

CHAPTER 3

Perspectives on the Irish Housing System

Introduction

This chapter outlines the many and varied perspectives which are applied to housing systems and which are prevalent in Irish housing law and policy to a greater or lesser extent. It begins with an overview of the classical and neo-classical economics approach, which in fact applies most cogently to the Irish situation. Within that analysis, relatively simple views on supply and demand within a housing market are put forward as the basis of policy making. A more complex analysis developed by the World Bank and others, known as the “enabling market approach” offers a wider perspective on the development and maintenance of housing market systems at a holistic level, accepting their co-existence alongside subsidised and social housing.

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The Marxist perspective on housing policy and its contemporary development is set out as a contrast to the classical *bourgeois* approach. The legacy of the colonial landowning system and the rise of Irish peasant proprietorship allied, with a strong political nationalism, is a theme which recurs in almost all examinations and public pronouncements on Irish social policy and law. It pervades thinking among powerful players in the housing system, although its contemporary relevance was questioned by the All-Party Oireachtas Committee on the Constitution in 2004.

More modern perspectives developed under newer sociological philosophies have led to the concept of “pathways” being introduced into housing policy. Indeed, this perspective has been adopted in recent State reports on homelessness and access to owner-occupation. The concept of “home” offers a newer consumer and person-oriented perspective, and this concept is already embedded in human rights law, as well as in Irish constitutional provisions. Social justice and human rights perspectives on the housing system view housing as an essential part of the development of human dignity, although rights-based approaches are becoming a little more sophisticated in their examination of State policies. However, the most influential perspective on Irish housing policy is derived from the “Social Partnership” arrangements and the NESC “vision of society”, which has redefined Irish social policy in terms of a life-cycle approach, since 2006. All State housing policies are drafted and monitored within this social partnership framework, and the current State policy approach, based on *Building Homes - Sustaining*

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Communities (2007) explicitly draws on the NESL lifecycle approach. Of course, the legal system and the operations of Irish law are not bound by social partnership, even though the Housing (Miscellaneous Provisions) Act 2009 specifically traces its origins to that process. There is a modernisation process underway into the registration and exchange of land and housing. The courts, especially at lower level, however, operate largely on the basis of housing as property, and a 19th century neo-liberal *petit bourgeois* perspective on the housing system (separating the deserving from the undeserving poor), combined with occasional semi-feudal notions of imposing social order on the lower classes.

Classical (and Neo-Classical) Economics

Classical Economics

3-03 The classical and neo-classical economics approach to housing systems begins (and sometimes ends) with descriptions of the factors of production and dynamics of housing markets.¹ The principle that the collective actions of producers in the market will ensure that useful items, including housing, are created, was developed by economists, such as Adam Smith in the late 1700s. He pointed out that “it is not through the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard of their own interest”.² A “hidden hand” guides the market towards a benevolent outcome for society. Of course, the housing system is now very sophisticated, yet these iconic 19th century models of markets pervade much political and public debate on housing in Ireland.

The legal rules on property and contract law date from that time and still contain many of these liberal market principles. The exchange of commodities—or the market—requires that clear and enforceable rules on ownership and exchange are firmly established. In the case of housing, or the property in land on which housing is built, there is a corpus of land, property and conveyancing law which guarantees the alienability of land and property, the exchange of housing as a commodity for value, and the enforcement of contracts. The law of property provides the rules by which a necessary element of legitimacy is conferred upon the *de facto* possession of scarce goods and resources. This approach allows the market in property,

¹ Classical economics is associated with the theory of value arising from the costs of factors of production and distribution, whereas neo-classical economics focuses on marginal utility, or marginalism, although neo-classical synthesis of Keynesian macroeconomics and neoclassical microeconomics is now widely promoted. Econometric studies of housing seek to apply economic theories to statistical data and there are many such studies of Irish housing.

² Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations*. (London, Strahan, W & Cadell, T, 1776). Smith also pointed out also that “people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”.

housing and other commodities to become prevalent and sustainable, based upon a particular view of society.

It reflects an impersonal, contract-based society in which each individual strives to maximise his own material interests. This philosophy gave priority to the institution of contract as the pre-eminent determining factor in the distribution of the material advantages of life.... In the world of *Gesellschaft* the law of property has no moral dimension. Its only function is to serve as a value-neutral medium of exploitation and exchange.³

Commodification of Housing

In 19th century and early 20th century Europe, housing and land became commodified—a historically defined situation, which arose with the rise of capitalism and fall of feudalism. This placed a value or price on housing and the land on which it was situated. 3–04

Price is an issue in market-based systems, but in societies where people build their own houses using raw materials which they collect and process themselves, price is not a determinant of housing consumption. Where mud is baked into bricks, trees are felled for roof timbers and grass is collected for thatch, the quality of housing may be limited by the availability of materials and the skills of self-builders, but homelessness is unlikely to be a problem. It is the commodification of housing which elevates the issue of price to such a dominant position. In other words, when land labour and materials all have to be paid for in cash, and dwellings are produced as commodities for sale, then obviously access to housing is determined by ability to pay and the supply of accommodation will reflect effective demand rather than need.⁴

The commoditisation of housing created an ambivalence over its nature, which is reflected today in many of the policy perspectives on the issue. On the one hand it can be a home, and on the other it can be a tradable or marketable item. Housing as a commodity, whose price is subject to laws of supply and demand of the market, implies a different relationship to its users than that which applies to housing as a basic human need. Marx described this genesis:

But it is only at a definite historical epoch in a society's development that such a product becomes a commodity.⁵

A commodity is in the first place an object outside us, a thing that by its properties satisfies human wants of some sort or another. The nature of such wants, whether, for instance, they spring from the stomach or from fancy makes no difference.⁶

³ Gray and Symes, *Real Property and Real People, Principles of Land Law* (London, Butterworths, 1981), p 17. Of course, this formal value neutrality concept is quite different in its substantive form.

⁴ Malpass, P and Murie, A, *Housing Policy and Practice* (London, Macmillan, 1994), p 4.

⁵ Marx, K, *Capital Vol. 1* (London, Lawrence and Wishart, 1983), p 67.

⁶ *ibid*, p 45.

Commodities come into the world in the shape of use-values, articles or goods such as iron, corn etc. This is their plain, homely, bodily form. They are, however, commodities, only because they are something two-fold, both objects of utility, and at the same time depositories of value.⁷

The Housing Market

- 3-05** The housing market is distinguished by a number of specific issues which are particular to it:

... and when taken together set housing apart from other goods and services. The principal features that distinguish housing from other goods and services in the economy are (a) this relatively high cost of supply, (b) its durability, (c) its heterogeneity (no two houses are identical in every respect) and (d) its location and fixity.⁸

- 3-06** Various sub-markets are differentiated by location, dwelling type, tenure, form, age, quality and other matters, but prices in the different segments of the market tend to be related to each other in a predictable way. However, in a macroeconomic context this does not undermine the principle proposed by neo-classical economists, i.e. that the housing market should reach the stage of perfect competition or equilibrium in an ideal world. Sometimes an ideological leap of faith is required to envisage this coherent housing market.

