

A Constitutional Right to Housing: A Tale of Political Sidestepping

Jerome Connolly

Introduction

There is in the Sherlock Holmes canon a particular and often-quoted phrase which comes to mind when scrutinising the housing policies of successive Irish governments over the last two decades. The phrase refers to an incident concerning a dog guarding stables from which a racehorse had been stolen during the night. The curious aspect of this, Holmes remarked, was not that the dog barked but that it did *not* bark.

The repeated failure of Irish governments to actively address the question of a constitutional right to housing in this country is surely an instance of a dog that did not bark – but should have, loudly and insistently, in the face of the serious and multi-faceted housing crisis which this country has faced over many years and will continue to face for the foreseeable future.

It is not as if the question of inserting a right to housing into the Irish Constitution has been completely ignored in official reports or neglected in the work of academics and of a broad range of NGOs, including church groups; it has not.

Committees, Committees

Constitution Review Group (1996)

In its Report, published in 1996, the Constitution Review Group considered the proposition that socio-economic rights should be constitutionally recognised and justiciable – that is, enforceable through the courts. The Review Group rejected this proposition after re-stating, in summary form, a number of standard objections to such rights.¹ Even at the time, these arguments of the Review Group were challenged in detail,² in what a member of the Group described subsequently as a ‘powerful’ critique.³

All-Party Oireachtas Committee on the Constitution (2004)

In light of the position taken by the Constitution Review Group, it is of significance that, eight years later, the All-Party Oireachtas Committee on the Constitution, in its report on private property rights in the Constitution, acknowledged that the question of according constitutional recognition to socio-

economic rights merited ‘extensive debate’.⁴ The Committee had been asked by the Taoiseach at the time, Bertie Ahern, to look at the issue of private property rights in the Constitution ‘and specifically the necessity for up-dating those provisions which pertain to planning controls and infrastructural development’.⁵

In its Report, the Committee, noting that it had received a number of submissions urging the recognition of socio-economic rights such as a right to housing and shelter in the Constitution, stated that it had come to the conclusion that this question ‘should be discussed in the round through an examination of all the socio-economic rights that have been proposed rather than the single one of shelter’.⁶ It therefore decided to ‘defer consideration of this to a later report’.⁷

No such report has ever appeared.

Convention on the Constitution (2014)

Within a few years of the publication of the Report of the All-Party Oireachtas Committee, this State entered the gravest recession of its history, affecting not least the housing situation of a large proportion of the population. It is therefore of considerable import that, in 2014, the Convention on the Constitution, which had been tasked by the then Coalition Government to consider eight issues for possible Constitutional amendment, chose, after addressing these, to consider on its own initiative the additional question of whether the Constitution should recognise social and economic rights, including housing.

After hearing submissions from people on both sides of the question the Convention members decided by a large majority that such rights did merit explicit recognition in the Constitution.⁸

Programme for Government (2016)

The Programme for a Partnership Government, agreed in May 2016, noted the Constitutional Convention’s recommendation regarding social and economic rights but signally declined to make a commitment to take action in response to this, other than to say the matter would be referred to yet

another committee. The Programme stated:

*Due to the substantial questions raised on the balance of rights, proper governance and resources, we will refer this report to the new Oireachtas Committee on Housing for consideration.*⁹

It is not at all obvious why the parties to the Programme, having at least agreed that the Constitutional Committee's recommendation ought to be given further consideration, should then have referred it to a committee concerned with just one of the socio-economic rights in question – *albeit* a critically important one.

If there was real intent on the part of the Government to proceed towards including social and economic rights in the Constitution then surely the Programme should have committed to establishing a new Oireachtas Committee on the Constitution charged with the task of examining the issue in depth and with a membership that would appropriately reflect this mandate.

It is hard to avoid the conclusion that there was little serious consideration of the issues involved before this commitment was written into the Programme for Government.

Special Committee on Housing and Homelessness (2016)

The narrative becomes somewhat more complicated at this point, when account is taken of yet another committee created around this time. In April 2016 – that is, before the Programme for Government was concluded – a Dáil 'Special Committee on Housing and Homelessness' was established and requested to present its final report by 17 June 2016.

The Special Committee's work was informed by both written and oral submissions, and several of these raised and discussed the issue of the right to housing.

In its Report, the Committee outlined in some detail the key points which had been made to it in the arguments presented for and against constitutional recognition of this right. Despite this, however, the Committee itself declined to take any position on the question, and instead referred to the commitment included in the Programme for Government that the matter would be taken up by the Oireachtas Committee on Housing.

And so the Committee's first recommendation in

this area was simply that:

*... the Oireachtas Committee on Housing, Planning and Local Government ... should bring the deliberations in this regard to a conclusion as quickly as possible by bringing a recommendation on the matter to the Government.*¹⁰

At one level, the Special Committee's position is understandable: it may have felt inhibited from taking a stance in light of the Programme for Government commitment that the matter would be referred to the Oireachtas Committee on Housing. But, at another level, it is disappointing that given the time and attention the Special Committee had devoted to the subject, and given the evidence it had received in written submissions and over several weeks of oral hearings concerning the alarming extent and impact of the housing crisis, it was not prepared to take any stance on the issue of the constitutional recognition of housing rights.

