying belief finds expression in the retreat of national government from responsibility for achieving more equal outcomes. As the divide grows, policy bifurcates between, on the one hand measures to maintain market stability for the majority, either in terms of mass owner occupation or a more

51 Kleinman et al. (1998) *European Integration and Housing Policy*. London: Routledge. p. 242.

52 The European Commission has established an Expert Group on Statistics on Homelessness to create a common definition and produce statistics on homelessness in Europe. Website: <http://forum.europa.eu.int/Members/irc/dsis/soipse/home>

balanced private renting/owner-occupation split, and, on the other hand, to alleviate some of the worst excesses for the poor, while transferring responsibility from national to local, or even community level.⁵³

The main role in the production and allocation of housing is thus referred to this enormous market structure, and the State's main role is to limit and correct the dysfunctions of this market (and in some cases to supplant the market through direct provision). The primary role of the State is therefore concerned with ensuring the sustainability of the housing market as the foremost system for the production and allocation of housing. The issue of rights to housing are interpreted within this context by State agencies. There is, however, some concession to the moral rights of the poor to be given shelter, commiseration with those who are homeless and an Irish communitarian legacy of provision for families and individuals without resources. But translating these into legal and enforceable rights to housing may well reveal some unexpected responses from State agencies, perceiving such change as a threat to the operation of the dominant market system, and an interference in the laws of supply and demand.

Of course, many of the rights to housing outlined today, are in fact essential to the operation of the market system, such as the rights of people to own and acquire housing of their choice. Indeed, it could be shown that the provision of such high levels of good quality public housing in the State created a stock of housing by the 1970s, which allowed the establishment of a sustainable housing market. There is, of course, massive State intervention in the housing market for social purposes, and to deal with the adverse effects of the market. There is a huge level of expenditure on social housing and financial support for supported housing is already in place. The extra resources required to give effect to a right to housing in Ireland would be minimal, and indeed the economic arguments for not incorporating such rights are particularly unconvincing.

Implementing Rights to Housing.

Implementing rights to housing in Ireland must address all the elements of the Irish housing system. Whilst the obvious needs relating to access to adequate affordable and suitable housing are clear, we must recognise that it is in the market sphere, both rental and purchase, that the great majority of housing is provided. However, within the area of social housing there are clear deficiencies in the areas of adequate provision, in the rights of tenants and those who rely on discretion in relation to many housing rights. For instance, there is a clear need for Charters of Rights to be developed: for people with disabilities as recommended in the Commission⁵⁴ report; in relation to housing for older people, especially in nursing homes; and in relation to the rights of homeless people, most of whom are users of hostel services provided by State and charitable agencies. Indeed, such Charters have already been

⁵³ Kleinman et al. *op. cit.* p. 250.

⁵⁴ See *Report of the Working Group on Housing/Accommodation. Commission on the Status of People with Disabilities*, (1995).

drawn up by advocacy agencies, and some excellent models exist for use by advocates.⁵⁵

Remarkably, the recent policy documents relating to homelessness do not allow any role for advocacy in relation to the advancement of the rights of homeless people, or indeed offer any role for homeless people themselves to participate or influence the Action Plans drawn up by the State and voluntary agencies concerned with such provision.⁵⁶ While the Travellers Accommodation Plans⁵⁷ of each local authority did consult Traveller groups there appears to be very little room for Travellers to have an input into the failure to provide adequate housing under the Plans.

Among tenants of social housing there are demands being expressed for such rights as adequate housing, for quiet enjoyment, for crime free neighbourhoods, for opportunities for personal and community development, for adequate facilities for young people and people with disabilities, and for dignified treatment. Indeed, while preparing this presentation the Irish Times relayed a report from a local authority estate in Dublin⁵⁸ where young people were actually becoming homeless as a result of overcrowding and stress arising from poor housing conditions.

"We don't want to win the Lotto – just basic rights."

Those tenants had prepared a wish list relating to their housing rights. They wanted to feel safe, to be crime free, drug free and feel "happy and proud." The wish list asked for a park, youth activities, a football pitch, a swimming pool, affordable childminding facilities, a chemist, phone boxes, a library and activities for children.⁵⁹ Of course all these rights have been set out with the UN Committee's *General Comment No. 4* on the extent of the right to housing. Clearly, there are a whole range of actions, which could be taken to strengthen the rights of those relying on social housing, both in relation access and once housed.

Addressing rights in the market.