It is by no means a perfect market either, because of the flow of services; no two houses are the same; location matters; there are many externalities; new production forms only part of overall supply; there are delays in attaining market equilibrium because of the time lag between the rise in demand and the completion of new units. Still it is a market.⁹

- 3-07** There is a further feature of the housing market which is important in understanding demand and price rises. Because housing can be both a consumption item, i.e. providing shelter, warmth, privacy etc. and can also be an investment item, i.e. providing a real capital return on capital invested, there are some important differences between the housing market and the classical economic market in commodities:

Thinking about housing as an asset helps to explain some of the seemingly odd things that happen in the housing market. For instance, if prices are rising one would expect the demand for most goods to fall. The experience in the housing market is exactly the opposite, however, because investors are interested in capital gains to come in the future.¹⁰

⁷ *ibid*, p 54.

⁸ Kenny, *The Housing Market and the Macroeconomy, Evidence from Ireland*, (Central Bank Research Technical paper, 1/RT/98, 1998) p 1.

⁹ Angel, S, *Housing Policy Matters—a Global Analysis* (Oxford, OUP, 2000), p 74.

¹⁰ Gibb, *et al*, *Housing Finance in the UK* (London, Macmillan, 1999), p 29.

This leads to the sharp growth in prices in the housing market-based on speculation that the values will increase further.

The NESC Report *Housing in Ireland: Performance and Policy* examined the supply and demand of housing in Ireland. Its analytical approach sought to demonstrate that housing markets involved different factors than other markets. These are: 3-08

- The *longevity or durability* of the housing stock;
- The importance of *financial markets*;
- The *cyclicity* of housing markets;
- The *volatility* of house prices which can have significant effects on wealth and consumption;
- The *lumpiness* of purchase and consumption;
- *Housing wealth* which tends to differ from most other forms of wealth: since every household needs shelter, increases in house prices simultaneously change the market value of wealth and the costs of future housing;
- *Tax treatment*: the complex interaction of the property market with the tax system is widely regarded as an important feature of housing markets.¹¹

The NESC Report also points out that some of these characteristics of housing are reinforced by the fact that settlement tends to agglomerate, with the formation of large cities.¹²

Supply and Demand

Supply and demand are central concepts in the market system. According to classical and neo-classical economic theory, from this meeting of supply and demand, in situations of perfect competition between suppliers, the price should settle at a level of equilibrium, i.e. at a point where the price being paid equates with efficient production and fairness. Where supply exceeds demand, then the price will fall back to a level where it becomes unprofitable for producers. These will then withdraw from production until shortages cause the price to increase to profitable levels again. 3-09

Of course, in modern urban areas people largely have no choice but to enter the housing market to secure accommodation, thereby creating or increasing demand.

Shelter remains among the prime necessities of man, for obvious reasons. Yet in many market economies where food and clothing are plentiful, housing remains in short supply, as evidenced, for example by the long waiting lists

¹¹ NESC, *Housing in Ireland* (2004), pp 21–22.

¹² The NESC Report also examined theories of land and house prices, and theories of house price dynamics, including the cyclicity in markets, the impact of credit constraints and the impact of the rental market.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

for public housing in many Western European countries. Why? The problem has to do with demand and supply. A shortage means that supply falls short of demand: hence the name. This has a simple and fundamental consequence: if the price were right, there would be no shortage.¹³

- 3-10** Of course, the problem is that a large number cannot participate in the market at all. The concepts of demand in neo-liberal economics terms means the “ability to pay” and many have not this ability. The concept of need epitomises another more people-centred approach.¹⁴ The growth in demand for housing within the market is often ascribed to peoples’ desire for home ownership, but other forces are also involved in fuelling demand, such as the availability of credit (which circumscribes those who can purchase or participate in the market), or investors of capital seeking a low risk return.

The features and characteristics of home ownership are an outcome of market processes. Changes in the way the market for housing production and consumption works have affected features of the tenure... In market economies, goods and services are provided in a market supply framework and become subject to market regulation. Home ownership is a commodified form of housing provision. Whilst this is a somewhat cumbersome term, it encapsulates the driving force within capitalist economies—namely the search for new areas of profitable activity... Home ownership is mass produced and marketed as the *leitmotif* of settled affluent family life.¹⁵

- 3-11** In the developed market economy, with the consumption of housing being regarded like the consumption of any other commodity, policy approaches to housing need take on a different perspective. The need for housing now becomes expressed in market terms as a demand for housing. Here, the concepts of “demand” and housing “need” become closely defined:

The concept of demand is one taken from economics and refers to the ability and willingness of the individual consumer to pay for housing, and the concept of need is a socially accepted aspiration, describing that standard of adequacy which society as a whole adopts as an expression of collective interest.¹⁶

Contemporary classical and neo-classical models of housing demand analysis have focused on demographics, new household formation, immigration and migration, fiscal and interest rate developments, replacement housing stock, income distribution and the elasticity of demand.¹⁷ Housing market models based on econometric analysis of house price developments and algebraic equations relating to housing stock, supply, prices, personal disposable

¹³ Marx, *Capital Vol. I*. p 21.

¹⁴ See Drudy and Punch, *Out of Reach*, Chapter 2.

¹⁵ Forrest, *et al*, *Home Ownership, Differentiation and Fragmentation* (London, Unwin Hyman, 1990), p 3.

¹⁶ Doling, J, *Comparative Housing Policy* (London, Macmillan, 1997), p 8.

¹⁷ See NESCC, *Housing in Ireland: Performance and Policy*, at Chapter 2.

incomes, costs of finance, demographic patterns, land costs, rate of depreciation and other variables feature strongly in modern housing market analysis.¹⁸

Important assumptions are made regarding consumer behaviour, the nature of the commodity and the housing market, which is assumed to veer towards equilibrium.¹⁹

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- There are many buyers and sellers;
- In relation to the aggregate volume of transactions the sales and purchases of each household are insignificant;
- There is no collusion amongst or between buyers and sellers;
- There is free entry and exit from the market for both consumers and producers;
- Consumers have a continuous, transitive and established preferences over a wide range of alternative choices of housing and non-housing goods;
- Consumers and producers possess both perfect knowledge with respect to prevailing prices and current bids, and perfect foresight with respect to future prices and future bids;
- Consumers maximise total utility whilst producers maximise total profits;
- There are no artificial (non-price) restrictions placed on the demands for supplies and prices of housing service and the resources used to produce housing service. For instance, house purchasers are not constrained by finance rationing or the non-availability of preferred housing choices;
- The market is assumed to be in equilibrium.²⁰

The key determinants of housing demand include:

- The price of owner-occupied housing;
- Disposable household income;
- Credit/mortgage available;
- The interest rate on mortgage payments;
- Household formation and other relevant demographic factors such as household composition, age and so on;
- Location relative to work/travel to work costs;
- The price of close substitutes (such as private or public renting);
- Tastes and preferences for different forms of housing, location and so on.²¹

¹⁸ For the detailed algebraic equations in relation to house prices see Angel, *Housing Policy Matters*, pp 74–80. In the Irish context this exercise is set out in Bacon Associates, *An Economic Assessment of Recent House Price Developments* (Dublin, The Stationery Office, 1998), pp 36–42.

