AN ANALYSIS OF THE RIGHT TO SHELTER IN IRISH LAW FOR CHILDREN AND ADULTS

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"Though a dwelling house is property and often indeed the most valuable piece of property an individual citizen possesses, it would be quite wrong to equate it with other forms of property such as money or money's worth [...] The free and secure occupation of it is a value very deeply embedded in human kind and this free and secure occupation of a dwelling house, apart from being a physical necessity, is a necessity for the human dignity and development of the individual and the family": per Hardiman J. in *The People (DPP) v Barnes*.[1]

INTRODUCTION

The words of Hardiman J. elegantly express the profound relationship between the secure occupation of a dwelling and basic human needs, both physical and mental. In this piece, we shall consider the extent to which a right to shelter currently exists in Irish law. It has been extensively noted that there is no explicit constitutional or statutory right to shelter or housing in Irish law, save for the State's duty to children under the Child Care Act 1991 (the "1991 Act") and Art.42.5—now Art.42A—of the Constitution. However, in this article we explore whether a right to shelter may be feasibly secured or implied through the protection offered by other constitutional provisions or through the jurisprudence of the European Convention on Human Rights ("ECHR"). In Part I we shall consider whether a right to shelter can be secured through the Constitution of Ireland, by examining a number of rights, namely the right to bodily integrity, the constitutional right of the person to protection, the constitutional property right a tenant may have in a lease, and the State's constitutional duty toward children. Our analysis suggests that there are a number of ways in which the Constitution could afford extensive protection to such a right. In Part II, we examine whether a right to shelter may be grounded in the jurisprudence of the European Convention on Human Rights through the obligations placed on state organs through the European Convention on Human Rights Act 2003 (the "ECHR Act 2003"). The recent work of the Constitutional Convention, and the majority vote of confidence by its members for the recognition of an explicit enumeration of socio-economic rights in the Constitution, once again raise controversial and contentious issues concerning

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1. [2006] IECCA 165; [2007] 3 I.R. 130 at 148–149.

the proper role of the courts in the democratic order and their legitimacy and capacity to grapple with such questions. We hope to demonstrate that although those in favour of vindicating a right to shelter through the Constitution will invariably continue to pursue an explicit enumeration of that right through amendment, the current jurisprudence in the area suggests that there may be other, albeit more subdued, means of vindicating a right to shelter.

I. THE RIGHT TO SHELTER UNDER THE IRISH CONSTITUTION

A. The constitutional right to bodily integrity

The right to bodily integrity was established, not without controversy, in the landmark decision in *Ryan v Attorney General*.[2] As Hogan and Whyte note, "this was the first time that anyone had claimed a specific right as latent in the general expression 'personal rights' and not deduced from any of the rights actually enumerated in the section—life, property etc".[3] Kenny J. held that one of these unenumerated rights included the right to bodily integrity, which he held meant that

> "no mutilation of the body or any of its members may be carried out under the authority of the law except for the good of the whole body and that no process which is or may ... be dangerous or harmful to the life or health of the citizen may be imposed ... by the Oireachtas".[4]

In *O'Brien v Wicklow UDC*,[5] the High Court appeared to suggest that a State failure to provide adequate accommodation or shelter may, in appropriate circumstances, amount to an infringement of the constitutional right to bodily integrity. *O'Brien* concerned a claim by a Traveller family that the State, acting through the local authority, had a duty to provide serviced halting sites for them. The evidence before the court was that the family were living in appalling conditions which were unfit for habitation. Costello J. held, in a volte face from his earlier position in *O'Reilly v Limerick Corporation*,[6] that "the plaintiffs have a constitutional right to bodily integrity which is being infringed by the conditions under which they are living".[7]

The jurisprudence of the Keane C.J. Supreme Court placed significant constraints on the operation of the unenumerated rights doctrine, particularly with regard to any attempt to imply recognition and protection for socio-economic rights under Art.40.3. In *TD v Minister for Education*,[8] a majority of the Supreme Court took the view that mandatory orders directing the executive

2. [1965] I.R. 294 (HC).
3. Gerard Hogan and Gerry Whyte, *J.M. Kelly: The Irish Constitution*, 4th edn (Dublin: LexisNexis Butterworths, 2003), p.1415.
4. [1965] I.R. 294 (HC) at 312.
5. High Court, ex tempore, 10 June 1994.
6. [1989] I.L.R.M. 181 (HC).
7. High Court, ex tempore, 10 June 1994 at 3–4.
8. [2001] IESC 101; [2001] 4 I.R. 259.

to fulfil its constitutional obligations could be granted only where there had been a conscious and deliberate decision by the executive to act in breach of its constitutional obligations, accompanied by bad faith or recklessness.[9] Moreover, a number of judges expressly signalled that the Constitution "could not be relied upon to protect implied socio-economic rights".[10] Thus, Murphy J. said:

> "With the exception of Article 42 of the Constitution, under the heading 'Education', there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio economic benefit for any of its citizens however needy or deserving."[11]

Murphy J. also held that the right to bodily integrity established in *Ryan* did not "suggest the existence of any general right in the citizen to receive, or an obligation on the state to provide, medical and social services as a constitutional obligation".[12] As Gerry Whyte observes, these dicta signalled that the "Irish courts ... could not be relied upon to protect socio-economic interests that are not explicitly referred to in the Constitution or legislation".[13] Hogan and Whyte concluded that the right to bodily integrity thus could not be "relied on ... so as to catch the State for some form of general non-feasance like failure to ensure proper housing conditions for all citizens".[14]

B. A slight retreat?

The approach adopted by the Supreme Court in *In re Article 26 and the Health (Amendment) (No.2) Bill 2004*[15] to arguments based on implied socio-economic rights may hold out the prospect of some residual role for the courts in the enforcement of socio-economic rights. This case concerned the unlawful policy of charging medical card holders for the provision of services in public nursing homes. The Bill sought to provide a lawful basis for these charges in the future and also sought to validate retrospectively the charges imposed in the past. Counsel challenging the Bill argued that citizens who could not look

9. However, Denham J. (as she then was) issued a strong dissent. She asserted that: "The court has a right and indeed a duty, to make a mandatory order in certain circumstances if there has been a breach of the Constitution, if an obligation has been evaded, if constitutional rights are being set at nought": [2001] IESC 101; [2001] 4 I.R. 259 at 311.
10. Gerry Whyte, "Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement", paper by Gerry Whyte, Law School, Trinity College Dublin, presented at the IHRC Conference on Economic, Social and Cultural Rights, 9 December 2005.
11. [2001] IESC 101; [2001] 4 I.R. 259 at 316.
12. [2001] IESC 101; [2001] 4 I.R. 259 at 316.
13. Whyte, "Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement", fn.10 above.
14. Hogan and Whyte, *Kelly: The Irish Constitution*, fn.3 above, p.1420.
15. [2005] IESC 7; [2005] 1 I.R. 105. See Eoin O'Dell and Gerry Whyte, "Is This a Country for Old Men and Women? *In re Article 26 and the Health (Amendment) (No.2) Bill 2004*" (2005) 27 D.U.L.J. 368.

after themselves independently had an implied constitutional right to care and maintenance by the State, stemming from the constitutional rights to life and bodily integrity protected by Art.40.3, and that they could not be charged for such care and maintenance. Counsel also argued that the charges that were provided for unduly restricted the constitutional right of access to the relevant services of persons of limited means. Significantly, the court seemed to hold open the possibility that citizens might enjoy an implied socio-economic right to care and maintenance, stating:

> "In a discrete case in particular circumstances an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs."[16]

Noting that it was not necessary to resolve this particular issue in the instant case, the court proceeded to decide whether the charges provided for could be regarded as an impermissible restriction on a constitutional right to care and maintenance by the State, assuming such a right existed. The court concluded that it could not be regarded as an "inherent characteristic of any such right that the services provided by the State had to be provided free of charge, regardless of the means of the holder of the right".[17] The court also held that the charges actually proposed would not restrict access to the relevant services by persons of limited means to such an extent as to amount to an infringement of their claimed right to care and maintenance by the State. The court observed that while there might be individual cases in which such a charge would involve undue hardship, the Bill made adequate provision for these. Eoin O'Dell and Gerry Whyte note that,

> "the fact that the Court upheld the proposed charge for in-patient services only after satisfying itself that the statutory regime would not unduly deny access to these services suggests, by implication, that legislation that did unduly deny access to such services might be regarded as unconstitutional".[18]

When one combines this passage with the fact that the court was "prepared to assume the premise that persons of limited means might enjoy a constitutional right to care and maintenance by the State",[19] it suggests that the present Supreme Court has distanced itself somewhat from its earlier pronouncements in *T.D.* The 2015 Supreme Court decision in *O'Donnell v South Dublin County Council*[20] may also represent another slight shift from the court's earlier hard-line stance in *T.D.* In *O'Donnell*, the plaintiff was living in "overcrowded

16. [2005] IESC 7; [2005] 1 I.R. 105 at 166.
17. [2005] IESC 7; [2005] 1 I.R. 105 at 37.
18. O'Dell and Whyte, "Is This a Country for Old Men and Women?", fn.15 above, at 371.
19. O'Dell and Whyte, "Is This a Country for Old Men and Women?", fn.15 above, at 371.
20. [2015] IESC 28.

accommodation" that was "unfit for human habitation" and had a reasonable requirement for separate accommodation. Her disabilities ensured that she was also in need of different accommodation for "medical or compassionate reasons". The plaintiff was also unable to meet the cost of the accommodation or to obtain other suitable shelter. Relying on Costello J.'s decision in *O'Brien v Wicklow UDC*, MacMenamin J. stated that the statutory obligations of South Dublin County Council had to be considered in light of constitutionally protected rights "and values" and the exceptional circumstances of deprivation in this case, which were known to the local authorities for a number of years. The Supreme Court accepted that the plaintiff was subjected to inhuman and degrading accommodation conditions, which compromised her rights to "autonomy, bodily integrity and privacy" under Art.40.3.

The court noted that the housing authority, "when faced with clear evidence of inhuman and degrading conditions, [had] to ensure it carried out its statutory duty"[21] under the Housing Acts in a manner which respected the plaintiffs' constitutional rights. MacMenamin J. noted that while the authorities may have discharged their statutory duties to the rest of Ellen's family, "(t)he evidence ... does not show that the County Council performed its statutory duty, towards Ellen, '*insofar as it was practicable*' as the Constitution provides".[22] The authority's powers under s.10 of the Housing Act 1988 "could have" been exercised and executed with the aim of respecting these rights by making offers of financial assistance, having repairs carried out and/or "lending a second caravan so as to make temporary accommodation space" for the plaintiff and her needs. The court thus awarded the plaintiff modest damages for the breach of the respondent's duties toward her.

As Liam Thornton notes, "there was no mention of Murphy J.'s dicta in *T.D.* of the Constitution not providing any form of socio-economic right or benefit to citizens 'no matter how needy or deserving'".[23] Indeed, while MacMenamin J. explicitly focused on the legislative obligations and duties on the county council under the various Housing Acts, it may be significant that the conditions the plaintiff endured were described in terms of being "inhuman and degrading" and lacking respect for the "constitutional values" of individual autonomy, private life, dignity and bodily integrity. Having regard to this post-*T.D.* jurisprudence, it may be cautiously suggested that the dicta of the Supreme Court represent a softening of the somewhat absolutist approach of the Keane era towards the recognition and protection of socio-economic rights. They suggest, contra to the dicta of Murphy J. in *T.D.*, that Art.40.3, in certain circumstances, provides a right to bodily integrity which may require the positive provision of care and maintenance, which could in appropriate cases

21. [2015] IESC 28, para.70.
22. [2015] IESC 29, para.74.
23. Liam Thornton, "Socio-Economic Rights, the Constitution and the ECHR Act 2003: *O'Donnell v South Dublin County Council* in the Supreme Court", *Human Rights in Ireland*, available at: *www.academia.edu/11456747/Socio-Economic_Rights_the_Constitution_and_the_ECHR_Act_2003_O_Donnell_v_South_Dublin_County_Council_in_the_Supreme_Court* [Last accessed 21 September 2015].

encompass adequate shelter. The decision in *O'Donnell* clearly recognises that the Constitution can, in certain instances, place a positive obligation on State authorities to exercise their statutory duties and powers in a manner which vindicates fundamental rights as far as practicable. It is arguable that, with regard to particularly vulnerable homeless persons, local authorities may have to exercise their powers under s.10 of the Housing Act 1988 in a manner which vindicates their bodily integrity through, inter alia, providing adequate shelter. Although s.10 of the Act is couched in discretionary language, it is clear from *O'Donnell* that these powers must be exercised in a manner which respects and vindicates a potential plaintiff's constitutional rights.[24] Indeed, the Supreme Court held that if statutory powers are

> "given to assist in the realisation of constitutionally protected rights or values, and if powers are given to relieve from the effects of deprivation of such constitutionally protected rights, and if there are no reasons, constitutional or otherwise, why such statutory powers should not be exercised, then I think *such powers may be seen as being mandatory*".[25]

However, it would be fanciful to regard *O'Donnell* and *Re Article 26 and the Health Amendment Bill 2004* as representing a complete volte face from the dicta in *T.D.* As O'Dell and Whyte conclude in relation to the *Health Amendment Bill* case:

> "There is ... a very significant difference between asking a court to grant a mandatory injunction directing the State to protect a socio-economic interest in the absence of any legislation ... and inviting a court, as in the instant case, to review legislation that affects such an interest."[26]

C. The constitutional right of the person

As David Kenny notes, "Hogan J. has rescued the right of the person from obscurity, and given it a broad meaning, raising the possibility that the provision could lead to a significant and novel development in the protection of personal rights under the Constitution".[27] The constitutional right of the person to protection in Art.40.3.2° has had little impact on the jurisprudence of the Irish courts. The clause could have been an alternative source of some of the unenumerated rights recognised under Art.40.3, such as the right of bodily integrity and the right to freedom against torture. In a string of recent cases, Hogan J. has sought to undo the underdevelopment of this express textual right through judicial reinvigoration.

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24. Section 10 of the Housing Act 1988 states that a housing authority "may" take various steps to assist those defined as homeless.
25. [2015] IESC 28 (emphasis added).
26. O'Dell and Whyte, "Is This a Country for Old Men and Women?", fn.15 above, at 371–372.
27. David Kenny, "Recent Developments in the Right of the Person in Article 40.3: *Fleming v Ireland* and the Spectre of Unenumerated Rights" (2013) 33 D.U.L.J. 322.