Advancing and implementing the right to housing within the dominant housing market system has not yet been clearly addressed in Ireland.⁶⁰ It must also be recognised that this market system has become very stratified, and addressing rights requires intervention at different levels. The integral elements of the housing market system are the property rights framework, the housing finance regime, the housing subsidies system, the residential

55 See *Report of the Working Group on Housing/Accommodation. Commission on the Status of People with Disabilities*, (1995), also *Forum of People with Disabilities. Advocacy - A Rights Issue*. 2001.

56 DoE&LG. *Homelessness – An Integrated Strategy*. (2000). *Homeless – Prevention Strategy*, (2002).

57 Drawn up under the *Housing (Traveller Accommodation) Act 1998*.

58 *Irish Times* 28th May 2002. p. 11.

59 *Ibid*.

60 But see recent cases by Director of Consumer Affairs, see Breslin, J. "What makes a term in a standard form contract unfair." *Bar Review*, Jan/Feb 2002 pp. 131-134.

infrastructure framework and the State regulatory regime.⁶¹ Within all these elements the question of rights must be addressed. To overlook these areas is to reduce the question of rights to housing to a small section of the housing system. For instance, the right to access to housing in the market is closely related to access to mortgage finance.

Remarkably, international monitoring systems have been putting in place a system of evaluating States implementation of the right to housing within this enabling policy framework. Indeed, sets of housing indicators have been developed at UN level, which acknowledge the existence of the market as the main provider of housing in most countries. This has not led to an absence of progressive realisation of the right to housing.

The UNCESCR monitoring system operates within the “*enabling approach*” of many States in relation to the right to adequate housing and has developed a series of detailed questions for States Parties to establish compliance under article 11(3) of the Covenant including:⁶²

...(c) Please provide information on the existence of any laws affecting the realization of the right to housing, including:

- (i) Legislation which gives substance to the right to housing in terms of defining the content of this right;
- (ii) Legislation such as housing acts, homeless person acts, municipal corporation acts, etc.;
- (iii) Legislation relevant to land use, land distribution, land allocation, land zoning, land ceilings, expropriations including provisions for compensation, land planning including procedures for community participation;
- (iv) Legislation concerning the rights of tenants to security of tenure, to protection from eviction, to housing finance and rent control (or subsidy), housing affordability, etc.;
- (v) Legislation concerning building codes, building regulations and standards and the provision of infrastructure;
- (vi) Legislation prohibiting any and all forms of discrimination in the housing sector, including against groups not traditionally protected;
- (vii) Legislation prohibiting any form of eviction;
- (viii) Any legislative appeal or reform of existing laws which detracts from the fulfilment of the right to housing;
- (ix) Legislation restricting speculation on housing or property, particularly when such speculation has a negative impact on the fulfilment of housing rights for all sectors of society;
- (x) Legislative measures conferring legal title to those living in the “illegal” sector;
- (xi) Legislation concerning environmental planning and health in housing and human settlements.

How do we progress it?

In relation to the relevance of the right to housing in Ireland we must accept that the fact that some 10,000 Travellers live on the side of our roads is a

61 See Angel, S. (2000) *Housing Policy Matters – a Global Analysis*. New York: Oxford University Press.

62 U.N. Doc. E/C.12/1991/1. *Revised guidelines regarding the form and contents of States reports to be submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*.

clear breach of their rights to housing. The rights to housing for the 800 people housed within hospitals and Victorian institutions in Ireland with intellectual disability have been widely ignored. Those who are denied shelter and those who are housed, but unable to develop their lives and that of their children in crime-free and supportive environments are also denied these rights. However, while the numbers denied basic social housing provision can be calculated through waiting lists and surveys, a more complex mechanism is required to assess whether the right to housing for all is being implemented in the market scenario. Here, it is important to examine the components of the market, i.e. to go behind the market and examine the equality of opportunity and equality of outcome of all sections of society. The formal equality of people as consumers needs to be unmasked for a real analysis of the implementation of rights to housing. Indeed, the UK Law Reform Commission⁶³ in its recent report on updating landlord and tenant law in the context of the development of rights has proposed that the whole area should be adapted to a consumer perspective. The benefits of existing consumer protection rights and the issue of unfair terms in the letting contract would become central to the protection offered in law.