¹⁹ See MacLennan, *Housing Economics* (London, Longman, 1982), p 36.

²⁰ *ibid.*

²¹ *ibid.*

Of course, demand for housing in growing industrial, urban areas has resulted in rising prices, and where there is a relatively fixed or steady level of supply, stratification takes place in the market.

It is not surprising that the cost of a house tends roughly to keep pace with the growth of incomes. Because housing is so central a feature of living standards and personal expenditure, any major development in consumption patterns (the introduction of central heating, motor cars, frozen foods or television, for instance) makes some impact on the kind of houses people want and the equipment they expect to find in those houses. As their incomes rise, they want more “house” and are prepared to pay more for it. But a change in the numbers of people in the household-formation age groups, or changes in the proportions of people in various age groups who form separate households, will have a direct impact on the numbers and the types of houses demanded.²²

3–13 Where there is a greater demand than supply, according to the classical model, then prices will rise, bringing further producers into the market.

The strength of the market economy lies in its inherent self-regulatory mechanisms (the hidden hand). When producers realize that their goods can no longer be sold at the existing prices, they will utilize both adjustment mechanisms on their own initiative; that is to say, they will reduce both the quantity produced and the price. The reason for such behaviour lies in the profit motive.²³

Osborne, writing in the *Central Bank Quarterly Bulletin* in 2005, summarised this neo-classical approach to housing markets:

At a theoretical level, there is a single widely accepted standard textbook model of the housing market. The two-equation model suggests that in the short-run, all other things being equal, house prices tend to overshoot their long-term values in a boom. Figures 1 and 2 below try to explain this phenomenon.

Examining Figure 1, at a given level of demand D , we observe that for any level of house prices below P_1 , an excess demand for housing exists, while for any level of house prices above P_1 , excess supply exists. Under conditions of short-run equilibrium, any stimulus to housing demand will result in a rise in house prices. In the short-run, the supply of housing is relatively fixed—i.e. the supply curve is almost vertical, meaning supply is inelastic or relatively unresponsive to prices. The demand curve, is, as usual, downward sloping. Recognising this, if there is a fall in the user cost (or an increase in disposable income), the demand curve shifts to the right to D . ‘Since in the short run supply is inelastic, the demand curve shifts from 0 to 1, and prices increase to match the relatively fixed supply of houses (P_2). However, in the long run, supply becomes more elastic and responsive to prices, as can be seen in Figure 2. This is represented by a relatively flat supply curve, and the housing stock increases and moves to a point 2. As a result prices fall (P_3).

²² Donnison, D & Ungerson, C, *Housing Policy* (London, Penguin, 1982), p 20.

²³ Isachsen, A, *et al*, *Understanding the Market Economy* (New York, OUP, 1992), p 34.

HOUSING LAW, RIGHTS AND POLICY

Figure 1.

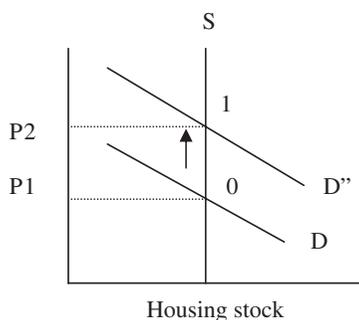
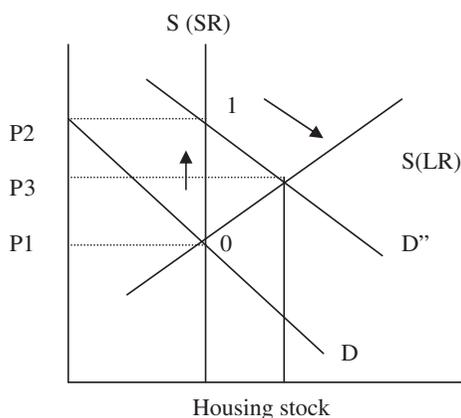


Figure 2.



An increase in demand will raise prices because supply is fixed in the short term. If buyer's expectations about future prices and lenders' willingness to extend credit are both based on recent price increases, demand will then rise further, pushing prices higher still.²⁴

Osborne also expands on the textbook model of housing markets to include other factors, such as availability of credit, locational desires and tax treatment.

While the theoretical model is important in explaining housing market dynamics, in the real world, where we observe credit rationing, spatial effects and tax treatment on owner-occupancy, things may turn out somewhat differently. Taking account of these features in practice is more difficult—largely related to empirical and econometric complexities.

Furthermore, the view that both the supply and demand for housing interact to determine an equilibrium level for real house prices should not be taken to

²⁴ See Osborne, J, "Housing in the euro area - Twelve markets, one money" *Central Bank Quarterly Bulletin*, 4, (2005) pp 87–114 at p 92.

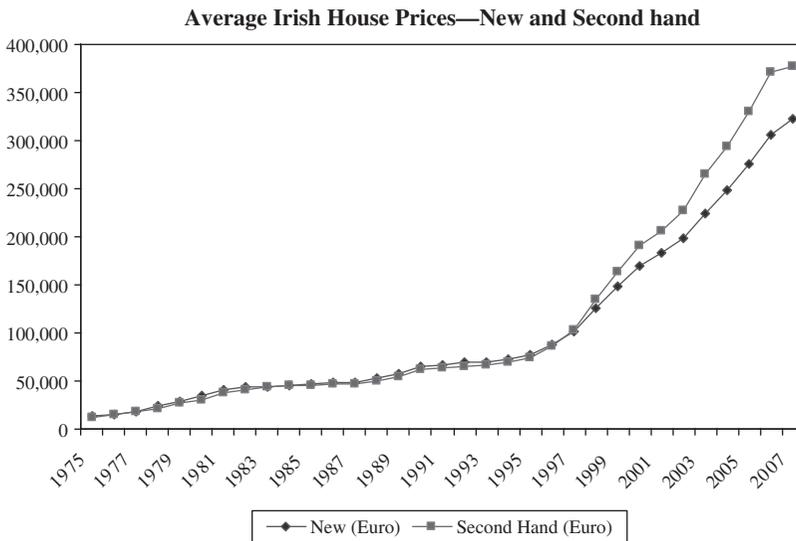
PERSPECTIVES ON THE IRISH HOUSING SYSTEM

imply that house prices are necessarily stable. In many countries it is frequently observed that house prices are significantly more volatile than would be predicted by the variation in the main determinants of supply and demand alone.²⁵

House Prices

- 3-14 House prices in Ireland have displayed an almost classical curve, which is closely related to access to housing finance.