The constitutional right of the person to protection has been held to protect the physical person, i.e. one's bodily and physical integrity. In *A. v Refugee Appeals Tribunal*,[28] Hogan J. relied on the right of the person to quash a decision of the Refugee Appeals Tribunal, which had not sufficiently regarded the risk that A, a minor, would be subject to female genital mutilation if she were deported to Nigeria. As he observed: "The subjection of any female to FGM is an open assault on her person, the very right which by Article 40.3.2° of the Constitution the State expressly undertakes to defend and vindicate in so far as it is practicable to do so."[29] The Tribunal had not had sufficient regard to this right, and its decision was quashed. The right was similarly invoked to protect physical wellbeing in *H. v HSE*,[30] where Hogan J. ordered the detention of a disturbed young man in St Patrick's Institution not for any punitive reason, but for his own safety and welfare. Kenny observes that the "protection of physical integrity is surely the very least that this right could mean, though its application to particular cases could be a matter of dispute, and it is surely subject to limitation".[31]

Hogan J.'s interpretation of the constitutional right of the person to protection goes beyond protecting the body or physical person; it includes vindicating mental and psychological integrity as well. In *Kinsella v Governor of Mountjoy Prison*,[32] the applicant's life was in danger amongst the general prison population. To protect him, the prison authorities kept him for 11 days in solitary confinement in an unfurnished padded cell that was used to observe those at risk of self-harm. He had no reading material, no radio or television, and no toilet facilities beyond a cardboard box. His only contact with the outside world was one six-minute phone call per day. Hogan J. said that these conditions violated his constitutional rights. His elucidation of the extent of the constitutional right of the person to protection is worth quoting at length:

> "[I]t is the State's duty to protect and vindicate the person of Mr. Kinsella which is principally engaged here ... [I]t is undeniable that detention in a padded cell of this kind involves a form of sensory deprivation in that the prisoner is denied the opportunity of any meaningful interaction with his human faculties of sight, sound and speech—an interaction that is vital if the integrity of the human personality is to be maintained ...
>
> By solemnly committing the State to protecting the person, Article 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality ... [O]ne does not need to be a psychologist to envisage the mental anguish which would be entailed by a more or less permanent lock-up under such conditions for an eleven day period."[33]

28. [2011] IEHC 373.
29. [2011] IEHC 373, para.15.
30. [2011] IEHC 297.
31. Kenny, "Recent Developments in the Right of the Person in Article 40.3", fn.27 above, at 325.
32. [2011] IEHC 235.
33. [2011] IEHC 235, paras 8–9.

Mr Kinsella's detention violated the basic minimum standards needed for the protection of his person, which included his mental integrity. In *Sullivan v Boylan (No.1)*,[34] Ms Sullivan had been subject to threats and intimidation by a debt collector, which included repeated phone calls, emails and text messages, and the besetting of her home. Hogan J. ordered an injunction restraining him from this conduct, as it violated, inter alia, Art 40.3.2°'s protection of the person:

> "[I]t requires little imagination to visualise the acute mental distress which Ms Sullivan suffered as a result of this ... outrageous conduct. The citizen's right to the security of his or her person necessarily implies that the subjection by unlawful means of any person to what would objectively be regarded as acute mental distress must be regarded as amounting in itself to a breach of Article 40.3.2."[35]

Kenny observes that the exact contours of this emerging jurisprudence are unclear: "Mental integrity could be interpreted in a fairly narrow way: as a negative entitlement, preventing treatment that would jeopardise the psychological well-being of individuals, as in *Kinsella* and *Sullivan*. But it is apparent that this could be a broad protection."[36] Thus the right could be limited to the determination of whether or not positive legislative, executive or private action actually attacks an individual's physical or mental integrity. Indeed, the cases cited above involved the court's providing protection to the citizen from negative interference with their physical and mental integrity through legislative, executive and private action. However it is arguable that, as the language of Art.40.3 is not solely couched in terms of negative protection, but also in terms of vindication, it could feasibly give rise to a claim for a breach of constitutional rights due to a failure to take positive steps to provide adequate shelter for particular individuals where the State has a statutory obligation toward the individual/group, such as those defined as homeless under the Housing Acts. This interpretation of Art.40.3—that it was not intended by the framers to be a solely a negative guarantee—is bolstered by considering the provision's drafting history. In their definitive account of the formation of Bunreacht Na h'Éireann, Keogh and McCarthy note that:

> "Article 40.3 would appear to have been influenced by the papal encyclical *Rerum Novarum*, an extract of which had been sent from McQuaid to de Valera. This stated: Rights must be religiously respected wherever they exist, and it is the duty of the public Authority to prevent and to punish violation of rights, and to protect everyone in the possession of his own ... wherever the general interest or any particular class suffers or is threatened with mischief which can in no other way be met or prevented, the public Authority must step in to deal with it."[37]

34. [2012] IEHC 389.
35. [2012] IEHC 389, para.23.
36. Kenny, "Recent Developments in the Right of the Person in Article 40.3", fn.27 above, at 327.
37. Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Dublin: Mercier Press, 2007), p.111.

The potential adverse impact of being homeless or residing in inadequate shelter on an individual's mental and physical integrity is undoubtedly considerable.[38] As a result, while the jurisprudence on the right of the person is in its infancy, it may provide an interesting and textually sound vista through which to explore the possibility of securing a right to shelter in appropriate circumstances, because of the intimate relation of shelters to safeguarding basic physical and mental integrity. However, despite the fact that the text of Art.40.3 is not couched in solely negative terms, following *T.D.*,[39] such a scenario is likely only if the existing law supports some minimal right to shelter in specific circumstances. The courts will not vindicate the right by directing the executive to take positive steps where the State's *omission* to take appropriate executive or legislative steps has caused the breach. In *A. v Minister for Justice and Equality*,[40] MacEochaidh J., having cited Murphy J.'s remarks in *T.D.*, said, obiter, "where State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of the order".[41] MacEochaidh J. essentially differentiates here between a situation in which the executive or legislature has yet to decide how to address a problem, where the courts should not intervene, and a situation in which the State has taken some action that affects human rights adversely. In that latter situation, the judge envisages that a judicial order could be made requiring the State to spend public monies to remedy the situation. Thus, the most likely result of arguing for a right to shelter through the constitutional right of the person to protection is that the right could be used to expand, minimally or significantly, existing protection of a right to shelter in statute, such as the powers vested in local authorities under s.10 of the Housing Act 1988. Similarly, in *O'Donnell*, the Supreme Court drew a distinction between the enforcement of mandatory orders against the executive in the absence of legislative provision and in the enforcement of a statutory obligation which may seek to vindicate constitutional values.[42] In respect of the latter MacMenamin J. held that:

38. People experiencing homelessness make up a growing vulnerable population that has an unacceptably high risk for preventable disease, progressive morbidity and premature death. Homeless people experience much higher levels of Hepatitis C, HIV, TB, poor nutrition, drug and alcohol addiction and mental health difficulties than the general population. See The Simon Community, "Submission by the Simon Communities of Ireland to The All Party Oireachtas Committee on the Constitution", available at: *www.simon.ie/Portals/1/Docs/policies/submissions/archives/right_to_housing_sept_2003.pdf* [Last accessed 21 September 2015].
39. As noted above, a majority of the Supreme Court took the view that mandatory orders directing the executive to fulfil its constitutional obligations could only be granted, where there had been a conscious and deliberate decision by the executive to act in breach of its constitutional obligations, accompanied by bad faith or recklessness.
40. [2014] IEHC 532.
41. 2014] IEHC 532, para.12.6.
42. There is nothing in the dicta of *T.D.* that is contra this assertion. In *T.D.* [2001] IESC 101; [2001] 4 I.R. 259 at 345, Hardiman J. discussed the possibility that relief could be afforded to the applicant under legislation. These dicta, combined with that in

> "Acts of the Oireachtas are to be read and interpreted in the light of the Constitution. If, in an exceptional case such as this, statutory powers are given to assist in the realisation of constitutionally protected rights or values, and if powers are given to relieve from the effects of deprivation of such constitutionally protected rights, and if there are no reasons, constitutional or otherwise, why such statutory powers should not be exercised, then I think *such powers may be seen as being mandatory*."[43]

D. Protecting a right to shelter through a lease

In a number of Superior Court decisions there have been obiter dicta suggesting that an individual may enjoy a constitutional interest in a lease. This constitutional interest, if explicitly recognised, may offer a useful means to implicitly protect an individual's right to shelter. The issue of a constitutional interest in a lease has not received much judicial or academic attention, so the next section of this article will explore the theoretical feasibility of such an approach.

