**Written evidence to the Government of Ireland’s Housing Commission submitted by Dr Conor Casey, Lecturer in Law at the University of Liverpool School of Law & Social Justice**

**INTRODUCTION**

1. I have been invited by the Housing Commission to give evidence to aid their work in examining the “complex constitutional questions arising…around potential wording for an amendment to the Constitution” in respect of housing and property rights.[[1]](#footnote-1)
2. My submissions address the following questions:
3. How does the Constitution in its current form inhibit the State’s response to the housing crisis?
4. Has the protection afforded to private property rights been overestimated?

**SUMMARY**

1. The Constitution in its current form – the text of Articles 40.3 and 43 and how they have been consistently interpreted by the Superior Courts – do not inhibit the Oireachtas and Government in taking whatever steps are required to delimit the exercise of property rights to ensure they are compliant with the common good. The deeply entrenched political perception of the strength of constitutional protection afforded to private property rights – that they pose a very serious stumbling block to legislative action - is therefore very significantly overstated.
2. It is reasonable to infer that the legal advice Government has received from the Attorney General’s Office has something to do with the entrenchment of this view. There are two plausible explanations for how legal advice relates to this constitutional misperception entrenched amongst political actors.
3. The first is that the legal advice given by the Attorney General’s Office has been excessively cautious and risk averse, underestimating the Oireachtas’ authority to regulate private property rights while overemphasising the legal risk of a Court invalidating legislation designed to address Ireland’s housing crisis.
4. The second is that Attorney General’s advice is not actually excessively risk averse or conservative, and the real problem is that it is being presented as such by members of the Government in the Oireachtas and in public statements. What we might be witnessing is a situation where valid legal risks identified by the Attorney General are exaggerated, inflated, and find public expression in a more categorical type of claim that the Government has been advised that a measure *could not* be considered constitutional. That is, the Government might tactically convey the impression a measure contained in a bill has been emphatically dubbed unconstitutional, to side-step pressure to take political action it simply does not want to take for policy reasons.
5. It is hard to establish which account is more accurate given the very high levels of confidentiality surrounding Attorney General’s legal advice. But either would be problematic and unsatisfactory.
6. On balance, I suggest it would be constitutionally irresponsible to pursue a referendum to amend Articles 40 and 43 based on nothing more than an ultimately *mistaken* political perception of how they are hamstringing the ability of the Oireachtas to regulate private property rights.
7. The Government and Oireachtas should instead first seek to test the bounds of their existing constitutional authority to regulate property rights. This could happen in conjunction with disclosure of Attorney General’s advice – whether in full or précis form – to bring a measure of transparency to bear upon the ostensible difficulties blocking the Oireachtas taking robust legislative action.
8. Should the Superior Courts invalidate legislative measures brought to address the housing crisis – whether via an Article 26 reference or in the course of ordinary litigation – it would then be a more appropriate and proportionate response to consider pursuing a referendum that would better empower the Oireachtas to regulate property rights.