Chart 3. Average House Prices 1975–2007²⁶



- 3-15 In any economic analysis centred upon market systems of provision, price signals play a critical role. In Ireland, various econometric models have been developed to determine the pattern of house price movements. In 1998, Murphy developed an econometric model comprising three equations dealing with demand, supply and determination of the overall housing stock, which was in line with reported economic literature.²⁷ In 2007, a new model of house price determination, driven by changes in income and

²⁵ *ibid.*

²⁶ Source CSO.

²⁷ Murphy, A, “*Econometric Modeling of the Irish Housing Market*” in Bacon Associates, *An Economic Assessment of Recent House Price Developments* (Dublin, The Stationery Office, 1998). See also Kenny, G, “The Housing Market and Macroeconomy: Evidence from Ireland”. No. 1/RT/98. Research Technical Papers from the Central Bank and Financial Services Authority of Ireland; ESRI Medium-Term Review 2008.

interest rates was proposed by McQuinn and O'Reilly.²⁸ This posited that the current level of income and interest rates would determine how much an individual could borrow from financial institutions to purchase housing, and was ultimately a key driver of house prices. The authors claimed that the results support the existence of a long-run relationship between actual house prices and the amount individuals can borrow. Fitzpatrick and McQuinn found a mutually reinforcing relationship between domestic bank credit and Irish house prices between 1996 and 2002.²⁹ Stevenson and Young compared three alternative models of forecasting housing supply in Ireland, highlighting key behavioural issues, such as the behaviour of developers in delaying projects.³⁰

Access to this mortgage finance determines access to housing in the market. Of course, where there is unlimited access to housing finance, prices can escalate. Drudy and Punch pointed out in 2005 that:

Ireland has the highest rate of house price inflation in the developed world over recent years, and despite the dismissals of the lending institutions and other housing-for-profit vested-interest groups, there is evidence to suggest that much Irish housing is significantly 'over-valued'.³¹

Balchin *et al.* have pointed out that the cyclical nature of the house-building cycle have been the result of bank lending policies. Booms have been the lagged outcome of low interest rates and conversely, slumps have been the delayed results of high rates- increasing and decreasing supply and demand respectively.³² In an analysis of residential investment in the boom-bust cycle, Rae and Van der Noord pointed out that between 1960 and 2004, some 49 construction booms have occurred in 23 countries for which data is available.³³ A boom is defined (rather generously) as a rise in the level of

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²⁸ See *Research Technical Paper - A Model of Cross-Country House Prices*, McQuinn, Kieran, O'Reilly, Gerard, 5/RT/07, July 2007. Central Bank and Financial Services Authority of Ireland. P.O. Box 559, Dame Street, Dublin 2. Ireland. <http://www.centralbank.ie>. See also *Research Technical Paper Estimating the Structural Demand for Irish Housing*. Addison-Smyth, Diarmaid, McQuinn, Kieran & O'Reilly, Gerard, 1/RT/08, March 2008.

²⁹ Research Technical Paper, *House Prices and Mortgage Credit: Empirical Evidence for Ireland*. 5/RT/04, October 2004. Central Bank and Financial Services Authority of Ireland. <http://www.centralbank.ie>.

³⁰ Stevenson, S & Young, J, "Forecasting Housing Supply: Empirical Evidence from the Irish Market", *European Journal of Housing Policy*, Vol. 7, No. 1, 1-17, March 2007.

³¹ Drudy, PJ & Punch, M, *Out of Reach: Inequalities in the Irish housing system* (Dublin, Tasc, 2005) p 11.

³² See Balchin, P, Isaac, D & Rhoden, M, "Housing Policy and Finance", in Balchin, P & Rhoden, M (ed.) *Housing - the Essential Foundations*. (London, Routledge, 1998).

³³ Rae, D & van den Noord, P, (2006) *Ireland's Housing Boom: What has driven it and have prices overshot?* OECD Economics Department Working Paper No. 492; See also Fahey, T, "The housing boom in Ireland: causes, effects of affordability and policy responses". *Housing Finance International*, June 2004, 11-17; McQuinn, K, "A Model of the Irish Housing Sector" Research Technical Paper i/RT/04, April, 2004.

real per-capita residential investment of at least 15% over a five-year period. In order to avoid identifying false peaks and data blips, a peak is defined as the highest point in a window of the preceding four years and the subsequent three years. In the cycles that have been identified, the average increase in real per-capita residential investment from trough to peak is around 40%. The largest occurred in Korea from 1973 to 1978 (where investment rose by 160%). The trough-to-peak increase has exceeded 50% in 16 cases.³⁴

- 3-17 The downturn that follows a housing boom is usually rapid. On average in the first year after the peak, 40% of the increase during the trough-to-peak upswing is reversed, with another 40% lost in the second year. Investment stabilises at that level for two years, before beginning to recover about five years after the peak. Rae and Van der Noord also examined the extent of so called “soft landings” in the housing market.

How common are soft landings? If a soft landing is defined as a relatively small reduction in the investment rate, they are not especially common. There have been only four cases where the decline in per capita residential investment has been smaller than one-third of the increase that occurred during the boom years (these are the Netherlands after 1978, Belgium after 1990, the United Kingdom after 1998 and Finland after 2000). Soft landings are more common if they are defined as *gradual* declines, *i.e.* where it takes at least three years to hit the trough. There have been around 20 examples of these. But all of these were comparatively deep declines. If a soft landing is defined as something that is *both mild and gradual*, there has not been a single case out of the 49 boom-bust cycles. It is also revealing to look at the behaviour of monetary policy before and after the construction peaks. Of the 34 booms for which there is also data on short-term interest rates, monetary policy tightened before the investment peak in only a little over half of all cases. Thus, there appear to be factors other than a tightening of monetary policy that have been responsible for many of the downturns.³⁵

House Price Statistics

- 3-18 Housing research in Ireland is predominantly positivist, with many conclusions on patterns of behaviour and trends in housing development being gleaned from statistical data. However, the source of this statistical data is worth considering as is its narrow base. This is particularly significant in relation to State published house price information, which is not collated on the basis of published house prices from individual sales. *The Irish Times* raised an important question in 2009:

Would investors buy shares in a stock market where transaction prices are known only to the buyer and seller, but not to other investors? Of course not. Investors would shun any stock market that lacked full price transparency. Nevertheless, that is how the domestic property market operates where the

³⁴ Rae, D & van den Noord, P, (2006) *Ireland's Housing Boom: What has driven it and have prices overshot?* OECD Economics Department Working Paper No. 492, p 20.

