

CHAPTER 1

Introduction

Introduction

Housing as a home affects everyone. The concept of home involves the human dimension of living and having relationships with other people. It encompasses important subjective emotional, cultural and physical issues. It is through these factors that the physical structure of a house acquires the quality of a home. Indeed, this interaction and the means by which houses are planned, produced, allocated, exchanged, financed and managed, forms the substance of housing law and policy. While the law of property relates to the ownership, control, use, and exchange of land and buildings, housing law is the expression of policy relating to people's interactions with land and buildings as homes. Housing law and policy is a product of the unique history of every country.¹ In Ireland, this involves a legacy of emotional bonds to land within a rapidly modernising and globalised State. Irish housing law has evolved from feudal legal concepts facilitating a few thousand large landed estates, later applied to almost half a million peasant proprietors, and now addressing almost 1.5 million householders in modern Ireland. The result is a complex and often contradictory situation. Housing law, in all its aspects, forms an integral part of legal activity, and this is set to grow as Ireland integrates further into the international economy and mortgage markets.²

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The legacy of insecure tenant farmers and the struggle for security of tenure continues to inform much political discourse and imagery around housing. The desire to be free of landlordism still appears as a primary reason for owner-occupation at any price. The cultural imagery of home and property ownership in Ireland is drawn from a distinct period in Irish history. Indeed, the dominance of the culture of peasant proprietorship in Irish politics and housing policy statements is pervasive. The liberal nineteenth century approach (as it then was) of expanding property ownership, and with it the creation of a responsible and civilised population, has been wholeheartedly endorsed by the modern Irish State. The hallowed and oft recited tenets of Irish housing law and policy, proclaimed by one Mr Raphael Burke TD, Minister for Environment,³ continue to echo into the twenty-first century.

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“Many people would argue that the Irish are by nature a conservative race. In the area of housing distinct characteristics have emerged over the years, which render us different from our European neighbours. One of these is the desire to own one's own home Successive Governments have recognised the natural inclination towards this form of tenure and the importance of providing it through the introduction over the years of measures designed to encourage home ownership!”⁴

¹ Housing in this book relates to all types of living accommodation from detached houses to apartments and caravans.

² See *The Integration of the EU Mortgage Credit Markets*, (European Commission, 2004).

³ Responsibility for “housing policy” (albeit in the sense of non-market housing) has rested with the Department of Local Government; Environment; Environment and Local Government; and more recently Environment, Local Government, and Heritage. For consistency the term “Department of the Environment” is used throughout and taken to mean whichever combination of functions it incorporates at that particular time.

⁴ See Fitzsimons, *Bungalow Bliss* (Kells, Co Meath, 1971), Foreword.

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- [1-03] If an Englishman's home is his castle, traditionally the Irish equivalent is surely "the field", but modern images of housing in Ireland are changing dramatically. Television programmes portray Ireland's "Househunters in the Sun" and Duncan Stewart's affluent self-builders and gentrifying owners. Caricatures such as David McWilliam's "Robopaddy with the gut feeling of the downtrodden, combined with the bank balance of the overlord", in GAA T-shirt buying apartments off-plan in Kusadasi, demonstrates some current scenarios.⁵ Conversely, real life stories of couples leaving children in nurseries at six in the morning, ahead of a 12-hour commuting day's work (necessary to pay the huge mortgage on their starter home), and the working class suburban housing estates portrayed by Roddy Doyle, are also an integral part of Ireland's contemporary housing scene. But housing policy in Ireland has been largely commandeered by developers and house-building corporations since the 1960s. Indeed, it could be the case that one would learn more about Irish housing law and policy since that time by reading the reports of the Flood and Mahon Tribunals than by studying State policy documents on the topic.⁶ The same may even be true of today, since ownership of wealth, property, land, and housing is not widely divulged or researched. Indeed, we only now know some 30 years later, after having resigned as a Minister in 1997, that "Mr Burke did not purchase his home at Briargate, Malahide, Swords from Oakpark Developments Limited in 1973 in a normal commercial transaction".⁷
- [1-04] Current housing policy in Ireland has struggled to deal with the economic development of the past 10 years. The upswing of the economy since the mid-1990s led to a rapid growth in demand for housing, primarily in the main cities, with a delayed growth in housing production. Between 1993 and 2001, the annual real growth in the economy was approximately eight per cent. Women's participation in the labour force rose from one of the lowest in Europe to close to the EU average, with numbers at work rising by three per cent annually. Returning Irish emigrants sought housing in the booming economy, and the rate of new household formation rose as result of the absence of emigration for the first time in the history of the State. This resulted in a booming housing market and housing price inflation up to 20 per cent per annum. The number of new houses and apartments built increased from some 39,000 in 1997 to almost 77,000 in 2004, bringing Ireland to the level of 400 units per thousand of population, significantly lower than the EU-15 average of 475 per thousand. All this unexpected development took place without a coherent housing policy appropriate for a modern industrialising country. It was largely left to the house-builders and developers to deal with this new phenomenon. Politicians initially complained that rapidly rising prices meant that the "nurse" and the "garda" could not afford to buy a house. By 2000, some new measures in planning and allowing access to those excluded from the market were developed, but the affordability issue was muted by the low interest rates arising from EU Economic and Monetary Union (EMU). While house prices continue to rise