In the area of the market the formal equality of access to credit may be promoted as a mark of equality, but perhaps not of equality of outcome, since income levels can reduce borrowing potential and access to home ownership. The formal equality of the market is belied by the inequalities experienced by many in Irish society, for instance, in relation to access to credit through family situation, occupation, employment opportunities, age or ethnic minority status. Questions relating to minority groups and individuals access to credit, land, social housing and legal redress against discrimination all transcend the formality of the market ideal, and establish the true level of rights to housing. Equally, access to land is restricted for some groups, and the impact of government subsidies and intervention on different groups in society can be unequal. For instance, the policies of providing social housing in halting sites to Travellers often serve to deny Travellers appropriate access to land and property.

There are many opportunities to advance rights to housing in Ireland. Of course, we must begin with an awareness of such rights and understand the extent of these rights and their interconnectedness with other socio-economic rights. Indeed, extracting the right to housing from other socio-economic rights may well be a regressive approach. We have seen how tenants in a local authority housing estate, where everyone had a house, were, nevertheless, calling out for the full range of rights to housing. Equally, confining the right to housing to a right to mere shelter could reduce provision to large-scale dormitories for the homeless. Indeed, confining the right to housing demands to shelter for street homeless people only, ignores the needs of Travellers, people with disabilities and others. It is vital therefore to take an inclusive approach. An inclusive approach will involve all those who are denied the right

63 The Law Commission. Consultation paper No. 162. *Renting Homes. Status and Security*. London The Stationery Office. (2002).

to housing in Ireland at all the levels of rights to housing, as established in international norms.

An Inclusive Approach.

Taking this inclusive approach, we must also encourage the participation of those who are most effected by the absence of these rights to housing to progress the changes required. Indeed, it is interesting to note that the disability groups have created the most awareness around the rights based approach, and their central involvement in advancing the right to housing would be extremely valuable. Taking this inclusive and participative approach will involve those who are denied access to adequate, affordable and suitable housing. It will involve those mothers who called for basic human rights on their council estate and those who are unable to access any property in the housing market or the social rented sector. It will involve those who are forced to live in unaffordable and insecure housing in the private rented sector, and those who act as their advocates. Growing numbers of older people are demanding adequate and supported housing as they grow older, but not in medicalised settings. And the demands for equality are creating new levels of awareness and demands for fairness in all areas of our housing system.

However, there is likely to be widespread opposition to the establishment of rights to housing from vested interests, and particularly from those who see it as a threat to the market. Within this inclusive approach, it must be recognised that a social movement to create the awareness for the establishment and maintenance of these rights is needed. While there is an obvious appeal in preparing a Housing Bill or a set of "newly discovered" indicators relating to the right to housing, it is important to avoid excessive reliance on legalistic methods. The realisation of rights to housing will involve more than a legalistic and litigation orientation. There is no silver bullet that will guarantee rights to housing. Indeed, it is questionable whether a purely legalistic approach to the development of rights for Irish citizens will serve any purpose after the recent decisions in relation to homeless children, an area where some Constitutional protection was already set out.⁶⁴ The concept of legal rights independent of social context, or arising from some metaphysical abstraction serves to obscure a real understanding of the social world.⁶⁵ We must recognise that human rights are constructed in real social and political situations. The power relations, which lie behind the enjoyment or absence of rights, at particular historic times and locations, explain the real situation. Uncovering and explaining these power relations is, in effect, the basis for the development of rights, such as the right to housing. Thus, there is need to align the development and monitoring of human rights with a social movement which uncovers and explains these power relations.⁶⁶

64 See Whyte, G. (2002) *Social Inclusion and the Legal System, Public Interest Law in Ireland*. Dublin: IPA.

65 Stammers, N. "Social Movements and the Social Construction of Human Rights", 21 HRQ 980-1008, (1999).

66 *Ibid*.

Drawing on recent studies of new social movements across Europe, it is proposed that successful social movements have had three strands.⁶⁷ These have been identified in the analyses of the development of movements such as the labour movement, the women's movement, the lesbian and gay movement, the environmental movement and others. There are valuable pointers in this for any inclusive social movement to advance the right to housing in Ireland. The three elements for a successful social movement for change are litigation, protest and political action. Legal and litigation strategies use the legal system to advance or create rights. Protest strategies to change policies or laws are familiar to us in Ireland, with the farming community demonstrating the effectiveness of such approaches. The political approach requires change be brought about through the political process and political action. This would be the accepted means of bringing about change within our liberal democratic system, but the rights of minority groups are not always acknowledged or protected by the party political system. It would appear from the research that litigation or legal change in relation to rights to housing, without the presence of a social movement which has a broad strategy, will not succeed. And vice versa.