The courts have not exhaustively explored the meaning of "property" for the purposes of the Constitution. However, the courts have considered numerous instances of what constitutes property, holding that, inter alia, land,[44]

A. and *O'Donnell*, appear to suggest that the Supreme Court are prepared to adopt a less restrictive approach to the granting of mandatory orders where the duties at issue were statutory rather than constitutional in nature. This is particularly so when the statutory duties are pursuant to constitutional values. Similarly, in *Sinnott v Minister for Education* [2001] IESC 63; [2001] 2 I.R. 545 at 712, Hardiman J. commented that "the enforcement of duties imposed by the legislature is obviously an exercise of a different kind to the devising or inferring of such duties without legislative intervention" In *Cronin v Minister for Education* (HC, 6 July 2004), a case which followed *T.D.* and *Sinnott*, Laffoy J. granted a mandatory interlocutory injunction directing the respondent Minister to provide the plaintiff with educational facilities pursuant to the Education Act 1998, pending the substantive determination of the litigation. Laffoy J. observed that the plaintiffs laid particular emphasis on the above dicta from Hardiman J. in *Sinnott*, when he observed that "a case based on a duty to provide services imposed by statute would avoid the difficulties of principle described in *O'Reilly v Limerick Corporation* and elsewhere ... the enforcement of duties imposed by the legislature is obviously an exercise of a different kind to the devising or inferring of such duties without legislative intervention". Laffoy J. concluded that the granting of a mandatory injunction enforcing the respondent Minister to fulfil his statutory duties did not fall foul of *T.D.* and stated that the relief granted merely extended a programme which the Minister had already sanctioned. For a more in-depth analysis of the decision, see Conor O'Mahony, "A New Slant on Education Rights and Mandatory Injunctions?" (2005) 1 D.U.L.J. 363.

43. [2015] IESC 28 (emphasis added).

44. *Central Dublin Development Association v Attorney General* (1975) 109 I.L.T.R. 69 (HC) concerned restrictions on the use of land in the interests of planning and development; *O'Callaghan v Commissioner of Public Works* [1985] I.L.R.M. 364 (HC) concerned restrictions on land user in the interest of preserving national monuments; *Whelan v Cork Corporation* [1991] I.L.R.M. 19 (HC) at 27 concerned the abolition of certain restrictive covenants. Murphy J. there referred to such covenants as potentially a "valuable intangible right of property".

intellectual property,[45] shares in a company[46] and certain intangible property arising from legislation[47] constitute "property". For example, in *Hempenstall v Minister for the Environment*, the State did not deny that taxi licences constituted property for the purposes of the Constitution, although Costello J. held on the facts that a regulation which had the effect of reducing the value of such licences did not constitute an "unjust attack" for the purpose of Art.40.3.2° of the Constitution.[48] However, what is significant for the purposes of this section is that Costello J. proceeded on the premise that a licence could garner constitutional protection. Thus the scope of protection afforded by the constitutional guarantee of private property is in no sense narrow.

Hogan and Whyte suggest that "[m]ost obviously of all, the constitutional guarantee applies to land and to rights arising from land ownership".[49] It may be that this principle extends to corollary rights arising from land ownership, i.e. the rights of lessees and not merely the rights of lessors. In *Re article 26 and The Housing (Private Rented Dwellings) Bill 1981*,[50] the Supreme Court recognised that tenants have constitutional property rights, although on the facts of the case the court did not attempt to carve out a test to balance the right of a tenant with those of a landlord.[51] However, O'Higgins C.J. noted that a question may arise whether hardship caused by seeking payment of rent due under the referred Act would amount to an unjust attack on the property rights of a tenant contrary to Art.40.3 or an unjustifiable treatment of a tenant contrary to Art.40.1 of the Constitution. As the Chief Justice observed:

> "On the assumption that undue hardship is likely to be caused in some instances, a question may arise whether such hardship would amount to an unjust attack upon the property rights of a tenant contrary to Article 40, s.3, of the Constitution, or would amount to an unjustifiable treatment of such tenant in contravention of Article 40, s.1, of the Constitution."[52]

This extension of constitutional protection to a lease can also be justified by drawing an analogy between the constitutional recognition offered to licences.

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45. In *Phonographic Performance (Ireland) Ltd v Cody* [1998] 4 I.R. 504 (SC) at 511 Keane J. upheld the rights of "the creator of a literary, dramatic, musical or artistic work".
46. *Private Motorists Provident Society v Attorney General* [1983] I.R. 339 (SC); *Pine Valley Developments Ltd v Minister for the Environment* [1987] I.R. 23 (SC); *Kerry Co-Operative Creameries Ltd v An Bord Bainne* [1990] I.L.R.M. 664 (HC); *O'Neill v Ryan* [1993] I.L.R.M. 557 (SC); *Re Eylewood Ltd* [2010] IEHC 57.
47. *Lovett v Minister for Education* [1997] 1 I.L.R.M. 89 (HC) at 100 (Kelly J.); *The State (FPH Properties SA) v An Bord Pleanála* [1987] I.R. 698 (SC); *Pine Valley Developments v Minister for the Environment* [1987] I.R. 23 (SC) at 46 (Lardner J.); *The Planning and Development Bill 1999* [2000] IESC 20, [2000] 2 I.R. 321 at 354 (Keane C.J.); *Maher v Minister for Agriculture* [2001] IESC 32, [2001] 2 I.R. 139 at 186–187 (Keane C.J.); *Hempenstall v Minister for the Environment* [1994] 2 I.R. 20 (HC) at 28 (Costello J.).
48. [1994] 2 I.R. 20 (HC).
49. Hogan and Whyte, *Kelly: The Irish Constitution*, fn.3 above, p.1971, para.7.7.06.
50. [1983] 1 I.R. 181 (SC) at 191.
51. [1983] 1 I.R. 181 (SC) at 189, 190 (O'Higgins C.J.).
52. [1983] 1 I.R. 181 (SC) at 189, 190.

In property law, licences are considered merely personal rights whereas leases are considered as property rights. The stronger protection and nature of the leasehold estate in comparison to licences, the latter of which was considered constitutional property in *Hempenstall*, justifies a fortiori constitutional protection of a lease as a more significant form of property. Additionally, *Shanley v Commissioner of Public Works* suggests that tenants' rights could attract constitutional protection through a constitutionalisation of their statutory rights.[53] For example, while tenants may not have standalone property rights under the Constitution, once the State legislates and affords them protection, those statutory protections would gain constitutional protection. This could operate in a way similar to the constitutional protection which accrues to intangible property rights such as certain litigation rights and causes of action, and shares in a company, all of which arise, or are created, from legislation.