**SUBMISSIONS**

1. **Constitutional Background**
2. In our constitutional system, decisions about the most important policy questions – including taxation, education, health, the funding of public services, and the provision and supply of housing – are the responsibility of the Government and Oireachtas.
3. Our Constitution provides the Oireachtas the sole and exclusive power of making laws for the State.[[2]](#footnote-2) The Constitution provides the Government with the executive power of State, making it responsible for faithfully implementing the laws enacted by the Oireachtas.[[3]](#footnote-3) The Constitution also provides the Government authority over preparing the annual budget outlining the revenue the State is estimated to take in in taxes, and how much it will spend on things like public services, that the Dáil must then consider and approve.[[4]](#footnote-4)
4. Moreover, in practice the Government drafts most bills that are introduced to the Oireachtas for consideration, with the aid of the civil service and parliamentary draftsmen in the Attorney General’s Office.[[5]](#footnote-5)
5. Because Ireland does not have a federal or devolved system of government, the executive and legislative powers of the Government and Oireachtas are unitary, and not divided amongst sub-national political actors. This gives them very significant policy authority over issues like housing.
6. However, the powers of both Government and the Oireachtas are limited by other provisions of the Constitution. One limitation is that the Constitution does not permit the three organs of State – Oireachtas, Government, and judiciary – to take over each other’s functions, or to voluntarily alienate them.[[6]](#footnote-6) So, it would be unconstitutional to let the Courts make laws, and for the Government to start adjudicating cases for example.
7. Another limitation, more relevant to these submissions, is that the powers of the Oireachtas and Government must be exercised consistent with, and not repugnant to, fundamental rights posited in the Constitution. This includes the right to private property protected by Article 40.3[[7]](#footnote-7) and Article 43.[[8]](#footnote-8)
8. A law may be found unconstitutional by a Court in two ways. One is through pre-enactment judicial review through the procedure established in Article 26. This allows the President, at her “absolute discretion” to refer a bill to the Supreme Court for a judgment on its constitutionality. If it is found unconstitutional the bill will not be signed into law. If the bill is upheld as constitutional the President will sign it into law. If a bill is found to be constitutional, its constitutionality cannot be challenged again. Article 26 challenges have become increasingly rare, and there has not been a reference made since 2005.[[9]](#footnote-9) Most constitutional questions do not arise through Article 26 references, but through ordinary litigation before the High Court where a Plaintiff pleads a particular statutory provision is unconstitutional.
9. **Philosophical Background to Constitutional Property Rights**
10. The dominant philosophical influences on the text of Article 43 come from the classical natural law tradition[[10]](#footnote-10) and Catholic social teaching.[[11]](#footnote-11) For example, it is well documented how the Papal Encyclicals *Rerum Novarum*[[12]](#footnote-12)and *Quadragesimo Anno*[[13]](#footnote-13)had a significant impact during the drafting process. Both encyclicals at their core emphasised the need for “rights-based protection of private ownership subject to State-imposed limitations designed to secure social justice”.[[14]](#footnote-14)
11. In the Thomistic natural law tradition and in contemporary Catholic Social Teaching, the right to hold and bequeath property is an aspect of the natural law because of its intimate connection with both individual human flourishing and the common good, through its connection to promoting social stability, sociability, familial security, and values associated with subsidiarity.[[15]](#footnote-15)
12. This means people cannot be denied the right to own and hold property and that the institution of private property cannot be legitimately abolished and absorbed by the State. Instead, the institution of private property must be respected by the positive law enacted by public authorities. This is reflected very clearly in Article 43’s guarantee that the State shall pass “no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.”
13. But aside from non-abolition of the institution of private property, these philosophical traditions give a very wide latitude to public authorities to prudently delimit and tailor the scope of an individual’s property entitlements, to ensure these entitlements are conducive to the common good and to the flourishing of the whole community.
14. This point cannot be overemphasised: respect for property is mandated by the natural law tradition *not* because protecting individual liberties like property is first and foremost the most important job of the State, but because of the contribution private ownership of property can make to the common good and human flourishing of all in a community.
15. Where patterns of property entitlements and ownership begin to have consequences contrary to human flourishing and the common good, the State may have a duty to take action to reorient their exercise to the common good by delimiting them.
16. **Superior Court’s Treatment of Property Rights Provisions**
17. In our constitutional system, it falls on the judges of our Superior Courts – the High Court, Court of Appeal and Supreme Court - to interpret the Constitution’s fundamental rights provisions and consider the impact legislative or executive action has on them. If the Courts are satisfied the impact is repugnant to the right, it may quash the action of the Oireachtas or Government as beyond their constitutional authority.[[16]](#footnote-16)
18. It is of course difficult to concisely sum up over 80 years of constitutional doctrine on private property rights, but the consensus amongst public law scholars is that Irish Courts have largely interpreted the property rights provisions in a manner consistent with the basic tenor of its background influences. Our Courts have consistently held that property rights are not absolute, can be extensively regulated by the Oireachtas in the interests of the common good, and that Courts should be deferential in assessing whether legislative action taken by the Oireachtas to reconcile the exercise of individual property entitlements to the common good is repugnant to the Constitution.[[17]](#footnote-17)
19. Since the 1990’s, the Courts have moved away from explicitly using the language of the classical natural law tradition and Catholic Social Teaching when assessing the constitutionality of legislation regulating private property, in favour of using the proportionality test of the kind found in many constitutional systems around the world, and in supranational courts like the European Court of Justice and European Court of Human Rights.
20. The proportionality test typically involves an assessment of whether a legislative measure engaging a right aims at advancing a legitimate aim, is framed in a manner rationally connected to that aim, interferes with the right no more than necessary to achieve the aim, and has an impact on the right in issue which is overall proportionate to the good of the objective to be achieved by the legislation.
21. But while the legal test used by the Courts in reviewing the constitutionality of legislation regulating private property rights has altered, they have applied the proportionality test in a manner highly deferential to the Oireachtas. Therefore, in substance, there has been continuity with the natural law tradition’s emphasis on the need for public authorities to have wide latitude to regulate property rights to ensure their exercise is consistent with the common good.[[18]](#footnote-18)
22. The leading scholarly authority on constitutional property law, Professor Walsh, surmises that the predominant response of Irish judges “has been to defer to judgments about the appropriate mediation of property rights and social justice reflected in legislative and/or administrative decisions”.[[19]](#footnote-19) Invalidations of legislative measures are, says Walsh, “rare overall” and when they do occur typically concern a failure of basic rationality or fair procedures, as opposed to a Court second-guessing whether a measure was in the interests of the common good or proportionate overall.[[20]](#footnote-20)
23. On whether the property rights provisions place a serious obstacle in the way of the Oireachtas legislating to regulate property rights, Professor Walsh concludes that:

On balance, given the nature of the protection for property rights enshrined in the Constitution (an institutional guarantee and a qualified individual rights protection, coupled with an express statement of the State’s power to delimit the exercise of property rights)…it is suggested that there is ample scope within the current constitutional framework to introduce measures that restrict the exercise of property rights to respond to the housing crisis.[[21]](#footnote-21)

1. The authors[[22]](#footnote-22) of *Kelly’s: Irish Constitution*, the leading treatise on Irish constitutional law, similarly argue that analysis of the Court’s case-law yields the conclusion that “considerable latitude is given the Oireachtas to regulate and organise a modern economy” and that the “popular conception to the contrary is a pure myth.”[[23]](#footnote-23)
2. **Disjunction between Case Law and Political Practice**
3. The account just sketched might surprise the average reasonable citizen who, although not familiar with the minutiae of judicial treatment of Articles 40 and 43, has repeatedly heard the Constitution’s ostensible rigorous protection of property rights being invoked by successive Governments to justify not pursuing certain policy measures to address Ireland’s housing issues.[[24]](#footnote-24)
4. Indeed, an ambient impression has undoubtedly gained traction in public[[25]](#footnote-25) debate that private property rights are strictly protected by the Constitution and place onerous legal burdens and risks in the path of the Oireachtas and Government seeking to regulate them in the interests of the common good.
5. This gives rise to a serious disjunct in need of explanation. How can we have a situation where Courts have been largely deferential when assessing if legislative measures regulating property rights are constitutional, but nonetheless also have a widespread perception that the Constitution’s protection of property rights presents a serious stumbling block to successful legislative action on housing issues? How can these facts, which clearly pull in incompatible directions, possibly be explained?
6. I have argued, along with several others, that one reasonable explanation is that successive Governments have internalised a deeply skewed, crabbed, and highly risk averse understanding of the Oireachtas’ constitutional law-making authority to regulate property rights for the common good.
7. The confidentiality of Government deliberations[[26]](#footnote-26) makes it hard to say definitively how its internalisation of a skewed understanding of the relevant constitutional law has come about. But evidence can be gleaned by analysing what members of Government say in their public statements and during debates in the Oireachtas about why and how they have come to adopt this position. And when one analyses these statements, I argue it supports the contention that legal advice given to the Government has played an outsized role in shaping their views on the legality of regulating property rights
8. It is well documented that the small group lawyers who provide legal advice to Government – the Attorney General, Advisory Counsel in the Attorney General’s Office, the Office of Parliamentary Legal Counsel, and the small circle of senior barristers externally briefed to provide opinions to assist the Attorney General’s work – exercise a significant influence over the policymaking process. Even though the Attorney-General is constitutionally strictly speaking only a legal *advisor,* in practice Governments have proceeded on the basis their “advice is not merely highly authoritative and of great weight when considering policies, but binding as a constitutional matter.”[[27]](#footnote-27)
9. This means it is no exaggeration to say, as Professor Carolan does, that the work of the Attorney General and those assisting them is amongst the “most significant constraint in the Irish system on the content of public policy”.[[28]](#footnote-28) The content and tenor of the legal advice given to the Government by the Office therefore plays a critical role in fixing the bounds of what its incumbents internalise as constitutionally possible and licit policy choices.[[29]](#footnote-29)
10. The starting point for assessing the likely impact the legal advice given to Government on the constitutionality of property rights has had on housing policy, is to note that Attorney General’s advice is legally privileged. There is a very strong level of confidentiality maintained by Government over the content of the legal advice it receives.[[30]](#footnote-30) Because the Government enjoys legal privilege and the benefit of cabinet confidentiality, it cannot be *compelled* to disclose the legal advice it receives. But the Government can *choose* to disclose the advice it receives anytime it wants, and in any format it wishes. It is entirely within its gift as the client in receipt of the legal advice.
11. While within the Government’s gift, successive administrations have flatly refused to disclose the content of the legal advice it receives, unless they see a political advantage in doing so.[[31]](#footnote-31)
12. Because they are strongly wedded to confidentiality, the best we can do to assess the impact and influence of legal advice on policymaking concerning housing issues is to draw reasonable inferences from the way the Government characterises the advice in its public statements and in the course of Oireachtas debates.[[32]](#footnote-32) That is, by considering how members of Government themselves characterise the impact of legal advice on their disposition toward a proposed policy or bill.
13. Helpfully for the purposes of this assessment, Governments have consistently and vocally invoked legal advice received from the Attorney General, in their public statements and during parliamentary debates, to justify not taking a course of legislative action in respect of Ireland’s housing issues.[[33]](#footnote-33)
14. For example, the Fine Gael-Labour coalition government (2011-2016) claimed to face very severe limitations on legislative action due to legal advice on constitutional property rights. Measures apparently thwarted by included land-hoarding restrictions, capping mortgage interest rates, eviction protections, and regulation of 'vulture funds'. Alan Kelly TD, having served as the relevant Minister for Housing for much of this period, stated later:[[34]](#footnote-34)

