

A CONSTITUTIONAL REFERENDUM ON A STAND-ALONE RIGHT TO HOUSING

Home for Good Proposal on Wording for a Constitutional Amendment

Why is a referendum needed?

Bunreacht na hÉireann currently provides protection of private property rights in both Article 43 and Article 40.3. There is no equivalent right to housing in the Constitution. This means that the starting point of every legal analysis in respect of the regulation of land begins from the perspective of a property owner's right. While this right may be restricted in the interests of the common good, the starting point for analysis remains the private interest, with the common good only relevant insofar as it justifies the State in limiting this right to private property.

As a result, the Constitution perceives property as a private interest held by a rights holder, with the common good cast in opposition and the State given the role of protector of this private right.

A more effective and proactive Constitutional approach, in the context of the current crisis and in preventing future crises, would be to continue the existing protection for private property rights but weigh these against a right to housing. In this scenario, the legislature and the courts would be tasked with balancing two rights against each other, subject to the usual restrictions around proportionality and rationality.

This would remove the current overly-narrow interpretation of private property rights and enable the Government to respond to the current housing and homelessness crisis in a manner which properly and fairly balances competing interests. Not only does this create a fairer balance, it will better frame the State's role in housing — not only as a protector of private property rights but as a protector of our human right to safe and secure housing.

Recommendation:

The insertion of a new Article 43A on Housing in the Constitution as follows:

Housing

Article 43A

- 1 The State recognises, and shall vindicate, the right of all persons to have access to adequate housing.**
- 2 The State shall, through legislative and other measures, provide for the realisation of this right within its available resources.**

A stand-alone right

- Home for Good recommends that a constitutional amendment includes a stand-alone and directly enforceable right to housing.
- Policy-makers have repeatedly ruled out progressive housing policies to tackle the current crisis on the grounds that the constitutional protection of private property presents a

strong barrier to State intervention.¹ This is on the basis of certain legal analysis which narrowly interprets the extent to which the common good may justify such action by the State under Article 43.

- There is, however, significant consensus among academic lawyers that the Constitution does not present an automatic barrier to progressive housing policies.
- This is on the basis of the substantial constitutional recognition of the State’s entitlement to regulate private property: Art.43.2 allows private property to be regulated according to the principles of social justice. Nevertheless, this express recognition of the principles of social justice has not been sufficient to allow those providing legal advice to policy makers to endorse housing policies that have been proposed to address the housing crisis. There is little reason to think that the addition of further phrases beyond ‘social justice’ in Art.43.2 will have a significant effect on freeing up the policy process.
- To rebalance the Constitution and ensure that any potential barrier to progressive housing policy is effectively removed, Home for Good proposes the insertion of a right to housing as a stand-alone right of equal value to the right to private property.
- The courts have generally taken a different approach to the interaction of a constitutional right with the common good and the interaction of two competing constitutional rights. Although this is not perfectly consistent across all the case law, two general trends are evident:
 - Where the right to private property is limited in the interests of the common good, the courts will apply a proportionality test to that limitation. The law limiting property rights must be rationally connected to the aim, impair the right as little as possible and be proportionate to the aim (*Re the Planning and Development Bill 1999* [2000] 2 IR 321, 354).
 - Where legislation seeks to balance two protected constitutional rights, the courts are more deferential and will apply a rationality test (*Tuohy v Courtney* [1994] 3 IR 1, 47).
- This means that the express recognition of a constitutional right to housing will free up the policy space for addressing housing in a broader and more robust way if some further limitation on the right to private property were inserted.
- Owner occupiers will have increased constitutional protection under a new stand-alone right to housing. An owner-occupier will have the right to private property, the right to housing and the right to inviolability of the dwelling to protect their home. None of these are absolute, but it is worth stressing that a person who lives in a home that they own has nothing to fear from this proposed amendment and will, if anything, have their rights strengthened.

Formulation of wording

- The recommendation is that there be two aspects to the constitutional right:

¹ Keyes, “Briefing Paper: Property Rights and Housing Legislation”, Oireachtas Library and Research Service, 2019, accessible [here](#)