Furthermore, recognising tenants as having constitutional rights in their lease would be consistent with the view of the Supreme Court that private property has "a moral quality which is intimately related to the humanity of each individual".[54] As J.E. Penner observes, private property rights develop individual personality and personhood, which promotes and preserves individual dignity and autonomy,[55] both of which were recognised as "constitutional values" by the Supreme Court in *Fleming v Ireland*[56] and *O'Donnell*.[57] Charles Reich suggests that property "performs the function of maintaining independence, dignity and pluralism in society".[58] It has also been described by the Supreme Court as one of the "pillars of the free and democratic society established under the Constitution".[59] In *The People (DPP) v Barnes*,[60] Hardiman J. eloquently discussed the particular importance that secure enjoyment of one's dwelling has for the individual citizen, observing that:

> "Though a dwelling house is property and often indeed the most valuable piece of property an individual citizen possesses, it would be quite wrong to equate it with other forms of property such as money or money's worth or other pieces of personal property. Though these may have a sentimental as well as a cash value, and may in certain circumstances be important or even essential for the individual who owns them, a dwelling house is a higher level, legally and constitutionally, than other

53. [1992] 2 I.R. 477 (HC). See Rachael Walsh, "Private Property Rights in the Irish Constitution" (PhD thesis, TCD, 2011).
54. *The Health Amendment (No.2) Bill 2004* [2005] IESC 7, para.120; [2005] 1 I.R. 104 at 201–202 (Murray C.J.). See Rachael Walsh, "Private Property Rights in the Irish Constitution", fn.54 above.
55. J.E. Penner, *The Idea of Property Law* (Oxford: Oxford University Press, 1997), p.169.
56. [2013] IESC 19; [2013] 2 I.L.R.M. 73, para.110 (Denham C.J.).
57. [2015] IESC 28, para.68.
58. Charles Reich, "The New Property" (1964) 73 Yale L.J. 733 at 771.
59. *The Health Amendment (No.2) Bill 2004* [2005] IESC 7, para.120; [2005] 1 I.R. 104 at 201–202.
60. [2006] IECCA 165; [2007] 3 I.R. 130.

> forms of property. The free and secure occupation of it is a value very deeply embedded in human kind and this free and secure occupation of a dwelling house, apart from being a physical necessity, is a necessity for the human dignity and development of the individual and the family."[61]

The secure enjoyment of a dwelling under a lease promotes and instantiates these moral qualities. Thus the potential constitutional interest individuals enjoy in respect of a lease may be employed as a means of protecting the individual citizen's right to shelter from disproportionate negative interference through ensuring that measures which would demand that the termination of a lease must not be an "unjust attack". While the issue has received scant attention in the Superior Courts, these precedents may provide the groundwork for a future argument to recognise such a right. Such a right could considerably augment the nature of the relationship between a landlord and tenant and perhaps narrow the grounds on which a lease may be terminated. It may, for example, ensure that any termination of a lease is proportionate in the circumstances, having regard to competing interests, such as the competing property rights of a landlord and the effect termination may have on the "constitutional values" of autonomy, self-determination and dignity. However, in *Fleming*, the Supreme Court was unwilling to interpret these values expansively, noting that while the Constitution did protect a degree of autonomy through specific rights, protection of autonomy could not be so extensive that "every law which impinges on the life of individuals is even prima facie inconsistent with the Constitution".[62] Thus, while the courts may be receptive to broader interpretations of property in principle, in practice it will be very difficult to succeed in making all but incremental increases in protection on the basis of these values.

E. A child's right to shelter

In *G. v An Bord Uchtála*,[63] the Supreme Court elaborated considerably on the scope of the child's "natural and imprescriptible" rights under Art.42.5. O'Higgins C.J. stated that, "The child also has natural nights ... [T]he child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human person." It was also made clear by Finlay C.J. in *In re Article 26 and the Adoption (No.2) Bill 1987*[64] that Art.42.5 was not to be confined, in its reference to the duty of parents towards their children, to the duty of providing education for them. He held that:

> "In the exceptional cases envisaged by that section where a failure in duty has occurred, the State by appropriate means shall endeavour to

61. [2006] IECCA 165; [2007] 3 I.R. 130 at 148–149.
62. [2013] IESC 19; [2013] 2 I.L.R.M. 73, para.110 (Denham C.J.).
63. [1980] I.R. 32 (SC).
64. [1989] I.R. 656 (SC).

> supply the place of the parents. This must necessarily involve supplying not only the parental duty to educate but also the parental duty to cater for the other personal rights of the child."[65]

The Child Care Act 1991 makes specific and concrete legislative provision for homeless children and encompasses some of this penumbra of rights. Section 5 of that Act provides:

> "Where it appears to a health board that a child in its area is homeless, the board shall enquire into the child's circumstances, and if the board is satisfied that there is no accommodation available to him which he can reasonably occupy, then, unless the child is received into the care of the board under the provisions of this Act, the board shall take such steps as are reasonable to make available suitable accommodation for him."

The constitutional and statutory rights of homeless children to be provided with shelter have been explicitly upheld. In *PS v Eastern Health Board*,[66] a case was taken on behalf of a teenage boy alleging the Eastern Health Board failed to promote his welfare as required under the Child Care Act 1991 and to provide suitable accommodation. The boy in question had been sleeping rough for a number of years. The health board had placed him and another boy in accommodation in Rathmines where they were supervised by a nurse, which evidence showed only exacerbated his isolation and unfocused lifestyle. Evidence showed that the boy needed placement in a secure residential facility with an educational programme to respond to his needs. Geoghegan J. concluded that the Health board had not breached its duty under s.5 from the moment it placed the child in the house in Rathmines. However, the judge noted that it was suitable only as part time emergency accommodation and that the stage had been reached where it was no longer reasonable accommodation as required under s.5 of the Child Care Act 1991. Thus, although s.5 pertained only to the accommodation and not educational facilities and training programmes, the absence of these would be a material factor in the reasonableness of the accommodation offered.

In *F.N. v Minister for Education*,[67] the constitutional obligations of the State towards homeless children were addressed by the High Court for the first time. The applicant had been in care for most of his life and his mother was dead and his father unknown. He had been placed in a residential home before being accommodated in a hostel for homeless boys. Evidence showed the boy suffered from hyperkinetic disorder and needed a period of time in secure accommodation in order to maintain his safety while his behaviour was assessed. The relevant sections of the 1991 Act had not yet come into force and thus the case fell to be governed by the Children Act 1908, and the only remedy available was to send the applicant to an industrial school pursuant to s.58 of

65. [1989] I.R. 656 (SC) at 663.
66. (HC, 27 July 1994).
67. [1995] 1 I.R. 409.

the Act. The Health Board purported to house the boy in an institution for more difficult children but denied that it was under a constitutional obligation to provide for services beyond those already provided.

Although Geoghegan J. was satisfied that the accommodation offered was a temporary solution, he rejected the contention that the Health Board had no further obligations to the child under the Constitution. He noted that, although the State's duties were not absolute, the limit had definitely not been reached in the instant case, and that the nature of the provision to meet the boy's special needs would not be so "prohibitively expensive or impractical"[68] as to exceed the limit of the State's obligations under Art.42.5. These obligations did not just include the provision of shelter but extended to "arrangements and services"[69] suitable for the applicant's special needs. Thus children enjoy a specific right to adequate and suitable shelter under statute and the Constitution.