In order to progress the right to housing in Ireland, we must build an inclusive movement and develop these three essential elements adopted by social movements across Europe and in Ireland for social change. Involved in this social movement must be all those denied access to adequate, secure, affordable and suitable housing. We have identified the housing needs of Travellers, homeless people, those with disabilities, tenants in poor housing, and those who are excluded from the market. The social movement will include those promoting equality in housing, those who provide housing and support to people in need, advocacy agencies, tenants associations, housing consumer groups, and those promoting human rights and social justice in Ireland. We have begun to raise awareness of the issue, and this conference marks an enormous step forward for the realisation of the right to housing as a socio-economic right in Ireland.

Indeed, we are already being assessed on our performance in this area, and I will end by relating to you the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights in May this year, on Ireland's performance in implementing the Covenant.⁶⁸

12. The Committee notes with regret that, despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts.

20. The Committee is concerned that: (a) many new households cannot secure adequate and affordable housing; and (b) some 1,200 families of the Traveller

67 See Hilson, C. "New social movements: the role of legal opportunity", *Journal of European Public Policy* 9:2, April 2002: 238-255.

68 UN Doc. E/C.12/1/Add.77. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*. 17/05/2002.

community are living in roadside encampments without access to water and adequate sanitary facilities, and are liable to be forcibly evicted.

21. The Committee is concerned that a large number of persons with mental disabilities, whose state of health would allow them to live in the community, is still accommodated in psychiatric hospitals together with persons suffering from psychiatric illnesses or problems, despite efforts by the State party to transfer them to more appropriate care settings.

23. Affirming that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation (paragraph 22 of the Committee's 1999 concluding observations) and strongly recommends that the State party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as the other domestic legislation. The Committee points out that, irrespective of the system through which international law is incorporated into the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order.

39. The Committee requests the State party to disseminate its concluding observations widely among all levels of society, and in particular among State officials and the judiciary, and to inform the Committee on all steps taken to implement them in its next periodic report.

Social And Economic Rights: A Rising Tide

Jerome Connolly

Introduction

From a moral and religious perspective a society which acknowledges no fundamental duty to ensure that everyone shares reasonably in the goods of that society is fundamentally flawed. In rectifying exclusion, and in preventing it from developing in the first place, the vindication of social and economic rights plays an essential role.

The benefits of the Celtic Tiger have been widely publicised. Not so widely acknowledged are its weaknesses and the growing inequalities it generates. While the so-called free market may be a good servant it is a bad master. A counterbalance is essential to the excesses and imbalances inseparable from an unfettered market approach to economic and social development. To make the market serve the common good, and in particular to ensure that the weak, the vulnerable and the excluded are protected and helped to flourish, social and economic rights need to be firmly established.

The Larger Framework

The appeal of rights lies for many in their intrinsic power to take precedence over prevailing political winds, over powerful interests in society, over money, social status, privilege, or the State itself. To proclaim a right is to make the gravest of claims. And claims that pretend to such power of moral and legal compulsion as rights do must be grounded on solid and tested foundations. A right which is not grounded in reason can sooner or later be disputed by reason. We can never take rights for granted. They must be responsibly justified, carefully invoked and balanced with each other and with their commensurate responsibilities if they are not to become ultimately incoherent, extravagant and superficial.

The past few years in Ireland have seen a surge of human rights developments in many fields. Not only have more and more rights been established in law, but much expanded administrative structures have been put in place and the use of rights language is much more commonplace.

These developments have come about not as the result of some master plan but for a series of often unrelated reasons. In the light of this it is useful, if not indeed desirable, to stand back and attempt to see things in a larger framework. [If not, the lack of reference points may cause confusion, duplication of effort, waste of effort, and disorientation. More damaging still, the risk of devaluing rights language may lead to a reaction by those who feel that rights are invoked too freely, in a conflicting way, and unsustainably].

One of the main historical divides between those on the right and left in politics, whether nationally or internationally, has been between their approach to economic and social rights. This fissure pre-dates the Cold War, and even the rise of Marxism in the 19th century. However it became largely

institutionalised in the Cold War context. Like many other struggles in history, while the struggle itself may have ended, some of its effects persist

The Universal Declaration of Human Rights in 1948 enumerated both civil and political and economic, social and cultural rights in a single list. Regrettably, approaches to the development and implementation of the Declaration rights became polarised almost at once, another victim of the Cold War.