⁵ See McWilliams, *The Pope's Children – Ireland's New Elite* (Dublin, Gill and Macmillan, 2005).

⁶ See Cullen, *With a Little Help from my Friends – Planning Corruption in Ireland* (Dublin, Gill & Macmillan, 2002).

⁷ See *The Second Interim Report of the Tribunal of Enquiry into Certain Planning Matters and Payments – The Flood Report* (2002), Summary/Conclusions at p 138. This quote refers to the same Mr R Burke.

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at comparatively exorbitant rates in a largely unregulated market, much political dissonance continues to pervade housing law and policy in Ireland today.⁸

The production of housing as a commodity in Ireland has now been developed to a very high level, with standard house types, increasing specialisation, and technological advances⁹ creating a very fine division of labour and skills, although there are concerns about productivity in the sector. The value of residential construction output has risen from £1.5 billion in 1991, to £7.6 billion in 2001 and in 2005 amounted to some 64 per cent of total construction output of €29.7bn.¹⁰ Persons employed in construction amounted to some 250,000 in late 2005, in itself a massive allocation of the resources of the State. Those associated with the functioning of the housing system in the areas of planning, law, finance, exchange, maintenance, and administrative work amount to a significant proportion of the working population.¹¹ But the ESRI has warned of the “euphoria” in the housing sector.¹² In its *Medium-Term Review 2005–2012*, it points out that:

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“The Irish economy is exceptionally dependant on the building industry for growth and employment. The continued growth in prices, well above the rate of inflation in most of the other rich EU countries, looks increasingly threatening. While a soft landing remains a possibility, one can envisage a range of shocks that could cause a dramatic turnaround in the sector. For example, a more extreme or sudden US adjustment process, through its negative effects on world growth generally, and in Ireland in particular, could cause a sudden loss of confidence bringing about a rapid and substantial fall in house prices of up to a third. . . . The loss of confidence and the related fall in prices could bring about a fall in housing output of around 40 per cent. . . . This *Review* is not suggesting that such a serious shock is inevitable. However, as the building and construction sector continues to grow it is becoming increasingly likely that some major shock will affect it, and, as a result, the whole economy.”¹³

Of course, Irish housing stock has improved greatly in the past 10 years when some 25 per cent of Irish homes were built. Indeed, only 22 per cent of current dwellings were constructed before 1940. Increased numbers of dwellings have led to a reduction in average household size to 2.9 persons per household, just higher than the European

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⁸ See Collins & O’Shea, *Understanding Corruption in Irish Politics* (Cork University Press, 2000).

⁹ The development of a flat-pack house, which is made in Ireland with insulated steel panels, overlaid with cedar cladding and topped with roof trusses, which can be erected in three or four days, costing €75,000, is being promoted by the British Deputy Prime Minister John Prescott MP. See *The Guardian*, 31 January 2005.