I was not hampered by political or financial obstacles. I was blocked by the Constitution. From the time it is taking to introduce the vacant site levy to tackle land hoarding, to protecting tenants fro m eviction in circumstances where their landlord wishes to sell the property, and many other issues, I was repeatedly blocked from making provision for what I believed was the common good by the strength by which property rights are protected under Article 43 of the Constitution.[[35]](#footnote-35)

1. In a particularly forensic study, Hogan and Keyes document that from 2010-2020 over 13 Private Members bills proposing a range of policy measures have been rejected by Governments, *not* because of straightforward policy disagreement, but ostensibly because of constitutional concerns raised in Attorney General’s advice.[[36]](#footnote-36) Examples of bills rejected on this basis include those proposing to (i) ban upward only rent review clauses; (ii) vacant site levies designed to curb site hoarding and speculation and encourage development; (iii) restricting the statutory grounds upon which a tenant could be evicted; (iv) introduce temporary rent controls or freezes. On some occasions the Government expressed sympathy to the goal behind a legislative proposal and stressed that their objection was purely legal.[[37]](#footnote-37)
2. It is clear then that legal advice tendered by the Attorney General is regularly invoked as a major stumbling block to robust legislative action. This raises an additional question: how can this advice be squared with the case law of the Superior Courts?