However, since *T.D.*, the Supreme Court has resolutely hardened its stance in respect of the granting of mandatory orders to vindicate a constitutional right save in the most exceptional circumstances. This has had the effect of reducing the efficacy of the right to shelter for children who fall within the ambit of the Constitution. In *T.D.*, a majority of the Supreme Court took the view that mandatory orders directing the executive to fulfil its constitutional obligations, in the absence of statutory provision, could be granted only where there had been "a conscious and deliberate" decision by the executive to act in breach of its constitutional obligations, accompanied by "bad faith or recklessness".[70] That said, the Supreme Court in the *O'Donnell* decision drew a distinction between the enforcement of mandatory orders against the executive in the absence of legislative provision and the enforcement of a statutory obligation which may seek to vindicate constitutional values.[71] In respect of the latter, MacMenamin J. held that:

> "Acts of the Oireachtas are to be read and interpreted in the light of the Constitution. If, in an exceptional case such as this, statutory powers are given to assist in the realisation of constitutionally protected rights or values, and if powers are given to relieve from the effects of deprivation of such constitutionally protected rights, and if there are no reasons, constitutional or otherwise, why such statutory powers should not be exercised, then I think *such powers may be seen as being mandatory*."[72]

It is also worth noting that the new "Children's Rights" provision, unlike Art.42.5, is not entirely self-executing but appears to be, in some respects,

68. [1995] 1 I.R. 409 (HC) at 416.
69. [1995] 1 I.R. 409 (HC) at 416.
70. See the judgment of Murray J. (as he then was) in *T.D.* [2001] IESC 101; [2001] 4 I.R. 259 at 372. Denham J. dissented on this point in *T.D.*, holding that in exceptional circumstances a court may grant a mandatory order in circumstances "where a constitutional right has not been protected by defendants and where there are no reasonable grounds to balance such a decision against the protection of constitutional rights": [2001] 4 I.R. 259 at 306. Geoghegan J. had expressed a similar view, obiter, in *Sinnott.*
71. See fn.42 above.
72. [2015] IESC 28 (emphasis added).

dependent on the enactment of appropriate legislation. While the reference to the natural and imprescriptible rights of the child in Art.42A.1 appears self-executing, the new formulation of the former Art.42.5, in Art.42A.2.1°, does not appear to be self-executing in the same way.[73] It remains to be seen how useful this provision will be for public interest lawyers seeking to protect children's socio-economic rights in situations of State neglect of such children.

II. A RIGHT TO ADEQUATE SHELTER UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

As Thornton notes, "there is no right under art.8(1) of the Convention to a specified form of accommodation or housing".[74] However, the jurisprudence of the court is not shut off to the possibility that the Convention may entail positive obligations in respect of socio-economic rights. In *Moldovan v Romania*, the ECtHR outlined the general principles applicable to art.8:

> "The Court has consistently held that, although the object of art.8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. There may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life and the home. These obligations may involve the adoption of measures designed to secure respect for these rights even in the sphere of relations between individuals."[75]

Later, the ECtHR stated:

> "Whatever analytical approach is adopted—positive duty or interference —the applicable principles regarding justification under Article 8.2 are broadly similar .... In both contexts, regard must be had to the fair balance

73. Art.42.5 stated that: "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child." In contrast, Art.42A.2.1° states that: "In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such an extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by *proportionate means as provided by law*, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child." (emphasis added). The latter provision appears to require the provision of legislation in order to be operative. The authors would like to thank Gerry Whyte for highlighting this distinction.
74. Liam Thornton, "The European Convention on Human Rights: A Socio-Economic Rights Charter?" in S. Egan, Liam Thornton and J. Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury Professional, 2014), see: *researchrepository.ucd.ie/bitstream/handle/10197/6132/Chapter_Fourteen_The_ECHR_A_SER_Charter.docx.pdf?sequence=1* [Last accessed 21 September 2015).
75. App Nos 41138/98 and 64320/01 (ECtHR, 12 July 2005), para.93.

> that has to be struck between the competing interests of the individual and the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to ensure compliance with the Convention ... . Furthermore, even in relation to the positive obligations flowing from Article 8.1, in striking the required balance, the aims mentioned in Article 8.2 may be of relevance."[76]

The Court has held that in respect of some particularly vulnerable individuals the positive obligations on a State may be more onerous. In *Marzari v Italy*, the Court observed:

> "Although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual."[77]

A. Safeguarding the right to shelter in Irish law through the European Convention on Human Rights Act 2003

In a number of recent Superior Court cases, applicant members of the Traveller community were able to successfully assert that their rights under art.8 were breached because of the failure of public authorities to provide adequate accommodation and shelter. The applicants, in a series of cases, managed to establish a duty on the part of local authorities to respond to their situations of overcrowding in caravans by providing them with suitable and adequate accommodation, though the courts refused to specify the type or nature of what shelter was to be provided.

The plaintiffs in *O'Donnell v South Dublin Council*[78] were three siblings suffering from Hurler Syndrome and in respect of whom Laffoy J. held that their existing accommodation in a caravan with other members of their family was "overcrowded" and "potentially unsafe".[79] The plaintiffs claimed that the failure to be provided with an appropriately modified caravan contravened their statutory rights under the Housing Acts and their Convention rights. The plaintiffs contended that the Housing Acts had to be read in light of s.2 of the Human Rights Act 2003 and be construed as far as possible in a manner compatible with the ECHR. Laffoy J. accepted that this was correct in principle, but noted the difficulty in applying this reasoning to the applicant's case, given that the applicants failed to identify a specific provision of the Housing Acts to be read in light of s.2.[80] Moreover, Laffoy J. noted that to imply a right to a caravan into s.13(2) would cross the Rubicon between judicial construction

76. App Nos 41138/98 and 64320/01 (ECtHR, 12 July 2005), para.97.
77. (1999) 28 E.H.R.R. CD 175, para.2.
78. [2007] IEHC 204; [2011] 3 I.R. 417.
79. [2007] IEHC 204; [2011] 3 I.R. 417 at 449.
80. [2007] IEHC 204; [2011] 3 I.R. 417 at 435.

of a statute and judicial amendment, one which would violate the separation of powers and have significant secondary effects on social housing policy.[81] Laffoy J. thus rejected the applicants' specific claim for relief but held that the shelter provided was unsuitable and in breach under art.8.[82] Laffoy J. left it to the parties to resolve the matter, with the defendants being placed under a duty to reassess the applicants' housing needs and to use their statutory powers to provide suitable accommodation.[83]

According to Laffoy J., the test to be applied was whether the practical and effective respect for the article 8 rights of the plaintiffs required the defendant Council to provide them with an appropriately adapted caravan. In deciding this, account had to be taken of the facts that the Council accepted that the existing provision made by it was not sufficient to discharge its obligations to provide the plaintiffs with suitable and adequate accommodation and that the Council was aware that there would be a delay in remedying this situation.[84] In the circumstances, Laffoy J. held that failure to make statutory provision for the applicants' dire accommodation needs constituted a breach of art.8. She adjourned to allow the parties to see how to proceed.

Similarly, in *O'Donnell v South Dublin County Council*,[85] Edwards J. held that the extent of overcrowding in the case before him was exceptional as it set to nought the earlier adaptations to the caravan made because of a disability of one of the children of the family. Although the court did not specify that the council was under a duty to provide a suitable caravan under the Housing Acts, Edwards J. did direct the housing authority to provide the applicants with adequate temporary shelter pending suitable permanent placement, while leaving to the council the appropriate steps to be taken to provide adequate shelter which would vindicate their art.8 rights.