¹⁰ See DoE&LG, *Construction Industry Review 2000, Outlook 2001–2003*, p 25; DKM, *Review of the Construction Industry 2004 and Outlook 2005–2007*. Capital formation in housing as a percentage of gross domestic fixed capital has grown from 25 per cent in 2000 to 41 per cent in 2004.

¹¹ Indirect employment in the construction sector e.g. engineers, architects, planners, etc., is estimated at 40 per cent of direct employment, but this does not include other professions employed in conveyancing, finance, auctioneering, and other related areas.

¹² *The Irish Times*, 16 December 2005.

¹³ *Medium-Term Review 2005–2012*, (Dublin, ESRI, 2005), p. *iv*h.

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average of 2.48.¹⁴ Yet larger houses are being constructed, with some 30 per cent of dwellings in 2002 containing seven or more rooms. Some 44 per cent of Irish dwellings are detached houses or bungalows, 27 per cent are semi-detached, 18 per cent are terraced, with only 8.6 per cent comprising apartments or flats. However, in 2002, bungalows and detached homes accounted for less than a third of new homes, while apartment development has grown dramatically, with 44 per cent of all new units in County Dublin in 2003 comprising apartments.

- [1-07] Over one in four of the new homes built between 1991 and 2002 were one-off houses, amounting to more than 50 per cent in counties Galway, Monaghan, Roscommon, Cavan and Leitrim. The numbers of single “one-off” dwellings in the countryside was estimated in 2002 as accounting for some 32 per cent of new dwellings, but for 60 per cent in the Midlands and West.¹⁵
- [1-08] The 2002 Census also showed that almost 97 per cent of dwellings had a water supply (although in some rural areas, where 33 per cent of water is provided through group water schemes, some water is not potable). Almost 97 per cent of homes had a sewerage facility, and some 84 per cent of private dwellings had central heating.¹⁶
- [1-09] Surprisingly, in view of the State policy of promoting owner-occupation the proportion of tenure in this sector actually declined in recent times. The 2002 Census showed that there were some 1,279,617 private dwellings in the State of which some 77.4 per cent were owner-occupied—a reduction from 80.2 per cent in 1991. Yet, Ireland is portrayed by *The Economist* as having the highest rate of home ownership among the top 14 “developed nations” of the OECD.¹⁷ The proportion of new social housing units is diminishing every year, with over 93 per cent of new homes produced in 2004 in the private/market sector. The comparison of mortgage lending in 2004 of €17 billion on new private homes with €1.6 billion on capital expenditure on social and affordable housing measures somewhat reflects this position.
- [1-10] Housing quality has undoubtedly improved enormously, but inequality in society arising from housing policy has grown in equal measure,

“... the Irish housing system has been dynamic but unbalanced... The unbalanced nature of the system is evident in the gap between demand and supply, especially in Dublin in the early years of the housing boom, in the inequality of opportunities and pressures across income groups and in the imbalance in the provision of private and social housing”.¹⁸

¹⁴ National Economic and Social Council, *Housing in Ireland: Performance and Policy* (Dublin, NES, 2004), p 33.

¹⁵ See NES, *Housing in Ireland: Performance and Policy*, p 37. These figures are based on ESB connections to new dwellings in developments of less than five units.

¹⁶ CSO *Census 2002* Vol 13, *Housing*. Significantly, 34 per cent of local authority tenants were without central heating in 2002.

¹⁷ *The Economist*, March 30–April 5 2002, p 65.

¹⁸ See NES, *Housing in Ireland: Performance and Policy*, p 3.