V. **Assessing the Political Impact of Attorney General’s Advice: Two Plausible Accounts**

1. Political perception of the strength of constitutional protection afforded to private property rights is very significantly overstated, and it seems reasonable to infer that the legal advice recent Governments have received has something to do with its entrenchment. There are two plausible explanations for how legal advice is linked to the misperception entrenched amongst political actors.
2. The first is that the legal advice given by the Attorney General’s Office, likely informed by opinions offered by external counsel from the Law Library, has been excessively cautious and risk averse; downplaying the constitutional authority the Oireachtas enjoys while overemphasising the legal risk of a Court invalidating a proposed policy measure.
3. Assuming the Government’s representation of the tenor and content of the constitutional advice it is receiving in the examples given above is accurate, it appears the advice has the following general characteristics:

* it has a heavy focus on risk minimisation;
* it places careful attention to whether policies, particularly those with ambitious scope, might engage the interests of constitutional rights-holders with the incentive and means to take litigation;
* it has keen awareness of the risk that even an ultimately successful defence of a challenged policy may “lead to significant delays and costs on the part of the State”;[[38]](#footnote-38)
* it works with an assumption that the best way to minimise risk is to practise cautious “political risk-avoidance in the design or introduction of policy measures”,[[39]](#footnote-39) whether by diluting, or excessively proceduralising preferred policies, or requiring elevated burdens of proof as to their necessity and efficacy.

1. Attorney General’s advice appears to put a “peculiar premium…on risk aversion in the sense of minimising the risk of constitutional invalidation or even of legal challenge altogether”.[[40]](#footnote-40) To be clear, this is not a criticism of the professional norms or technocratic competence of the lawyers involved in advising the Government on these constitutional issues. Legal risk aversion amongst Government legal advisors is certainly not unique to Irish political life and has been well-documented in other legal systems where senior legal advisors are designed to be a largely technocratic figure, as opposed to a dual legal-political actor along the lines of the UK Attorney General.[[41]](#footnote-41)
2. However, this cautious and risk-minimising disposition to legal advice giving can have significant costs and downsides, like helping to seriously narrow what political actors like the Government regard as the appropriate scope of political action for the common good. Given that, in practice, Attorney General’s advice is treated as binding, the existence of a high aversity to *legal risk* can help us account for clear evidence of aversity to *political risk* concerning the “initiation of new laws that restrict property rights”[[42]](#footnote-42) notwithstanding extensive latitude offered to the Oireachtas in the judicial doctrine.
3. Another plausible account of how legal advice relates to the Government’s deeply entrenched and misperceived understanding of constitutional doctrine, begins from the premise that Attorney General’s advice is not actually excessively risk averse or conservative, and the real problem is that it is being presented as such by members of the Government in the Oireachtas and in public statements.
4. In other words, what we might be witnessing is a situation where valid legal risks identified by the Attorney General are exaggerated, inflated, and find public expression in a more categorical type of claim that the Government has been advised that a measure *could not* be considered constitutional. That is, the Government might tactically convey the impression a measure contained in a bill has been emphatically dubbed unconstitutional by the Attorney General, to side-step pressure to take political action it simply does not want to take for policy reasons.
5. There is a very serious difference between advice identifying the presence of relevant legal risks, and advice which offers a categorical statement about unconstitutionality. Virtually all consequential legislation is likely to raise *some* identifiable legal or constitutional risk. The more important question is whether the relevant legal risk identified is that legislation will fail, on any reasonable view, to satisfy the deferential standards of review outlined by the Court in its case-law and be found unconstitutional. Thus, what might at first impression look like Government deference to conservative legal advice, may in fact involve a strategic and misleading use of confidential legal advice to shore up a controversial political position or state of inaction.
6. In the absence of any transparency over the content of Attorney General’s advice, it is hard to say which account is more plausible. Both are undesirable in their own way. But the latter account outlined – of strategic Government presentation of equivocal legal advice as unequivocal – would be worse and more problematic.
7. **Implications for Reform Discussions**
8. What relevance does this have for current debates over potential constitutional reform? I suggest several points are worth considering.
9. My main suggestion is that our Constitution – the text of Articles 40 and 43 and how they have been consistently interpreted by the Superior Courts – do not inhibit the Oireachtas and Government in taking whatever steps are required to delimit the exercise of property rights to ensure they are compliant with the common good. I fully agree with Professor Walsh in her written submissions to this commission that:

On balance, given the nature of the protection for property rights enshrined in the Constitution…there is ample scope within the current constitutional framework to introduce measures that restrict the exercise of property rights to respond to the housing crisis.[[43]](#footnote-43)