The first regional human rights instrument to be drawn up in the wake of the Declaration was the European Convention on Human Rights. While the Convention marked a huge step forward by making formerly sovereign states subject to an international human rights regime, including an international court of human rights, the Western European drafting nations balked at including economic and social rights in the Convention. Such rights, it was held, were not appropriate for adjudication by a court. Rather they should be implemented only by political and administrative measures, and by democratically accountable authorities. Only civil and political rights were to be justiciable. These were the so-called "negative" rights. To ensure their implementation, the State, it was held, was generally required only to refrain from doing something. In contrast, economic and social rights required positive resource allocation by the State. Allocation decisions, so the argument went, could and should not be made amenable to decision by the courts. It was therefore appropriate that they be promoted and redressed by non-judicial means.

It took another ten years for the same states to draft a companion instrument for social and economic rights. This was the European Social Charter, opened for signature in 1961. The Charter formalised the difference in status accorded to the two categories of rights – those which were justiciable, i.e. adjudicable by an (international) court of law, and those which were not. The main requirement on states, which became party to the Social Charter, was to subject themselves to periodic international scrutiny of their performance in relation to the Charter rights.

This system of rights apartheid was followed also within the United Nations. After eighteen years' debate and discussion, the Universal Declaration was translated into treaty form in 1966 in the shape of two rather than one international instruments. These were the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (CESCR). The United Nations not only replicated the Council of Europe's distinction between the two categories of rights, but its member states proved unable to agree to make even civil and political rights internationally justiciable. To this day, Europe remains the only region of the world with an effective international system of human rights adjudication in which individual states are made subject to an international court, although social and political rights still remain outside its scope.

The ending of the Cold War at the beginning of the 1990s has removed much (although by no means all) of the gladiatorial aspect of human rights debates within the UN. It is somewhat easier to debate specific human rights on their

merits (or demerits). In a way not really possible during the nearly four decades of the Cold War, human rights questions are likelier to find their own level, rather than be promoted or disputed for extraneous ideological reasons. This does not mean that ideology or values systems no longer enter into the debate – far from it. But it does mean that they are less likely to exploit human rights solely as weapons in a global confrontation.

Today we see the resumption of developments and discussions which, had the Cold War not frozen them, would probably have taken place continuously since the Universal Declaration.

Among the most important events to fuel the advancement of economic and social rights since the early nineties was the World Conference on Human Rights, held in Vienna in 1993. The Vienna Concluding Document declared that all human rights were indivisible and interrelated.

Another factor has been the growing acceptance within the UN human rights system that social and economic rights have a three-fold structure, important elements of which are *prima facie* justiciable.

Within the Council of Europe the member states, which now number over 40 (a fifth of all the states in the world), agreed to update the 1961 European Social Charter, resulting in the opening of the Revised Social Charter for ratification in 1996. While the RSC continues to operate through the system of examination of state reports and cannot adjudicate cases, the expansion of the scope of economic and social rights, which it represents, clearly strengthens the promotion and defence of ESC rights within Europe.

There have too been moves, albeit tentative, to erode the distinction between the two categories of rights. The Convention that prepared the European Union's Charter of Fundamental Rights produced a text, which for the first time since the Universal Declaration listed some economic and social rights in the same document as civil and political rights. The significance of this development is enhanced by the likelihood that the Charter will be incorporated in the EU Constitution due to be negotiated in 2004.

In 2000 the Committee of Ministers of the Council of Europe adopted a Resolution calling on member states of the CoE to establish a legal right to a basic minimum of subsistence, including shelter. The explanatory memorandum to the resolution was careful to state the limitations to such a right. What was proposed was indeed a right to a minimum only, not an unlimited or open-ended right. Nonetheless the resolution is noteworthy in situating the right to a basic minimum within the context of the European Convention on Human Rights, not the European Social Charter, thus obliterating more of the distinction between the two categories of rights. As well the accompanying explanatory memorandum makes it clear that the possibility of a more developed statement of rights such as shelter, nutrition or health in a justiciable form in the future is not closed off.

Throughout the 1990s the UN system of examining the reports of states parties to the various UN human rights treaties slowly but surely gathered momentum. While the system is intrinsically limited, notably by the lack of any effective enforcement mechanism, it is gradually establishing itself as a source of intangible but by no means negligible moral authority and influence on the human rights performance and standards of states around the world. One of the most important factors contributing to its greater influence has been growing awareness on the part of national and international NGOs of its existence and possibilities. Increasingly they appreciate the potential inherent in bringing publicity and public opinion to bear on the reports submitted by States parties.