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The year 2001 showed the fourteenth consecutive year of rising house prices in the Republic of Ireland, bringing the cumulative increase since 1987 to 350 per cent. Indeed, *The Economist* pointed out in 2004 that the price of houses had tripled since 1995, the most rapid house price inflation in the industrialised world.¹⁹ The average house price in 2001 was €207,000, or almost eight times annual incomes in the manufacturing sector.²⁰ New house prices had reached 12 times average annual industrial incomes by 2003, but the extent of unmet housing need also increased, with almost 50,000 households (over 108,000 people), on waiting lists for social housing across the country. Initial figures for the 2005 assessments showed some 43,684 households on local authority waiting lists.²¹ Other studies point to an overall housing need of some 106,000 households (amounting to some 250,000 people), taking into account those on rent allowance and those paying more than 35 per cent of net income on mortgage payments.²² Local authority housing strategies, required by the Planning and Development Act 2000 (PDA), showed that up to one third of new households would not be able to afford even the cheapest house or apartment in the housing market. One of the primary responses of the State was the 2003 Partnership Agreement which contained commitments to provide some 10,000 new “affordable” housing units for low paid workers who are excluded from accessing housing in the market.²³ By 2005, there was little progress and the Affordable Homes Partnership was established to facilitate housing developers and the market to produce some units of cheaper housing for sale, with assistance from the State through local authorities and extra subsidies through the provision of some State land.²⁴ The fact that there were many thousands of Traveller²⁵ children, women and men living on the Irish roadsides, and hundreds of people with disabilities living in hospitals and Victorian institutions because there was no suitable housing available to them, highlighted the weakness of the contemporary approach of Irish housing policy.²⁶

The absence of an open and comprehensive housing policy in Ireland has accentuated major age inequalities in Irish society. As one contemporary social commentator pointed out:

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¹⁹ *The Economist*, 3 January 2004.

²⁰ *The Irish Times*, 8 February 2002.

²¹ There are increases from the 2002 figures in all the main cities except the Dublin City area, and a decrease in almost all County Council areas with the exceptions of Kerry, Kilkenny, North Tipperary and Louth.

²² See Drudy & Punch, *Out of Reach: Inequalities in the Irish Housing System* (Dublin, tasc/New Island, 2005).

²³ *Sustaining Progress*, (Government of Ireland, 2003).

²⁴ The Affordable Homes Partnership has been established as a corporate body under the Local Government Services (Corporate Services) Act 1971, and will be subject to public service corporate governance disciplines, including audit, and appropriate ethics requirements will be applied.

²⁵ The term ‘Traveller’ refers an indigenous minority in Ireland of some 25,000 people who make up 0.05 per cent of the population. They claim a long shared history, cultural values, language, customs and traditions which make them a self-defined group, and one which is recognisable and distinct. Their culture and way of life, of which nomadism is an important factor, distinguishes them from the sedentary (settled) population.

²⁶ It is notable that no new agency or initiative to fast-track housing solutions for these excluded groups was developed in recent years.

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“The housing market bubble is causing the single biggest transfer of wealth from the young to the old that we have ever seen in any country in peacetime. Almost all societies since Mesopotamia have been based on the premise that the old pass wealth and wisdom to the young, but not so in the Ireland of 2002. Here, the young pass enormous amounts of wealth to the old via the housing and corrupt land market For every five indebted first time buyers, tearing their hair out in traffic this morning, there is an Irish sixty-year-old millionaire about to tee off in the Algarve sunshine”.²⁷

[1–12] Top prices paid for homes in 2004 in Ireland were €9.3 million in Ballsbridge, €9 million in Dartry, €8 million in Ballsbridge, €7.8 million in Clontarf, €7.7 million in Killiney, €7.1 million in Sandymount, and €6.2 million in Rathmines.²⁸ The equity held in private housing nationally amounted to more than €179 billion in 2002, when there were some 990,723 homes in private ownership, many without a mortgage.²⁹ Irish housing equity owners purchase second or holiday homes at increasing levels and this equity has been identified as the basis for much future mortgage market lending by international mortgage lenders.³⁰ On the other hand new house purchasers work longer hours to repay mortgages, usually at the same time in their lives when childcare responsibilities are greatest. The *Report of the Constitutional Review Group* in 1996 pointed out that 89 per cent of people in Ireland own some form of property or assets, with home ownership accounting for most of this. At a time of debate on equitable taxation policies it is truly remarkable that no recent study of the distribution of property and wealth in housing in the country has been undertaken.³¹

[1–13] There is specific legislation relating to social housing, and this extends the concept of property law to State housing. There are some added features to manage the behaviour of tenants and others in relation to maintenance and management of properties, particularly in estates of housing. Indeed, much of this legislation, such as the Housing Act 1966 and the Housing (Miscellaneous Provisions) Acts of 1992, 1997 and 2002 are

²⁷ McWilliams, *Saints and Spinners* (Dublin, Dialogue, 2004), p 19.