³⁵ *ibid.*

failure to publish sales process for those risks creating a false market, given the lack of reliable information available to buyers and sellers.³⁶

In Ireland, house sales are largely by private treaty rather than public auction, and only the buyer, seller, auctioneer and solicitor may know of the price paid. None is under any obligation to officially report the price, except the solicitor's verification of stamp duty or other tax liability. Although the auctioneering organisations support the collection of house prices through the disclosure of individual sales/purchases, the Data Commissioner has ruled that the sale prices of properties sold through private treaty cannot be disclosed without the consent of the parties.

However, many estate agents, auctioneers and financial corporations produce reports on house prices and other information based on their own sales and business patterns, such as Sherry Fitzgerald, Douglas Newman Good, National Irish Bank and others.

The *Annual Housing Statistics Bulletin* and *Quarterly Bulletins* of the Department of the Environment publish a range of data on house prices, housing completions, loans, etc. The annual bulletin for 2008 states under the title "housing market indicators" that a number of indicators are available to assess the trends in the housing market.³⁷ These include house completions, house guarantee registrations, commencement notices, planning permissions granted, serviced housing land availability, house prices and affordability measures.

All of Ireland's lending institutions submit details of loans approved to the Department which then calculates an average of house/apartment prices for the period. However, the Department acknowledges that in comparing house price figures from one period to another, account should be taken of the fact that changes in the mix of houses (including apartments) will affect the average figures. There may be a considerable time lag between the date of mortgage approval and the date of the completion of sale and thus there is a time lag in the information. The Bulletin uses data for loans paid from IBF/PwC Mortgage Market Profile since 2007, and this is not directly comparable with previous years data.

The Department pointed out in 2009 that:

Average House prices are derived from data supplied by the mortgage lending agencies on loans approved by them. In comparing house price figures from one period to another, account should be taken of the fact that changes in the mix of houses (incl. Apartments) and the continued slowdown in mortgage market activity will affect the average figures.

³⁶ *The Irish Times*, 8 September 2009.

³⁷ The Bulletin also publishes data on a monthly basis from Residential Commencement Notices, received by all of the 37 Building Control since January 2004.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

The Department with the assistance of the mortgage lending agencies and the CSO, is currently developing a mix-adjusted house price index which will take account of different property, location and purchaser characteristics.³⁸

3–21 The Department maintains an index of housing affordability measured by reference to the costs of servicing a mortgage. It states in the Annual Housing Statistics Bulletin (2008) that to take account of trends in family and work situations, and the steady increase in female participation in the workforce it is appropriate to examine trends in affordability for two-earner (married) households. The index assumes a loan period of 20 years, as this has been the traditional loan period. The availability of longer-term loans has meant that first-time buyers have been able to make lower monthly repayments but this has increased their overall cost of borrowing in the long run. This index is based on a two earner household—one person earning the average non-industrial wage and the other earning the average industrial wage. The 2008 mortgage outgoings are based on a 20-year mortgage, 5% interest rate and an average national house price of €305,269.

3–22 The Annual Statistics Bulletin includes details of private new house completions based on the number of ESB domestic connections. Social house completions are based on figures from local authority. New units acquired by local authorities under Part V of the Planning & Development Acts 2000–2007 for local authority rental purposes are included, as well as housing provided under the capital loan & subsidy and capital assistance schemes developed by voluntary housing associations and cooperatives.

The Central Statistics Office now provides a database of housing statistics online which includes house prices.

3–23 The Permanent TSB/ESRI House Price Index is a three-month moving average. The index is based on the agreed sale price and is calculated using data from mortgage drawdowns. Therefore a lag exists between the time the sale price is agreed and when the mortgage is drawn down.³⁹ The index is now based on quarterly mortgage sales processed by Permanent TSB and gives representative data on house prices and their movement.⁴⁰ The Permanent TSB/ESRI data distinguishes between dwelling size, type, location and other characteristics.

In the UK, the Land Registry House Price Index (HPI) captures changes in the value of residential properties. The HPI uses sales data collected on all residential housing transactions, whether for cash or with a mortgage, in England and Wales since January 1995. This can be searched at a national

³⁸ See: <http://www.environ.ie/en/PublicationsDocuments/FileDownload,20776,en.pdf>.

³⁹ See website: http://www.esri.ie/irish_economy/permanent_tsbesri_house_p/.

⁴⁰ For an examination of the international literature on house price indices, looking at the basic methodologies employed, the variables chosen for the indices and the functional forms used see Conniffe, D & Duffy, D, "Irish House Price Indices—Methodological Issues", *The Economic and Social Review*, Vol. 30, No. 4, October 1999, pp 403–423.

level as well as for the various regions, counties and London boroughs. The HPI is normally published on the 20th working day of every month. The report includes data up to the final day of the preceding month.

The HPI uses a sample size that is larger than all other statistical measures available. Since the Land Registry data set is the only complete record of residential property transactions in England and Wales, it is calculated by using the Registry's own "Price Paid Dataset". This is a record of all residential property transactions made in England and Wales since January 1995. At present it contains details on over 15 million sales. Of these, over five million are identifiable matched pairs, providing the basis for the repeat-sales regression analysis used to compile the index. This technique of quality adjustment ensures an "apples to apples" comparison between properties.⁴¹

3-24

Consumer Price Index and House Prices⁴²

There have been many questions as to why the rapid and enormous increase in house prices has not been reflected in the Consumer Price Index which forms the basis for wage increases and other measures of living expenses. In May 2003 the CSO issued an Explanatory Note on this topic setting out the position. Remarkably, for some, the Memorandum stated that:

3-25

There is no contradiction between rapidly rising house prices and low rates of inflation. In line with general international practice the Irish CPI does not reflect changes in house prices as such because house purchase is considered to be a capital acquisition or investment rather than consumer expenditure. Furthermore, most house purchases are financed through mortgage loans over a considerable period of time.

The Memorandum stated that although house prices are not included, the CPI does reflect changes in the mortgage interest costs. House price changes are taken into account in determining the level of average size mortgages. The CPI does include home ownership costs arising from repairs and decorations, local authority charges, house (dwelling and contents) insurance, mortgage interest or house maintenance services. Changes in mortgage interest costs are estimated by tracking the change in the cost of a fixed basket of mortgages of up to 20-year's duration (i.e. both current high mortgages and lower older ones are covered). Mortgage capital repayments and down payments on house purchases are not covered in the CPI, as they are also considered to be an investment.