Although in these cases the specific right to a caravan or shelter of the applicant's choice was rejected, the applicants managed to achieve a recognition of the duty owed to them by the Council to assess their accommodation needs and to provide them with suitable and adequate accommodation and shelter in a manner that respects their article 8 rights. The dicta of Laffoy and Edwards JJ. demonstrate that certain circumstances of overcrowding and inadequate accommodation may constitute a breach of art.8 if the State does not exercise its statutory duty to take reasonable steps to alleviate the situation through providing suitable shelter, which may include a caravan in the case of Travellers, although the courts are inclined to leave the decision of specific accommodation or shelter to the relevant authority.

B. Narrowing the use of the Convention

In Part I of this article we discussed the Supreme Court's interesting approach to constitutional rights in *O'Donnell v South Dublin County Council*, where a

81. [2007] IEHC 204; [2011] 3 I.R. 417 at 435.
82. [2007] IEHC 204; [2011] 3 I.R. 417 at 449.
83. [2007] IEHC 204; [2011] 3 I.R. 417 at 454.
84. [2007] IEHC 204; [2011] 3 I.R. 417 at 448–449.
85. [2008] IEHC 454.

unanimous court found that there had been a violation of Ellen O'Donnell's personal rights under the Constitution, notwithstanding the fact that socio-economic considerations were involved. From the perspective of those sympathetic to public interest law on behalf of the economically disadvantaged, this finding is very welcome. However, the Supreme Court's approach to the Convention issues raised may present a hurdle in the way of utilising the Convention to secure a right to shelter for vulnerable individuals. In the High Court stage of *O'Donnell*, Edwards J. held that the authorities,

> "... had failed to carry out positive measures needed to enable Ellen O'Donnell to enjoy 'a normal private and family life'. Given her vulnerability and severity of the consequences of not providing suitable accommodation, her Article 8 ECHR rights to family and private life had been breached. This reasoning relied upon the principle that without such provision, there could be no meaningful exercise of the Article 8 rights for the individual".[86]

On appeal to the Supreme Court, the case was resolved on constitutional grounds. However, the court made a number of interesting comments about the role of national courts in interpreting Strasbourg case law. When hearing claims under the European Convention on Human Rights Act 2003, s.4 requires Irish courts "when interpreting and applying the Convention provisions, [to] take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments". In *O'Donnell*, the Supreme Court held that this provision requires our courts "subject to the Constitution, to take 'due account' of *clear and consistent* principles laid down in Strasbourg jurisprudence".[87] MacMenamin J. moreover held that it stressed that the s.4 duty,

> "... is to be seen in the context of the function of the ECtHR to adjudicate within its own powers, as identified under its Treaty of establishment (see the judgments of Murray C.J., Denham J. and Fennelly J. in *JMcD v PL*; and the references therein to *R (Ullah) v Special Adjudicator* [2004] 2 A.C. 323)".[88]

As O'Donovan surmised, "The *Ullah* principle has been commonly ... summed up as the idea that in handling Strasbourg jurisprudence, national courts should supply 'no less, but certainly no more' rights protection than has been seen in the ECtHR caselaw".[89] In *McD. v L.*,[90] direct reference to *R (Ullah)* is found in

86. Darren O'Donovan, "Future Worries for ECHR litigation in Ireland? *O'Donnell v South Dublin County Council*", *Human Rights in Ireland*, available at: available at: *www.academia.edu/11456747/Socio-Economic_Rights_the_Constitution_and_the_ECHR_Act_2003_O_Donnell_v_South_Dublin_County_Council_in_the_Supreme_Court* [Last accessed 21 September 2015].
87. [2015] IESC 29, para.76.
88. [2015] IESC 29, para.76.
89. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
90. *McD. v L.* [2009] IESC 81; [2009] 2 I.R. 199.

the judgment of Fennelly J. who, in relation to s.4, stressed that "the European Court has the primary task of interpreting the Convention. The national courts do not become Convention courts".[91] Fennelly J. approved the statement of Lord Bingham in *Ullah* that national courts should,

> "... follow any *clear and constant jurisprudence* of the Strasbourg Court ... . It is of course open to Member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national Courts, since the meaning of the Convention should be uniform throughout the States party to it. The duty of national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: *no more, but certainly no less*".[92]

The principle rests upon the "fundamental distinction that national courts should be dutiful *appliers*, not fresh *interpreters* of the ECHR case law".[93] In looking at the *O'Donnell* cases, the court continually stressed that any alleged rights or duties had to be viewed in the light of *McD. v L.* (and *Ullah).* MacMenamin J. held that in respect of the duties imposed by art.8, "before an act or failure to act can amount to a lack of respect for private and family life ... there must be a clear statement of principle to that effect discernible from the ECtHR jurisprudence".[94] Specifically in relation to the positive obligations imposed by art.8, MacMenamin J. cited the dicta of Charleton J. in *Doherty v Dublin County Council*,[95] where it was held that:

> "It may be that there is a positive duty cast upon public authorities to intervene under Article 8, consistent with the proper disposal of available resources, where special circumstances cause a direct interference of a serious kind in family life and where the subject of that interference has no available means to alleviate the absence of that right."[96]

MacMenamin J. observed: "I consider that this expresses the hypothetical legal position correctly"; but once again strongly emphasised that "the *existence and extent* of such a duty would have to be discerned from *clear and consistent* Strasbourg jurisprudence".[97] While one should not draw sweeping conclusions from what are essentially obiter comments, if this dictum is taken at face value then it may narrow the ability of the Superior Courts to apply art.8 or Art.3 in a manner which requires positive State action. As O'Donovan notes, the "requirement that *the existence and extent* of such a duty be discernible (*from*

91. *McD. v L.* [2009] IESC 81; [2009] 2 I.R. 199, para.322.
92. *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323 (HL) at 350 (emphasis added).
93. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
94. [2015] IESC 29, para.82.
95. [2007] IEHC 4.
96 [2007] IEHC 4, para.36.
97. [2015] IESC 29, para.80 (emphasis added).

clear and consistent Strasbourg Jurisprudence) is especially demanding".[98] O'Donovan cautiously suggests that "there is a danger that, given these repeated warnings, a lower court judge or legal advisor might infer that the High Court case law 'pushed the boat' out unduly" by recognising a positive obligation to provide adequate accommodation to vindicate the plaintiffs' right to private life.[99]

It should be mentioned that the Supreme Court did highlight that in *Marzari v Italy* the Strasbourg Court had acknowledged "*in certain circumstances*" a *possible* positive obligation under art.8 towards those with a severe disability. O'Donovan suggests that while "this boosts the argument that the Court was not directly condemning the specific High Court findings",[100] it was unfortunate, or potentially worrying, that rather than "endorsing the ECtHR's statement in *Mazari* as sufficiently clear, the court referred to it as merely being 'not without interest'".[101] O'Donovan concludes that ultimately "we are left without guidance on whether the statement was sufficient to mark out the 'existence and extent' of a duty discernible from Strasbourg jurisprudence, and therefore applicable by our courts".[102] While we note that this dictum is both obiter and certainly did not expressly condemn the lower court's approach to art.8 and the extent of positive obligations of the local authorities to the plaintiffs in the relevant cases, the judgment *may* indicate that the positive obligations imposed by art.8, filtered through the European Convention on Human Rights Act 2003, will, in future cases, be applied very cautiously and only in lock-step with clear and consistent Strasbourg jurisprudence. This could well have a "chilling effect on High Court judges. For now, some might be tempted to hit the dimmer switch on some interpretations of Strasbourg jurisprudence".[103] In turn, this may lead to a judicial reluctance to extend the ambit of positive obligation in respect of adequate shelter beyond scenarios clearly dealt with by Strasbourg, which consequently reduces its efficacy for proponents of public interest litigation.[104] Gerry Whyte suggests that "it would seem unlikely that the 2003 Act will significantly enhance the potential for using litigation in Irish courts to protect implied socio-economic rights".[105]