Rebuilding Ireland: Action Plan for Housing and Homelessness (2016)

The Government's *Action Plan for Housing and Homelessness*, published in July 2016,¹¹ represents an even more striking failure to confront the issue of the right to housing. The Plan, which is intended to set the agenda for housing up to 2021, managed the difficult feat of not mentioning the right to housing at all, even in a glancing way.

Treaties, Treaties

The unwillingness on the part of successive governments to take decisive action towards establishing a constitutional right to housing has been all too evident also in the State's response to obligations arising from Ireland's ratification of international human rights treaties, in particular, the International Covenant on Economic, Social and Cultural Rights and the Revised Social Charter of the Council of Europe.

Covenant on Economic, Social and Cultural Rights

On three occasions since the late 1990s Ireland has submitted reports to the UN Committee on Economic, Social and Cultural Rights, the body responsible for monitoring implementation of the Covenant on Economic, Social and Cultural Rights, which Ireland ratified in December 1989.

In its observations and recommendations following examination of Ireland's record (in May 1999, May 2002 and June 2015), the UN Committee has

pointed out that all Covenant rights are, or ought to be, justiciable in the national legal order. On two occasions, it has strongly recommended that Ireland should incorporate social rights, such as housing, into the Irish Constitution. Thus, its *Concluding Observations* following the examination of Ireland's second report, in 2002, stated :

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 it went on to say:

*Affirming that all economic, social and cultural rights are justiciable, the Committee ... strongly recommends that the State party incorporate economic, social and cultural rights in ... the Constitution, as well as in other domestic legislation.*¹²

The Government's response to this recommendation is outlined in Ireland's Third Report to the Committee, submitted in November 2013 and examined in June 2015; this states:

*The Government ensures that the State's obligations to implement the Covenant in Ireland are met through policies aimed at improving the enjoyment of economic, social and cultural rights, including by fighting persistent poverty and social exclusion.*¹³

The Third Report then notes that in Ireland some rights are protected in the Constitution (for example, the rights of the family) and others are protected 'by means of legislation, or via exercise of Executive power'. It goes on to state, without any supporting justification, that:

*The Government considers that this differentiated approach affords the best means of implementing Ireland's obligations under the Covenant.*¹⁴

In essence, the State's response to the UN Committee's position regarding domestic legal recognition of economic and social rights has been invariable, persistent and fails to engage with the thrust of the Committee's argument. Its approach has been merely to repeat the kind of arguments made in 1996 by the Constitution Review Group.

Stonewalling

The core of the official position can be simply stated: the fact that Ireland has a dualist system

of law justifies the State's persistent failure to respect the basic principle of international law that a State Party should modify its domestic system of law as appropriate to give domestic effect to the obligations it has undertaken in ratifying international treaties.¹⁵



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Further, it is claimed that, because of the fundamental Irish constitutional principle of the separation of powers, not all rights are suitable for framing in a legislative fashion. For example, during the 2002 examination of Ireland's implementation of the Covenant on Economic, Social and Cultural Rights it was argued that rights such as housing 'did not lend themselves to being framed with the necessary legislative precision'.¹⁶ If they were not framed with such precision the judiciary would necessarily have to interpret them, which in the State's opinion would transfer power to an unelected and unaccountable judiciary. There is no legal right to housing in Ireland, it was claimed, because 'decisions in relation to the allocation of financial resources are a matter for Government, rather than the courts'.¹⁷

By persisting in this dogged stonewalling, the State shows itself culpably ignorant of the radically changed legal and analytical landscape in regard to rights adjudication since well before 1996, when the Constitution Review Group issued its Report. For example, a year before that Report appeared, the Swiss Federal Tribunal had recognised a right to the basic minimum conditions of life, encompassing the guarantee of all basic human needs, including housing (a right subsequently confirmed by incorporation in the revised Swiss Federal Constitution of 1999). And in 1996, in the

same year the Review Group reported, the new Constitution of the Republic of South Africa, drawn up after extensive public consultation, incorporated a justiciable right to access housing.

European Social Charter

In 1996, the Council of Europe adopted the Revised European Social Charter, as part of the process of incrementally replacing its original Social Charter of 1961. The Revised Charter entered into force in 1999 and was ratified by Ireland in 2000. However, in doing so, Ireland opted out of complying with Article 31, which deals with the right to access housing.¹⁸

Responsibility for monitoring the compliance of a State Party with obligations under the Social Charter lies with the European Committee on Social Rights. At a meeting in October 2005 between the Committee and Irish officials from several government departments to review the ‘non-accepted’ provisions of the Charter, Ireland’s position regarding Article 31 was summarised by the Committee as follows:

*Although Ireland has adopted wide-ranging housing programmes there is a reluctance to accept Article 31, as there is a perception that Article 31 would require the provision of an individual right to housing enforceable by the courts. It has difficulties with the right to housing per se.*¹⁹ (emphasis added).