- a recognition of a directly enforceable right; and
 - a separate statement of the State’s obligation to realise that right within available resources.
- As a directly enforceable right, it is necessary to state the recognition and guarantee of the right in plain terms. However, as what is being proposed is a socio-economic right, it will involve positive duties being placed on the State and must have some regard to resources. As such, it is necessary to affirm the positive obligation to realise the right and the conditions attaching to that obligation. This has already been achieved in Art.42.4 in respect of the right to primary education and a similar approach is recommended here.
 - The recognition of these two elements is in line with guarantees given in public international law for example Article 11 of the International Covenant on Economic Social and Cultural Rights and Articles 27(1) and 27(3) of the Convention on the Rights of the Child.
 - The wording recommended is derived from Article 11.1 of the International Covenant on Economic, Social and Cultural Rights, to which Ireland is a party. General Comment 4 sets out the appropriate interpretation of that provision and the core terminology is incorporated in this proposed wording.
 - The wording is also an adaptation of the formulation in section 26(1) and 26(2) of the Constitution of the Republic of South Africa. The core principles of an express right and a stated obligation to realise that right are also contained in the South African wording. The wording proposed here has however been adapted to bring it in line with the language used in existing Irish constitutional rights guarantees, but the core concepts are the same as in the South African sections. This provides the added benefit of a body of existing case law from a similar legal system which can help inform the operation of a new right in the Irish Constitution in due course.
 - In reviewing State action, or inaction, affecting socio-economic rights, the South African Constitutional Court has generally tested same against the criterion of ‘reasonableness’. Academic analysis of that jurisdiction’s case law suggests that this standard requires that State measures must be comprehensive, adequately resourced, reasonably conceived and implemented, balanced and flexible, capable of responding to intermittent crises, responsive to the extreme levels of deprivation of people in desperate situations, and publicised to all affected parties.²

Policy obligations of the State under a stand-alone right

- The recommended amendment gives a constitutional framework for State involvement in the provision of housing for those who cannot house themselves. It places a positive constitutional obligation on the State to act, rather than, for example, to adopt an entirely passive market-led approach to housing.

² Brand “Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale” in Coomans (ed.) **Justiciability of Economic and Social Rights** (2006), at pp.21-3.

- This already occurs, to some extent, at a statutory level through the Housing Acts, but the obligation would be raised to a constitutional level and balanced against the right to private property. It would become the touchstone against which all action or inaction by the State would be measured.
- There is some room for manoeuvre as to whether the State has to do this directly or whether it would suffice for the State to fund others to do this. The existing constitutional socio-economic right to primary education (Art.42.4) has allowed for the State to fund others to provide the education directly. The State already provides housing to those in need through approved housing bodies under the Housing Acts. It is to be expected that such methods would be in line with the obligation in the second paragraph of the proposed stand-alone right.
- As was set out above, the inclusion of a stand-alone right will remove perceived barriers to the implementation of housing policy which affects private property rights. This changes the architecture of the legal space in which housing policy will operate. At present, policymakers are concerned that proposals might be unlawful because of the limitations provided by private property rights. That concern inevitably affects the development of housing policy. With a stand-alone right to housing, there will be a counterbalancing obligation to realise that right and an impetus for concerted and consistent action by the state.
- While constitutional rights are frequently seen as the preserve of lawyers and the courts, the effect of constitutional rights on overall policy is also important. It will form the baseline for all housing-related measures and be the prism through which any measure will be viewed. A constitution is a political in addition to being a legal document. The proposed obligation to realise a right to housing is a statement of legal obligation but is also a statement of political intent. In the event that the amendment is carried with substantial popular support, it will provide both a political mandate and political capital for action to address housing need.

Realisation within available resources

- A constitutional amendment providing for a standalone right to housing is not intended to guarantee everyone a house, never mind a “free” house of their choice. The right provides for generalised access to housing to an appropriate standard, which is not the same as a right to a house. The right to education in Article 42.4 has been a significant impetus for action, but it has never guaranteed parents the right to a school of their choosing, to be provided in the location of their choosing.
- The provision of housing ultimately depends on the availability and allocation of resources. A constitutional amendment cannot, of itself, generate additional resources. The most the amendment can do is oblige the State to use a share of existing resources for a particular purpose. That reality will exist whether or not there is an express recognition of it in the proposed right. However, for the sake of ensuring clarity of understanding of the obligations, it is proposed that the wording would expressly recognise that realisation is within available resources. This is also the approach envisaged under international law, which recommends a state realise the right of every individual in the shortest possible time in accordance with the maximum available resources.

Enforceable in the Courts in serious cases

- There has been a trend in Irish case law to defer to the other branches of government when seeking to enforce or give guidance on similar constitutional rights. One such instance being in the case of Article 42.4 and education. The Courts are most unwilling to be seen as in any sense ‘legislating’ where our elected politicians are designated to carry out this function. A constitutional obligation to realise the right to housing could nonetheless in serious cases be relied on to effectively address significant failure by the State to comply with its constitutional obligation. Those cases will require a policy response, but the other branches of government will have freedom in how that response is formulated. Existing case law on the rights of children with disabilities arising from Article 8 of the ECHR indicate the sort of approach that might be expected (see *O’Donnell (A Minor) v South Dublin County Council* [2011] 3 IR 417; *O’Donnell (A Minor) v South Dublin County Council* [2015] IESC 28).
- Where the State has unreasonably failed to discharge its obligations in respect of housing, the amendment would empower the courts to review such failure to grant appropriate remedies, up to and including mandatory orders directing the State to address the housing needs of particular litigants. The lessons of existing constitutional rights case law (e.g. primary education Art.42.4) is that the courts would be slow to intervene in this way in all but the most serious of cases. However that experience also shows that litigation may be one mechanism available to compel the State to remedy situations brought about by the State’s neglect of its constitutional duty.

October 2020