²⁸ *The Sunday Business Post*, *Property Review 2004*, 5 December 2004. According to *The Irish Times* 1 December 2005, the top price paid in 2005 was €58m. for a property in Ballsbridge, but this and other top priced properties in 2005 included significant amounts of development land.

²⁹ Based on 2002 Census figures of 272,342 homes in Dublin and 718,381 in the rest of the country in owner-occupation, and based on second-hand house prices at Quarter 2 in 2002 from the Housing Statistics Bulletin of €297,723 in Dublin and an average of €185,227 for the rest of the country. Residential mortgages from all lenders according to the *Central Bank Quarterly Bulletin* for Autumn 2002 was €34,756 billion, leaving a net equity from this simple analysis of €179,390 billion. Of course, the average does not disaggregate the many higher valued homes, and equally house prices have risen since 2002.

³⁰ See *View from the Rooftop, Prospects for Europe's Mortgage Markets*, (Citigroup, 2005).

³¹ The last comprehensive survey of personal wealth in Ireland was conducted in 1987 by the ESRI, and identified residential property as the single largest category accounting for 55 per cent of personal wealth. A survey in 2000 set out in Fahey, Nolan & Maitre, *Housing, Poverty and Wealth in Ireland* (Dublin, CPA, 2004) at Chap 6, stated that about 78 per cent of all households had some net housing wealth and that older people had more mortgage-free homes.

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primarily concerned with control of State property, or control of behaviour of tenant relations with property.³² The Irish “Ejectment Code” which originated in the reign of Queen Anne, removed every formality by which the common law delayed and obstructed the forfeiture of a tenant’s estate. This was extended to ejectment of yearly tenancies in 1851, and the destruction of tenancy rights under Deasy’s Act 1860, parts of which are still in force today. The same approaches and summary procedures from that time apply to the ejectment procedures used by local authorities in Ireland.³³

The development of social housing law and policy in the Republic of Ireland has often been viewed in the context of “the duty of the dominant classes to assimilate the poorest of the poor into national society”, while at the same time “tinkers were not so much citizens as wards of the State”.³⁴ Attempts to deal with the social exclusion of many Irish citizens arising from the historical residualisation of social housing have created yet more development and building opportunities, rather than any real distribution of resources.³⁵ Political rhetoric raising issues around Travellers, drug abuse, and anti-social behaviour has prompted much recent social housing legislation. While this has further strengthened the punitive and managerialist roles of the State, there has been little real change in approach to enhancing citizenship rights or equality of opportunity. In any case, the control of anti-social behaviour in some public housing estates has been poor.

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This “control” paradigm is fundamental to any examination and understanding of housing law in Ireland, in both the private and State arenas. Indeed, a small number of powerful individuals and institutions increasingly control new housing provision, land ownership and housing finance in the State. On the other hand, there is some limited concession to the moral rights of the poor to be given shelter, commiseration with those who are homeless, and to the Irish charitable neo-communitarian legacy of provision for families and individuals without resources.

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But housing policy in Ireland in the 21st century is largely occupied with housing equity, affordability, the ubiquitous predictions around market exuberance or slow-down, mortgage securitisation and occasionally the “horrors” of homelessness or one-off rural housing. There is an almost obsessive tendency to produce statistics on prices, units of output, and financial spending in both public and private sectors. There is a body of esoteric and insular information on “social” housing trends, problems and

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³² Although more measures and funding are developing to deal with common areas and communal facilities attached to housing schemes, largely with the objective of maintaining the property.