It is important to note that despite opting out of Article 31, Ireland’s housing performance can still be scrutinised by the European Committee on Social Rights under no fewer than four other articles, including Article 16 (family protection) and Article 23 (right of the elderly to social protection), so that many aspects of the State’s housing policies and performance are still subject to formal scrutiny by the Committee.

This scrutiny is effected in the first instance through examination by the Committee of the reports which, as a State Party, Ireland is required to submit every two years. Secondly, Ireland is subject to scrutiny under the collective complaints procedure that is provided for in an additional Protocol to the Social Charter; Ireland voluntarily acceded to this Protocol in November 2000.

Under the Protocol, complaints can be made against a State Party to the Charter concerning alleged failure to respect any of the rights which that state

signed up to when ratifying. If deemed admissible, complaints are examined by the Committee on Social Rights which acts as a quasi-judicial body. The Committee’s interpretative methods and techniques are similar to those of the European Court of Human Rights, and the substantial body of case law and interpretation which it has built up has been referenced by the European Court on numerous occasions, a significant testimony to its status.

That the Committee already enjoys such an extensive range of scrutiny over Irish housing policy considerably weakens the State’s justification for continuing its opt-out of Article 31 of the Social Charter.

Housing and the Protection of Human Dignity

While there is not space in this article to elaborate on the specific legal and political arguments in favour of a justiciable constitutional right to housing, it may be worthwhile to set out some broad reasons why this right should be recognised.

All social rights such as housing situate the individual in a family and communal context, balancing economic freedom with values of community and social justice. Housing, furthermore, not only protects a fundamental human interest in itself, but is instrumental to the enjoyment of a range of other human rights, including health, education, employment, family life, privacy, and the rights to civic and political participation. Thus housing denial or deprivation impairs a much wider swathe of human wellbeing than might appear at first sight. Constitutional vindication of a right to adequate housing is therefore an essential complement to juridical protection of other rights such as the right to private property.

The insertion of a right to housing in the Constitution would signal clearly that assuring adequate housing for every person in the State is a central national moral and political objective, the attainment of which is essential if the basic dignity of every individual is to be respected.

A justiciable constitutional right to housing would ensure at least a minimum level of provision for which the legislature, executive and local authorities could be held accountable, similar to the existing constitutional provision which lays down that at least a minimum level of primary education

is to be provided. However, minimal provision is only the first part of fulfilling the obligations arising under the right to housing; the second part is the concomitant requirement of ‘progressive realisation’, as set out in various UN conventions on human rights, notably the Covenant on Economic, Social and Cultural Rights. Enshrining a duty of progressive realisation in the Constitution would oblige both legislators and the courts to understand the vindication of the right to housing ‘as an on-going task’.²⁰

A constitutional right to housing would be an important element in bringing about a situation where the State, regardless of which government is in power, could be held to account publicly in the courts for culpable failure to ensure that everyone in the State is housed in at least minimally decent conditions. It would oblige the legislature and executive to define statistically and/or in qualitative terms the extent and nature of housing needs to be addressed, to establish targets and timetables for housing provision, and to outline comprehensive and effective policies, with commensurate financial resources, to address existing deficiencies in housing and shelter within a reasonable time frame. This is what progressive implementation of a constitutional obligation means.

Constitutional recognition of the right to housing would enhance democratic stability and social cohesion in the State by promoting social justice and a sense of social solidarity within the community. It would make for better governance and administration in housing delivery, at both national and local government levels, by strengthening procedural safeguards, enforcement machinery, monitoring and accountability. It would give greater protection to families and individuals against undue market or institutional pressures (whether domestic or international) to privatise what is an essential social service.

Inserting a justiciable right to housing in the Constitution would *not*, as claimed by the Constitution Review Group, ‘leave the Oireachtas with no option but to discharge the cost, whatever it might be, as determined by the judiciary’.²¹ If that were the case, existing constitutional rights such as the right to access justice or the right to primary education, both of which are heavily resource intensive, should not merit constitutional protection. These rights do enjoy such protection and have not bankrupted the country.

Social rights can be, and already have been, successfully and prudently adjudicated by courts in various jurisdictions. Courts are fully cognisant of the budgetary constraints on governments, and of the effective limits to their juridical reach under the separation of powers. They also do not need to be told that unrealistic adjudications of, for example, a right to housing would erode their own credibility and political status.²²

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Conclusion

It will be apparent from the above brief review that the stance of successive governments of varying hues, and of government officials, is, by and large, firstly to avoid the issue of giving constitutional recognition to social and economic rights, in particular housing, and secondly, where it cannot be avoided, to simply repeat doggedly the same points, in almost the same language, outlined in the Report of the Constitution Review Group in 1996.

Truly, it would appear to be the case that, as the Council of Europe report put it, with no little restraint, ‘[Ireland] has difficulties with the right to housing per se’.

This has meant that over the past two decades opportunities have been repeatedly passed over to bring the question of a constitutional right to housing to the forefront of national consciousness and debate and to put in place a process towards establishing such a right.

A lack of commitment in this regard is again evident in the approach of the current administration.

As noted earlier, the May 2016 Programme for Government appeared to give a mandate to the Oireachtas Committee on Housing to consider the question of inserting economic and social rights in the Constitution. More than a year later,