It is often argued that the content of ESC rights is nebulous and undeveloped in comparison to that of civil and political rights. If so, this deficiency is being increasingly addressed. One example is the work of the UN Committee on Economic, Social and Cultural Rights, which has published detailed Comments on specific ESC rights including education, food and nutrition, housing and health. These reflect the growing experience gained by the Committee during its examinations of numerous state reports, amplified by the work of relevant UN committees, sub-committees and other parts of the UN human rights system.

Nationally

The picture is more varied within Ireland. In a negative direction, the *Report* of the Review Group on the Constitution (1996) brusquely and briefly rejected the proposition that anti-poverty rights be included in the Constitution. In 1999, however, the "Concluding Observations" of the UN Committee on Economic, Social and Cultural Rights, issued following its examination of the First Irish Periodic Report under the Covenant on Economic, Social and Cultural Rights, recommended that ESC rights be included in the Irish Constitution. Later in the same year the Labour Party introduced a private members' bill proposing the insertion of several core socio-economic rights including shelter and healthcare into the Constitution. Fine Gael, the largest opposition party, supported the motion to give the bill a second reading. As expected, the Coalition government of the time opposed it and the bill failed. Most of those speaking on the Government side relied on essentially the same arguments used by the *Report* of the Review Group in 1996.

The Second Periodic Report of Ireland contained the official Irish response to the recommendations of the UN Committee's "Concluding Observations" on the First Irish Report. The Second Report repeated, with variations, largely the same objections to making economic and social rights justiciable as those first put forward in the *Report* of the Review Group and by the Government speakers during the Dail debates on the Labour private members' bill. When, earlier this year (2002) the Second Periodic Report was examined in Geneva by the UN Committee, the Irish delegation once again fell back on the same arguments as the Review Group. The Committee, however, was neither convinced nor diverted. Affirming that "all economic, social and cultural rights are justiciable" it reiterates its earlier recommendation, and "strongly recommends" that the State party [i.e. Ireland] incorporate social, economic

and cultural rights in its Constitution as well as in other domestic legislation (par. 23).

During the examination the Irish delegation had argued that the dualist (common law) legal system in Ireland posed a major obstacle to the constitutional recognition of ESC rights. The Committee bluntly rejected this. It took pains in its "Concluding Observations" to point out that when a state voluntarily ratifies an international human rights instrument, it thereby assumes the legal obligation to give the relevant international law full effect in the domestic legal order. The precise nature of a State party's legal system is therefore, according to the Committee, irrelevant.

The question of according constitutional status to economic and social rights may also arise as part of the Republic's obligations under the Good Friday Agreement. Under the Agreement a Bill of Rights for Northern Ireland has to be drawn up. Taken together with another provision of the Agreement, under which the Republic must provide an equivalent level of protection of human rights as that prevailing in Northern Ireland, this faces the Republic with the possibility of having to accept greater protection for social and economic rights, if such rights are included in a Northern Bill of Rights, although a great deal of official resistance to doing so could be anticipated.

The Good Friday context aside, the All-Party Committee on the Constitution must sooner or later come to consider the rights section of the *Report* of the Review Group on the Constitution. It is difficult to see how at that point the Committee will be able to avoid discussion of economic and social rights. In the light of the recent recommendation from the UN Committee and its dismissal of the dualist argument, it will hardly suffice for the Committee simply to regurgitate the brief arguments of the Review Group. To do so would put the Committee, and the State as a whole, in direct opposition to the UN Committee on Economic, Social and Cultural Rights. While a confrontation may be postponed, it cannot be indefinitely sidetracked if the UN recommendation is sidelined.

Rights-based approaches to social policy

There is of course much more to rights than the question of justiciability. It is difficult to think of any right that can be effectively protected and promoted by legislation alone. In practice rights generally need underpinning by a substantial implementing apparatus of policy elaboration, administrative provision, finance, and other types of support. This, in brief, is why effective access to rights is increasingly seen as requiring explicit complementary approaches. Vindicating rights requires not only that they be clearly stated and made justiciable in law, but that a wider rights-based approach which gives flesh to the concept at all relevant levels of society and of the State is implemented in support. This is the so-called "rights-based" approach to social and other policies.