C. Widening the gap?

Given that the comments of MacMenamin J. were strictly obiter, it is helpful to consider whether a future court may, in the interests of promoting the right to shelter, depart from this view. Notwithstanding the views expressed in *Ullah* and echoed in *McD. v L.*, it is important to remember that, but for the 2003 Act,

98. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
99. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
100. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
101. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
102. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
103. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
104. O'Donovan, "Future Worries for ECHR litigation in Ireland?", fn.86 above.
105. Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, 2nd edn (Dublin: Institute of Public Administration, 2015), p.112.

the Convention could not have domestic effect, as it remains an agreement between signatory States.[106] The significance of this point in relation to the above analysis cannot be understated. As Ian Loveland notes in the UK context, it bears repeating that the Convention has no effect in domestic law and thus the articles of the Convention referred to in the Schedule to the Human Rights Act 1998 have their own autonomous meaning which is to be decided by domestic courts.[107]

A useful example in the context of the right to shelter is the UK Supreme Court's recent jurisprudence on art.8. *Manchester City Council v Pinnock*[108] and *Hounslow London Borough Council v Powell*[109] confirm this approach to the interpretation and application of the Convention at the domestic level. In *Pinnock*, the Supreme Court appeared to elide the content of art.8 of the ECHR with art.8 of Sch.1 to the Human Rights Act 1998, overruling the previous line of case law which had taken a more conservative approach to art.8. Admittedly, the reason for overruling previous cases was clear and consistent Strasbourg jurisprudence. However, subtle differences remained between the Strasbourg jurisprudence on art.8 of the ECHR and the protection afforded by art.8 of Sch.1. The approach adopted in *Powell* suggests that art.8 of Sch.1 is engaged where occupants in local authority housing are there lawfully. Thus, a local authority will only rarely succeed in establishing that a property is not a lawful occupant's *home* for the purposes of art.8. As Rachael Walsh notes, this assumption of engagement offers greater protection than the approach adopted by the ECtHR itself as it examines the links between individuals and properties as a preliminary stage of its assessment of arguments based on art.8.[110]

The operation of the HRA 1998 in the United Kingdom thus provides a useful comparison to the position in this jurisdiction with respect to the ECHR Act 2003. Both the United Kingdom and Ireland require enabling domestic legislation to give effect to the Convention and both Acts contain the text of the Convention in Sch.1. Section 2(1) of the ECHR Act 2003 requires the Irish courts to interpret Irish law, in so far as it is possible, in a manner compatible with the Convention provisions, which are set out in the ECHR Act 2003. Section 4 of the 2003 Act provides that an Irish court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments. There is thus clearly some leverage for a more favourable interpretation by domestic courts than the European courts may have thus far

106. Fiona de Londras and Cliona Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Round Hall, 2010), p.5.
107. Ian Loveland, "The Shifting Sands of Article 8 Jurisprudence in English Housing Law" [2011] 2 E.H.R.L.R. 151 at 154–155.
108. [2010] UKSC 45; [2011] 2 A.C. 104.
109. [2011] UKSC 8; [2011] 2 A.C. 186.
110. Rachael Walsh, "Integrating Proportionality into Public Authority Possession Applications—Conclusive Answers from the Supreme Court?" (2011) 22(3) King's L.J. 414 at 420–421. Walsh cites *Blečić v Croatia* (2005) 41 E.H.R.R. 13 and *Kozak v Poland* (2010) 51 E.H.R.R. 16 to illustrate the divergence in approach between the position adopted in *Pinnock* and affirmed in *Powell* and the practice of the ECtHR.

provided. Indeed, Fennelly J.'s observation in *McD. v L.* that the European Court has the "primary task" of interpreting the Convention suggests that the domestic courts do have a secondary interpretative role. It is therefore submitted that the Irish courts may nevertheless give more (or less) extensive protection to Convention rights than MacMenamin J. suggested. Indeed, considering the comparative position in the UK, it would be jurisprudentially consistent for the Irish courts to extend Convention protection in principle while in practice maintaining restrictions on it. This would align the constitutional position referred to above in relation to "constitutional values" with the Convention position, a not uncommon practice in Ireland.[111] Moreover, the UK Supreme Court has moved away from a rigid approach with regard to the interaction between domestic and Strasbourg jurisprudence. In *R (Hanley) v Secretary of State for Justice*, Lord Mance and Lord Hodge, in their joint judgment, noted:

> "Usually, domestic and Strasbourg jurisprudence march hand in hand, as contemplated by the 'mirror' principle 'no more, but certainly no less' (as put by Lord Bingham in *R (Ullah) v Special Adjudicator*), or 'no less, but certainly no more' (as put by Lord Brown in *Al-Skeini v Secretary of State for Defence*). But increasingly it has been realised that situations are not always so simple. The domestic court may have to decide for itself what the Convention rights mean, in a context which the ECtHR has not yet addressed: see e.g. *Rabone v Pennine Care NHS Foundation Trust.*"[112]

These observations are clearly capable of application in this jurisdiction. It is therefore submitted that there is no need to close the door to the possibility of invoking the Convention to promote or enhance the protections available for the right to shelter in Irish law.

CONCLUSION

While our analysis concedes that there is no express constitutional or Convention right to shelter or housing for adults, the existing legal landscape suggests that an implied right to adequate shelter may, in certain instances, be a necessary corollary of, or could be protected by, other constitutional rights, including the right to bodily integrity, the right of the person, and the constitutional property right in respect of a lease. Moreover, children do enjoy a constitutional and statutory right to shelter. The European Convention on Human Rights does

111. Oran Doyle, "Conventional Constitutional Law", available at: *www.academia.edu/8125080/Conventional_Constitutional_Law* [Last accessed 21 September 2015].

112. [2014] UKSC 66; [2015] 2 W.L.R. 76 at 88–89 (citations omitted). *Ullah* can also be contrasted with the House of Lords decision in *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 at 193, where Lord Hope stated that "Strasbourg jurisprudence is not to be treated as a straitjacket from which there is no escape". See Aileen Kavanagh, "Strasbourg, the House of Lords or Elected Politicians: Who decides about rights after *Re P*?" (2009) 72(5) M.L.R. 828.

not provide a specific right to shelter. That said, the obligations imposed on State organs under the European Convention on Human Rights Act 2003 may ensure that housing authorities must carry out the statutory obligations in a manner compliant with art.8. In appropriate circumstances, this may involve providing shelter which is adequate and which is capable of guaranteeing the substance of the complainant's Convention rights. However, we suggest that, ultimately, the current constitutional and Convention jurisprudence on the right to adequate shelter is, compared to an expressly enumerated right, somewhat subdued. This is not to say that the jurisprudence discussed above could not be expanded upon by a future court or provide fertile grounds for arguments in prospective public interest litigation. Be that as it may, it is understandable that those who seek to protect economic, social and cultural rights through the Constitution should strongly seek to have such rights made expressly enumerated and justiciable through referendum. However, we hope that this article demonstrates that, until such rights are expressly enumerated, proponents of public interest litigation seeking to vindicate a constitutional or Convention right to adequate shelter are certainly not completely toothless.

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