3-26

⁴¹ See <http://www1.landregistry.gov.uk/houseprices/housepriceindex/>.

⁴² CSO, Consumer Price Index (CPI) House Prices and the Consumer Price Index- Explanatory Note, May 2003.

3–27 The Memorandum points out the differences between purchases of houses and consumer goods:

The coverage of home ownership presents considerable methodological difficulties in the compilation of CPIs in all countries. The main reason for this is that the purchase of a dwelling differs in a number of significant respects from the purchase of consumer goods. For example:

- it is generally the largest single purchase which an individual or household makes in its lifetime;
- the purchase is normally not paid for outright in cash but funded through long-term (20–30-year) mortgage loans;
- the mortgage impacts on household budgets in the form of large regular installment repayments which, in the case of variable interest rate agreements, can change if the interest rate changes.

The biggest difference, of course, is that houses have a long life span and can appreciate significantly in value over time. The purchase of a house, therefore, not only provides living accommodation for a family but generally is also a very profitable investment.

3–28 The CSO also examined the methodological approaches used in other countries to this issue of reflecting changes in home ownership in the Consumer Price Index, outlining the Consumption Approach, the Acquisition Approach and the Payment Approach, one of which is used by most countries.

(1) Consumption Approach

This method relates to the cost of using owner-occupied dwellings. Households are viewed as consuming shelter services provided by the dwelling, which they own. Two ways are used for reflecting this in the CPI in some countries:

– Imputed Rent Method

This method measures the change in the imputed rent which owner-occupiers, as tenants, are considered to notionally pay themselves as occupiers (or alternatively the expenditure they save by not renting similar property). In practice, the imputed rent must be estimated on the basis of the rents actually paid for privately owned unfurnished rented dwellings of an equivalent type (i.e. size, quality, facility, location, etc.) The disadvantages of the approach are that imputed rent as a notional concept, is very difficult to estimate in Ireland because of the small rental market and the differences between rented and owner-occupied housing, and would have a very large weight in the CPI due to the high incidence of owner-occupied dwellings (approximately 70% of the housing stock).

– Opportunity Cost Approach

This method measures the change in the opportunity cost (i.e. income foregone by the owner) in tying up capital in house ownership rather

than investing in some other financial asset. The disadvantages of the approach are that it is conceptually difficult to understand, is necessarily based on some arbitrary assumptions, and is again removed from market transactions impacting on inflation.

(2) Acquisition Basis

This approach measures the change in the prices actually paid in the market acquisition of dwellings. For existing dwellings most purchases coincide with a sale so the methodology is generally restricted to changes in the purchase price of net additions to the stock of owner occupied housing (i.e. new housing). The disadvantages of the approach are that house purchase is traditionally regarded as an investment rather than a consumer purchase, the real problem of collecting prices for comparable new houses over time, and the difficulty of excluding houses purchased for rental (i.e. business) rather than residence purposes in the estimation of the corresponding index weight.

(3) Payment Approach

This approach measures the change in mortgage costs actually incurred by house owners to occupy the house. Capital repayments and down payments are usually excluded as they are regarded as investments. One of the main arguments in favour of this approach in the Irish CPI is the public acceptability of the results. This is likely to be due to the fact that mortgage interest is regarded by house owners as being their current expenditure on housing (particularly when a rise in mortgage interest rates increases their mortgage installment repayments).⁴³

The CSO also outlined the practice in other countries in relation to the treatment of home ownership costs in the CPIs, pointing out that it varies considerably. Home ownership costs are omitted from the CPIs in Austria, France, Greece, Italy and Luxembourg. Mortgage interest payments are included in Australia, Ireland and the UK. Imputed rents are included in Denmark, Germany, Japan, Netherlands, Norway, Portugal and the US. The opportunity cost approach is used in Canada and Finland. The Memorandum also points out that:

Because of this variability in the treatment of home ownership costs and differences in the incidence of owner-occupied and rented dwellings in different countries, the International Labour Office (ILO) recommends that international comparisons of CPIs should be completed exclusive of all housing costs. The Irish CPI is published with/without housing costs and mortgage interest to facilitate such comparisons. The Harmonised Index of Consumer Prices (HICP), designed to measure inflation for EU member states on a comparable basis also excludes home ownership costs at present. Efforts are continuing to

⁴³ CSO, Consumer Price Index (CPI) House Prices and the Consumer Price Index—Explanatory Note, May 2003.

get an agreement on a harmonised approach on the treatment of owner-occupied housing, and a programme of research into the issue is currently underway.⁴⁴

Rationale for Intervention in Housing Markets

- 3–30** There is an acknowledgement, even among classical economists, that markets may not operate efficiently, or effectively, or indeed at all times with the best social outcomes. Some intervention may be necessary on grounds of efficiency, equity (horizontal and vertical), minimizing negative externalities, preventing monopolies and imperfect competition, providing information and protecting consumers, and in cases of market failure, by supplanting provision directly by the State.⁴⁵
- 3–31** In 2004, a report to the EU Housing Ministers advised that “in the vast majority of European countries the housing market as a whole, or specific segments of it, are in disequilibrium at the current time”.⁴⁶ The factors creating this disequilibrium included scarcity of development land, problems in relation to the efficient operation of planning, procurement and building control systems, low incomes of potential purchasers, and problems in accessing mortgage finance. A set of “equilibrium interventions” across the European States, including subsidies and the provision of social housing, is now reported to the EU Housing Ministers annually. This intervention has been described by one writer thus:

Among the advanced industrialised countries there are no examples of Governments being prepared to allow the continued existence of a housing system in which all the citizens have been left to search only among free markets alternatives.... They have introduced measures to modify the quantity, quality, price, access and control of housing, and in doing so they have also modified the ‘Iron Law’.⁴⁷

- 3–32** The “Iron Law” referred to here is:

... that those groups in societies with the greatest command over material resources will live in the biggest and highest quality homes and those with least

⁴⁴ *ibid.* In the Harmonised Index of Consumer Prices (HICP) the imputed prices for the services provided by owner-occupied housing are currently excluded. However, an index based on housing acquisition costs is being piloted for possible inclusion in future. It will be compiled separately from the HICPs on an experimental basis before any decision is made to incorporate it within the HICPs. National CPIs use a variety of methods - for example some use an approach involving imputed rents, some include mortgage interest in their CPI, while others entirely exclude the shelter costs of owner-occupiers. See European Commission, *Harmonized Indices of Consumer Prices (HICPs)* (Luxembourg, European Commission, 2004).