³³ See Housing Act 1966, s 62. See also Kenna, “Implications for Local Authorities of the ECHR Act 2003”. Paper presented to Human Rights Commission and Law Society of Ireland, European Convention on Human Rights Act 2003 Review and Human Rights in Committed Relationships, Conference, 16 October 2004. See www.ihrc.ie/documents/larticle

³⁴ MacLaughlin, “The evolution of anti-Traveller racism in Ireland”, *Race & Class* 37(3) 47 [1995]. See also McLaughlin, *Travellers and Ireland: Whose Country, Whose History* (Cork University Press, 1995).

³⁵ The term “residualisation” refers to the process whereby public housing is used largely to house those who are unable to go elsewhere, and who are on the whole economically and socially vulnerable. See Nolan & Whelan, “Urban housing and the role of ‘underclass’ processes: the case of Ireland” (2000) 10(1) *Journal of European Social Policy* 5.

expenditure, which largely ensures that this area is seen as separate from the “real” housing system. The only nexus between what is described as the “social” aspects of housing and the “real” housing system revolves around tenants’ inability to “get on the housing ladder”, fears of feckless tenant behaviour, illegal drug-taking affecting local house prices, and scares of Traveller invasions or nearby halting sites. This ensures that a partisan approach is evident in all housing policy debates.³⁶ Critical analysis of the housing system as a whole is noticeably absent.

- [1–17] This book seeks to offer another way of discussing housing in Ireland, which brings to the fore the legal and policy dynamics underpinning this important issue. The book examines the legal background to the flourishing housing market and housing system in Ireland. It uncovers some important principles, legally established rules and rights that are largely taken for granted in the debate. It identifies some fundamental changes that are taking place to the legal and policy basis of our housing system, in the development of rights approaches, consumer protection, the role and responsibilities of the State, the financing of housing, and the system of housing registration and exchange.
- [1–18] The author contends that Irish housing law and policy cannot be meaningfully understood in isolation. It is vital to examine the potential impact of relevant international legal instruments to which Ireland is a party, and which protect the human right to housing. One interesting by-product of this analysis is the acknowledgement that Irish constitutional law has, so far, been incapable of supporting the kinds of legislative measures needed to make our international legal commitments a reality. The approach of the State advancing social rights and intervening in markets to guarantee social and economic rights has not been a major feature of Irish political debate. Human rights are largely couched in natural law and individual moral rights terms, ignoring the structural components required to give effect to such citizenship guarantees already made by the State at international level. It is largely through European Union (EU) and Council of Europe (CoE) measures that important rights-based legal change has been prompted. The origins, development, and application of rights-based approaches to housing set out here can enhance a people-centred paradigm for examining housing law and policy in Ireland.
- [1–19] This study of housing law and policy in Ireland is divided into a number of chapters.³⁷ Chapter 2 examines housing law in Ireland, establishing a contemporary framework for the consideration of this extensive field of law which includes conveyancing, planning, mortgages, housing standards and infrastructural issues, regulation, and State housing supports and subsidies. Chapter 3 examines social housing law in Ireland, from the consolidating Housing Act of 1966 to the present day. In Chapter 4, social housing policy and the specific areas of housing need requiring State support are examined. Many indirect legal measures arising from equality, family, consumer, human rights, and other areas of law which impact on housing are considered in

³⁶ At the time of writing, there are proposals to introduce Anti-Social Behaviour Orders (ASBOs) into the Irish criminal law code.

³⁷ The term Ireland is used throughout with the meaning given to it in Art 4 of the Constitution of Ireland, but this is not intended to reflect a lack of concern with Northern Ireland, where the development of housing law and policy is based on different legislation and policies.

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Chapter 5. In Chapter 6 the controversial area of rural housing is examined, together with the growing private rented sector. Chapter 7 traces the origins and application of rights-based approaches to housing, including international human rights instruments. The European dimension to Irish housing law and policy is examined in Chapter 8, while Chapter 9 examines some contemporary and new influences on the development of housing law and policy in Ireland.