1. I argue it follows from this fact that a referendum is not required, if the purpose and intent of a proposed amendment would be merely to make more explicit that the Oireachtas can act wherever necessary to regulate private property rights in the interests of the common good. Given the current state of constitutional law such an amendment would be, from a legal perspective, redundant.
2. Some might argue the entrenched political belief of successive Government’s that Articles 40.3 and 43 impose a serious and insurmountable obstacle to robust legislative action, *by itself justifies* holding a referendum. Simply put, the argument is that whether or not the Government’s position on the constitutional limits on the Oireachtas’ power to regulate property rights is misconceived, a referendum would be justified if it can make clear, beyond any doubt, that the Oireachtas has ample authority to act in this domain.
3. I appreciate the sentiment motivating this kind of argument. It is frustrating to see Governments over the last decade deploy legal advice which is clearly - whether in substance or in its presentation - seriously out of step with the Superior Court’s treatment of Article 40.3 and 43. It is particularly frustrating when this entrenched misperception is used to block action and justify inaction on Ireland’s serious housing difficulties.
4. However, my considered opinion is that it would nonetheless be constitutionally irresponsible to pursue a referendum to amend Articles 40 and 43 based on nothing more than an ultimately *mistaken* political perception of how they are hamstringing the ability of the Oireachtas to legislate. Amending our fundamental law based on an erroneous understanding of existing constitutional limitations on the Oireachtas is no way for a mature constitutional democracy to resolve its political problems.
5. Instead, the Government and Oireachtas should first seek to test the bounds of their existing constitutional authority to regulate property rights. Should the Superior Courts invalidate legislative measures brought to address the housing crisis under the Oireachtas existing constitutional authority – whether via an Article 26 reference or in the course of ordinary litigation – then at that point it would be a more appropriate and proportionate response to consider a referendum that would better empower the Oireachtas to regulate property rights.
6. But to pursue amendment now, in circumstances where (i) the Superior Courts have been very consistent in their attitude of deference to the Oireachtas and (ii) where no one outside Cabinet knows the precise reasons why the Oireachtas is ostensibly constitutionally hamstrung, seems to me a regretful waste of political energy.
7. I suggest the most appropriate course of action, that could be undertaken immediately, would be to disclose what constitutional problems the Attorney General’s Office and Government are concerned about – whether in full or précis form – to bring a measure of transparency to bear upon the ostensible difficulties blocking the Oireachtas taking robust legislative action. Then, the Government could consult widely with relevant constitutional experts to see what solutions could be found to address these concerns.
8. Following this, the Government could bring forward whatever legislative measures it thinks appropriate to address Ireland’s current housing issues and to test the bounds of the Oireachtas’ existing constitutional authority.

Conor Casey

25th April 2022

1. Terms of Reference of Housing Commission (12 January 2022), <https://www.gov.ie/en/publication/e9d71-terms-of-reference-for-the-housing-commission/>. [↑](#footnote-ref-1)
2. Article 15.2.1. [↑](#footnote-ref-2)
3. Article 28.2. [↑](#footnote-ref-3)
4. Article 28.4.4. [↑](#footnote-ref-4)
5. Conor Casey & David Kenny, ‘The Resilience of Executive Dominance in Westminster Systems: Ireland 2016–2019’ (2020) Public Law 356, 359-362. [↑](#footnote-ref-5)
6. *Pringle v. Ireland* [2012] IESC 47. [↑](#footnote-ref-6)
7. 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

   2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen. [↑](#footnote-ref-7)
8. 1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