In 1999 the UN Committee on Economic, Social and Cultural Rights recommended in its "Concluding Observations" on the First Irish Periodic Report that a rights-based approach be developed in the context of the

National Anti-Poverty Strategy. In its second set of "Concluding Observations" issued last month in Geneva, it not only reiterated this recommendation but also further recommended that such an approach be included in the Disability Bill and that the National Health Strategy be "revisited" with a view to including a rights-based approach in it. It is to be expected that by the time of the examination of the Third Irish Periodic Report under the Covenant in 2007, the UN Committee will expect a much more developed rights-based approach from Ireland.

The Case For and Against ESC Rights

But what is a rights-based approach? Daniel Defoe, the author of *Robinson Crusoe*, once observed sarcastically during a time of anti-Catholic agitation in England: "there are a hundred thousand stout fellows ready to riot against Popery, without knowing whether Popery is a man or a horse". There is much work to be done in developing the concept of a rights-based approach to particular areas such as housing or health in the specific circumstances of this country. Every right has to be rooted in a particular community and a particular national reality, and this requires research, patience, dialogue and commitment.

Not everyone who has reservations about promoting ESC rights is a benighted backwoodsman (or woman). There are substantial concerns which have to be openly and honestly acknowledged and met, but I am convinced that this task is feasible and that the tide of argument, precedent, and analysis in favour of ESC rights will continue to rise until the argument is decisively won.

The task now facing the proponents of economic and social rights is to engage constructively with those who need to be convinced and won over. They are the elected politicians who have the responsibility for the public purse, the civil servants who have the day to day responsibility for administering legislation and carrying out policy, (and are often indeed the ultimate source of new policies), the lawyers and academics who believe that to give greater status to such rights is at least a bridge too far, and the general public.

The Case Against

There is not space in the time allotted to me to do more than note the main arguments so far voiced within Ireland against ESC rights. They appear to be concerned in large part with fears over the resources that might be required to vindicate such rights.

Such fears derive from several propositions. Firstly, to guarantee and develop ESC rights effectively requires substantial resources. Secondly, the resource demands to satisfy ESC rights are open-ended, therefore potentially unlimited. Thirdly, the resources available to State authorities are clearly limited. Fourthly, there are always competing demands on these resources. Regardless of one's views on ESC rights, it is a perfectly reasonable question to ask how such competing demands are to be adjudicated and balanced

against each other, and how or according to what criteria should limits be put on the allocation of resources to satisfy particular needs.

It continues therefore to be argued that, in the face of inescapable resource constraints, the task of levying the necessary resources, rationing them and allocating them as between competing uses, cannot and should not be entrusted to the courts. The only appropriate body competent to do so is the one which has been democratically mandated by the body of citizens, namely the elected parliament and the duly appointed government, which ultimately remain democratically accountable to the people.

The opponents of justiciability and of a rights-based approach to social policy maintain that to make social and economic rights justiciable would be a dangerous and unjustifiable step. The danger would be great that the courts, which are neither elected nor accountable, could hand down adjudications compelling the State and government to allocate an unsustainable level of resources.

This would also be inappropriate for another reason. The court hears and comes to a judgement only on the facts and arguments relevant to a specific case. It does not and cannot come to a judgment about resources in the light of all the possible needs, which an elected government has to satisfy after taking a considered view of all relevant factors. In making their expenditure and taxation decisions governments must take into account a great variety of issues. In addition to the recurring expenditure commitments which carry over from year to year, governments have to take into account such issues as the national and international security situation, development aid obligations to poorer countries, unexpected emergencies such as coping with an outbreak of foot and mouth disease, setting aside monies to provide pensions for an aging population, and obligations arising from our membership of international entities such as the European Union and the United Nations, to take some actual examples.

The Case For

What arguments and persuasive considerations might be urged in favour of giving greater status to socio-economic rights? Again, time and space allow me to do no more than note some of them in passing.

At the level of argument and principle, the following can be appealed to:

- the **weakness of the traditional distinction between so-called negative rights (i.e. civil and political) and so-called positive rights**, a distinction made on the assumption that one set of rights requires no resources to vindicate them, only that the State should abstain from violating them; and that the other set cannot be implemented without substantial allocation of resources
- the implications of the increasingly accepted concept of the **three-fold structure of ESC rights**, according to which the State has the duty a) to respect; b) to protect; and c) to facilitate and promote the right in

question. A) and B) are *prima facie* capable of being vindicated without any substantial additional resource provision.