⁴⁵ King points out in *Housing, Individuals and the State – the morality of government intervention* (London, RICS, 1998), that contemporary housing and social policy is fundamentally at odds with political individualism, and such State approaches are aspects of communitarianism which are mutually exclusive to libertarian approaches.

⁴⁶ Norris & Shiels, *Regular National Report on Housing Developments in European Countries. Synthesis Report for EU Housing Ministers* (Dublin, The Housing Unit, 2004), p 147.

⁴⁷ Doling, J, *Comparative Housing Policy* (London, Macmillan, 1997), p 7.

command will find the lowest quality solutions: and for the latter their housing circumstances will be socially unsatisfactory.⁴⁸

Whatever the ideological basis, the level of industrialisation, the demographic or social characteristics, the climate, or the availability of building materials, governments have intervened widely and deeply within the production and consumption of housing. Indeed, all countries have a “political tenure strategy”.⁴⁹ Government actions have resulted in statutes, regulations and institutional arrangements, which have the effect of altering the balance of advantage and disadvantage facing households making tenure choices.

In his seminal work on Irish housing policy, in 1988, John Blackwell devoted a chapter to the criteria for evaluating housing policy where he pointed out that the criteria used to evaluate the outcomes under housing policy were linked to the basic reasons why Governments intervene in housing markets.⁵⁰ These are: 3–33

- (i) A wish to make housing markets work more efficiently; this is essentially an intervention on grounds of ‘market failure’
- (ii) In order to achieve minimum housing standards.
- (iii) A desire to promote either private or social ownership as something desirable in its own right.
- (iv) In a world where markets and private ownership are dominant, the achievement of a distribution of income other than that which would occur if market forces were to operate; this raises issues of equity.⁵¹

The efficiency case for government intervention in markets is that private markets are unable to deliver the “optimum” amount of housing services. First, there are “externalities” which occur in housing markets, such as public health dangers requiring legally binding public health codes. Secondly, there may be monopolies in the supply of housing in particular areas due to land ownership, costs of professional services or lending policies etc. Thirdly, purchasers may not have available to them the full information required to make informed decisions, such as prevailing prices in the area, attributes of a particular house or location etc.

Equity is concerned with achieving the most equitable distribution of goods and services among the members of society. In order to achieve equity through the housing market some intervention takes place in almost all industrialised countries. The equity case for intervention arises from the fact that the market assumes that individuals or households are the best judges of their own welfare, and will secure the housing which best suits them at a price they wish to pay. 3–34

⁴⁸ *ibid*, p 8.

⁴⁹ See Kemeny, J, *Housing and Social Theory*, (London, Routledge, 1992).

⁵⁰ Blackwell, J, *A Review of Housing Policy*, (Dublin, NES, 1988).

⁵¹ *ibid* at p 141–142.

Vertical equity deals with the treatment of people with different incomes. Progressive distribution of income ensures that those with higher incomes pay more or are taxed more. This can ensure that no one falls below minimum standards of income or services. Horizontal equity implies that those who are in all senses identical should be treated equally, i.e. “equal treatment for all those in a particular income group and with a particular family composition”. In terms of housing this involves the concept of equality of access “to ensure that elements such as income, sex or family background do not form a barrier to provisions: or equality of access with special provision for those with special needs, irrespective of ability to pay”.⁵²

3–35 Other forms of intervention to create equity can be targeted at certain sections of the population and applied in a number of different ways. History shows that particular types of household are almost always unable to secure adequate housing in a free market situation. Indeed, the wider context of income inequality in society will be reflected in the housing market options open to some people. Even after income redistribution in society, many others too, will not benefit from the market approach to housing allocation.

... self-regulating market mechanisms lack a social dimension which builds on the ethics of solidarity, equity and collective responsibility for the disadvantaged. The ‘invisible hand’ cannot provide services for those homeless people who are in need of social assistance or therapeutic care.⁵³

However, McLennan has pointed out that:

Government intervention is often proposed in the housing system not solely to effectuate income redistribution but to ensure consumption levels for externality or distributionally-related concerns specifically to housing conditions. In essence, consumer sovereignty for one group in society is suspended in order to pursue politically determined housing objectives which embody both redistributive concerns and housing consumption targets.⁵⁴

Political intervention in the housing market in Ireland has been characterised by political support for different interest groups. Close links between some political parties, developers and financiers involved in the construction industry, has meant that Irish Government intervention has not always been at the level of rational policy decisions for the common good.⁵⁵

⁵² Blackwell, J, *A Review of Housing Policy* (NESC Dublin 1988) p 143.

⁵³ Avramov, D, *Homelessness in the European Union. Social and Legal Context of Housing Exclusion in the 1990s* (Brussels, FEANTSA, 1995), p 8.

⁵⁴ MacLennan, *op. cit.*, p 161.

⁵⁵ See Report of the *Flood Tribunal*, (2000); Collins, N and O’Shea, M, *Understanding Corruption in Irish Politics* (Cork University Press, 2000); Cullen, P, *With a little Help from my Friends – Planning Corruption in Ireland*, (Dublin: Gill & McMillan, 2002).

Forms of Intervention

The Economic and Social Research Institute (ESRI), in its work on successive Irish National Development Plans, developed a four-way typology for the rationale of different types of public investment and other interventions in markets. This distinguished between public goods, such as products which are inherently public, i.e. cannot be provided on a private market basis (e.g. street lighting); corrective tax or subsidy which aims at altering relative prices facing firms or individuals in order to correct for some generally persistent externality; targeted schemes which are specifically designed to alter behaviour; redistributional tax or subsidy designed to alter the distribution of personal or household income in favour of particular groups, e.g. people who are less well-off.⁵⁶ 3–36

In most industrial countries, there are at least six types of strategies/policy options which Governments can adopt in relation to the housing market. These have been identified as non-action, exhortation, regulation, taxation, subsidies and direct provision.⁵⁷ They can be applied at the various stages of housing production, exchange, allocation or renovation as shown in the following matrix.⁵⁸ 3–37

Table 1. Range of Housing Policy Instruments

POLICY INSTRUMENT	POLICY STAGE			
	Development	Construction	Allocation	Renovation
Non-Action				
Exhortation				
Regulation				
Taxation				
Subsidy				
Provision				

Examples of actual intervention measures in the housing market across Europe take place both on the supply side and the demand side of the housing market system, which encompasses owner-occupation, social rented and private rented housing. There are a range of intervention in relation to owner-occupation, both on the supply side and the demand side. On the supply side there are examples of laws and policies in relation to: 3–38

- residential property tax
- subsidised sites for developers

⁵⁶ Morgenroth and Fitzgerald, *Ex-ante Evaluation of the Investment Priorities for the National Development Plan 2007–13*, ESRI, October 2006.