   2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

   2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

   2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good. [↑](#footnote-ref-8)
9. See Hilary Hogan, ‘The Decline of Article 26: Reforming Abstract Constitutional Review in Ireland’ (Forthcoming 2022) 67 Irish Jurist. [↑](#footnote-ref-9)
10. Professor Doyle notes the “intellectual lineage of Article 43 unquestionably lies in the natural law tradition” Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart 2018) 94. [↑](#footnote-ref-10)
11. Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021) 60. [↑](#footnote-ref-11)
12. Pope Leo XIII, *Rerum Novarum: On Capital and Labour* (May 15, 1891). [↑](#footnote-ref-12)
13. Pope Pius XI, *Quadragesimo Anno: On the Reconstruction of the Social Order* (May 15, 1931). [↑](#footnote-ref-13)
14. Walsh (n 11) 61; Donal Coffey, *Drafting the 1937 Irish Consttution: Transnational Influences in Interwar Europe* (Palgrave Macmillian 2018) 236-241. [↑](#footnote-ref-14)
15. Conor Casey & Adrian Vermeule, Myths of Common Good Constitutionalism 45 (2022) Harvard Journal of Law & Public Policy 103, 138-144. [↑](#footnote-ref-15)
16. Article 34.3. [↑](#footnote-ref-16)
17. Walsh (n 11) 14. [↑](#footnote-ref-17)
18. David Kenny, ‘Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland’, 66 (2018) American Journal of Comparative Law 563-564; see Rachael Walsh, ‘The Constitution, Property Rights and Proportionality: A Reappraisal’ (2009) 31 Dublin University Law Journal1. [↑](#footnote-ref-18)
19. Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021) 14. [↑](#footnote-ref-19)
20. id. [↑](#footnote-ref-20)
21. Rachael Walsh, ‘Constitutional Property Rights – Setting Parameters for Responses to the Housing Crisis: Written Submissions to Housing Commission’ (May 2022). [↑](#footnote-ref-21)
22. *Kelly: The Irish Constitution* (Bloomsbury 2018). Including Professors Rachael Walsh, David Kenny, Gerry Whyte and Judge Gerard Hogan. [↑](#footnote-ref-22)
23. id., xvii. [↑](#footnote-ref-23)
24. Hogan and Keyes note how the “manner in which constitutional property rights have been debated and discussed by those in Government over the past decade suggests that the Constitution and the courts prohibits radical State intervention in the housing market.” Hilary Hogan and Finn Keyes, The Housing Crisis and the Constitution (2021) 65 Irish Jurist 87, 117. [↑](#footnote-ref-24)
25. # See e.g., Fergus Finlay, "We must change the Constitution if we want to end homelessness scandal", Irish Examiner (27 January 2020); Liam Cahill, ‘To tackle homelessness we must amend the Constitution’ Irish Times (18 August 2017).

    [↑](#footnote-ref-25)
26. Article 28.4.3. [↑](#footnote-ref-26)
27. Conor Casey & David Kenny, (n 5) 369. [↑](#footnote-ref-27)
28. Eoin Carolan, ‘The Constitution, politics and public policy’, in David Farrell and Niamh Hardiman (eds.), *Oxford Handbook of Irish Politics* (Oxford University Press 2020) 236. [↑](#footnote-ref-28)
29. id., 239. [↑](#footnote-ref-29)
30. See Conor Casey & David Kenny, ‘The Gate Keepers: Executive Lawyers and Executive Power in Comparative Perspective’ (Forthcoming 2022) International Journal of Constitutional Law. [↑](#footnote-ref-30)
31. Conor Casey & David Kenny, ‘A One-Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency’ (2019) 42 Dublin University Law Journal 89, 96. [↑](#footnote-ref-31)
32. Conor Casey & Eoin Daly, ‘Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland’ (2021) 17 European Constitutional Law Review 202, 210. [↑](#footnote-ref-32)
33. Casey & Kenny (n 5) 369-371. [↑](#footnote-ref-33)
34. Kitty Holland, 'Kelly Says Constitution Blocked Attempts to Tackle Housing Crisis' The Irish Times (Dublin, 31 March 2016). [↑](#footnote-ref-34)
35. id. [↑](#footnote-ref-35)
36. Hogan and Keyes, (n 24). [↑](#footnote-ref-36)
37. Casey and Daly, (n 32) 210-211. [↑](#footnote-ref-37)
38. Carolan (n 28) 241. [↑](#footnote-ref-38)
39. id. [↑](#footnote-ref-39)
40. Casey and Daly, (n 32) 223. [↑](#footnote-ref-40)
41. # Conor Casey & John Larkin, ‘The Attorney General and Renewed Controversy Over the Law/Politics Divide’ (Forthcoming 2022) 2 Edinburgh Law Review.

    [↑](#footnote-ref-41)
42. Walsh (n 11) 244-245. [↑](#footnote-ref-42)
43. Walsh (n 21). [↑](#footnote-ref-43)