- Fears of opening the door to unlimited and impracticable resource adjudications can be met by the insertion of **qualifying language**, such as is already to be found in the rights language of the Irish Constitution.
- a crucial element of guaranteeing substantive rights such as to health is the **concomitant guarantee of procedural and cross-cutting rights**. These include rights to due process, redress and non-discrimination, which are also intrinsically amenable to adjudication by the courts. In some cases guarantees of effective cross-cutting rights may be more important than providing extra resources. A recent example is to be found in the provisions of the Council of Europe's *Additional Protocol to the Biomedicine Convention Concerning Transplantation of Organs and Tissues of Human Origin*. Among the general principles of this Protocol are those of *equitable access* to transplantation services for patients, *transparent rules* for organ allocation, and *health and safety standards*. Specific provisions include *confidentiality*, *sanctions*, and *compensation* and the *prohibition of financial gain*. It is not difficult to see how equitable access or transparency of allocation rules would be crucial in a right to housing.
- The concept of a **minimum core provision** of a right, for example to emergency medical care, basic food and nourishment, or essential shelter, is surely adjudicable by the courts. Even the Review Group on the Constitution admitted that the existing right to life in the Irish Constitution could be held to include basic rights to shelter and nourishment.
- without explicit legislative guidance, the courts will of course be left to their own devices, whereas if the legislature enacts appropriate legislation to expand the content of a constitutionally enumerated right, this will furnish the courts with appropriate guidance and direction, which might be otherwise lacking. **The argument that ESC rights should not be made justiciable is to a considerable extent self-fulfilling;**
- The development of a rights-based approach in various areas of social policy such as housing will over time establish a **framework of norms, standards and criteria of good practice which the courts could refer to** for guidance as to what constituted a reasonable discharge of the State's obligations in regard to a specific right.
- **Neither Ireland nor other states can indefinitely flout the requirements of adhering to international human rights instruments without bringing the whole international system of human rights protection into disrepute.** A world in which the international human rights regime is not respected is a more dangerous one for a small, vulnerable nation like ours. Conversely, the more we

enhance respect for the values of the international human rights system, and promote its effectiveness, the more secure becomes the international environment in which we operate. We have only to consider the likely consequences of a nuclear exchange between India and Pakistan to appreciate how vulnerable we would be to the impact of such hostilities on international trade, communications and in turn on our employment and living standards.

Promoting ESC Rights

There are numerous signs that interest in a rights-based approach in Irish social policy is growing. The time is now ripe, I would suggest, to take another step by developing a shared inter-sectoral strategy for the promotion and realisation of socio-economic rights in Ireland.

The logic of an inter-sectoral strategy rests on the fact that the arguments for or against the further development of particular ESC rights are largely common to them all, and an advance in promoting any one of them should benefit the others as well. It reflects the reality that there is usually a close relationship between the various core rights in practice.

The objective of the sort of inter-sectoral strategy that I am proposing should be to establish a broad-based Irish ESC rights coalition with three aims:

- To campaign for core socio-economic rights to be inserted into the Irish Constitution, and if necessary amplified in supporting legislation
- To work for the integration and development of a rights-based approach in relevant social policy areas such as housing, education, health, disability, anti-poverty, children, the elderly
- To establish information, education and training programmes in ESC rights for interested NGOs.

In addition to interested NGOs other groups (trade unions, churches, lawyers, academics) could be invited to participate, with the objective of building up as influential and vocal a lobby as possible.

Many of the elements of such a coalition already exist; it is a question of bringing them together in a forum which would allow the various existing groups and interests to pool their strengths and work together to achieve the common goal of realising social and economic rights more effectively. The vision is there, the need is there, the possibilities are there; I am confident that the necessary courage, commitment and dedication to realise the vision will not be lacking.

Threshold Contact Information

Head Office

21 Stoneybatter, Dublin 7
Tel: [01] 678 6098
Fax: [01] 677 2407
Email: info@threshold.ie

Dublin Advice Office

21 Stoneybatter, Dublin 7
Tel: [01] 678 6096
Fax: [01] 677 2407
Email: advice@threshold.ie

Cork Advice Office

8 Father Mathew Quay, Cork
Tel: [021] 427 1250
Fax: [021] 427 0261
Email: threshold@eircom.net

Galway Advice Office

Augustine House, St Augustine Street, Galway
Tel: [091] 563 080
Fax: [091] 563 687
Email: thresholdgalway@eircom.net
Website: www.threshold.ie