⁵⁷ Doling, *Comparative Housing Policy*, p 40.

⁵⁸ Balchin, *Housing Policy in Europe* (London, Routledge, 1996).

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

- serviced land for developers; area improvement grants
- renovation/improvement/adaptation/conservation grants; no stamp duty on new homes
- no VAT on new homes; specification of building standard
- tax relief against construction costs in designated areas and tax relief against maintenance costs

On the demand side there are interventions in relation to:

- mortgage interest tax relief
- no capital gains tax on sale of main residence
- no tax on imputed rent
- grants for first time buyers/self builders
- income support payments for mortgage payments
- low start mortgages
- shared ownership schemes/equity sharing schemes
- loan guarantees
- equity release schemes
- subsidised mortgages from the state and mortgage caps

Interventions by the State through law and policy in relation to private rented housing on the supply side include:

- capital subsidies to landlords tied to nominations
- rent controls
- income tax on rental income
- registration of rented properties
- enhanced rent payments to landlords for housing specific groups
- capital subsidies tied to rent control for a period of years
- subsidised interest rates to investors in private rented housing
- restrictions on evictions
- minimum standards/social protection
- depreciation allowances against tax for landlords
- tax relief for landlords against interest payments
- capital tax allowances for construction in designated areas
- capital gains tax exemptions on disposal of properties

On the demand side there are interventions such as tax allowances for tenants and housing allowances/income support measures, as well as legislation giving long-term security of tenure.

In relation to social rented housing there are interventions in law and policy in relation to:

- private loans with interest subsidies for approved bodies
- 100% capital grants to approved bodies
- capital costs written off

- annual allowances for maintenance and management
- rent to mortgage schemes

There are also a range of interventions and measures in social housing in relation to:

- differential rents related to income
- tenant involvement and tenant control
- residency qualification for eligibility
- income restriction for eligibility
- housing benefits to assist those on low incomes
- options to buy at discount as sitting tenants
- equal opportunities in access
- incentives to buy on private market
- adapted for special needs
- provision of support and care in specific projects
- security of tenure

Oxley has established that government intervention in housing markets across Europe can be categorised into 10 specific policy responses. Each involves a redistribution of resources, but each also involves the use of different policy instruments, and thus different distributional means and consequences. However, it is necessary to identify and estimate the level of all these subsidies.⁵⁹ 3–39

Whether or not housing is being subsidised and the degree of subsidisation are important political and economic issues. In the context of the European Union more heavily subsidised housing in one country than another may have significant consequences for labour costs, labour mobility and industrial competitiveness. In a housing policy context subsidies raise issues both about the efficiency and equity of resource allocation. The looseness or simply lack of definition of housing subsidy devalues debate about housing policy changes.⁶⁰

Among the policy measures used are; increasing household incomes to enable more people to buy; providing housing vouchers or housing allowances, tying the demand for decent housing by subsidising its consumption; guaranteeing or subsidizing mortgages; addressing non-market barriers to demand, such as providing personal or social support; subsidizing supply without price and allocation conditions; subsidising supply with price and allocation conditions; State supply with market allocation; State supply with non-market allocation criteria; changing 3–40

⁵⁹ See further on the lack of transparency of subsidies to the Irish housing system in Chapter 6 below.

⁶⁰ Haffner & Oxley, "Housing Subsidies: Definitions and Comparisons", (1999) *Housing Studies* Vol. 14, No. 2, p 149.

the definitions of housing need and decent housing; using a mixture of approaches.⁶¹

3-41 In the midst of these developments there is also another market, namely the “political marketplace”. In this marketplace, those who feel that the economic market has not delivered for them may politically agitate or lobby to get the State to intervene by either supplementing market mechanisms (by artificially boosting consumer power on the demand side or by stimulating the supply side market mechanisms with financial incentives), or, in exceptional cases, by supplanting market mechanisms with direct State provision. In other words, deficiencies in the primary marketplace (the economic marketplace) can be addressed in the secondary marketplace (politics).

3-42 There are circumstances where State funding of direct supply of housing can be justified in economic terms. According to Hills these are:

- paternalism, i.e. the feeling that assistance should be tied to meeting the actual housing need whereas as against, for example, simply giving cash people might use it for some other less desirable purpose;
- merit goods, which are seen as so important that everybody should have access to them (primary education is another traditional merit good);
- externalities, i.e. that if some people’s housing is of a particularly poor quality, then it has a knock-on effect on others such as their neighbours;
- legacy, i.e. the view that high quality buildings are a good investment to pass on to the future and that if left entirely to the market, people on lower incomes might construct poor quality housing.⁶²

Government intervention in the housing market arises from both general and housing policies, such as equity, redistribution, capital market issues and wider political and social aims, as well as the demand for re-election of political parties. In many ways, the latter is often the ultimate factor in decisions for intervening in the market. The various interventions in Ireland, from large-scale public housing provision, to support for greater owner-occupation, have often been in response to voter expectations.

3-43 Political considerations can vary from the desire to promote either private or social ownership as something desirable in its own right.⁶³ Planning the provision of housing to meet need, access to housing, minimum standards, affordability, environmental issues, conservation of particular areas or properties, integrating housing into overall planning issues and development

⁶¹ Oxley, *The Future of Social Housing: Learning from Europe* (London, IPPR, 2000), p 29.

⁶² See Hills, J, *Ends and Means: Future Roles of Social Housing in England*, ESRC Research Centre for Analysis of Social Exclusion (2007). Available at: <http://www.hcymru.org.uk/news/5573.html>.

⁶³ Blackwell, *op. cit.*, p 141.

of particular areas, all create the need for political intervention in the housing market. There is also the need to ensure that the market does not create social segregation. Thus, social protection and inclusion measures are now used to justify a range of interventions.⁶⁴

The Enabling Market System

Angel points out that in the absence of a clear and accepted definition of what constitutes housing policy and who attends to it, we can only speak of the housing policy environment—the set of policies or government interventions that motivate, enable, and constrain housing action.⁶⁵ He defines the housing policy environment as the set of government interventions that have a critical and measurable effect on the performance of the housing sector. This implies that policies that do not have any effect on the housing sector are not included. However, the definition is open and inclusive. 3–44

Defining “enabling” in the simplest terms as “setting boundaries and giving support, while relinquishing control”, Angel posits that some interventions are enabling, while others are non-enabling.

The enabling and non-enabling debate could be cast as a simple reformulation of the old dichotomy between laissez-faire and planning, between letting the market work versus abandoning the market in favor of a centrally planned economy—it should not be. Neither laissez-faire nor the centrally planned economy have survived the test of time. A real economy cannot function without government intervention or without markets. And given that there has to be some government intervention in the economy, the debate must be refocused on precisely what form intervention should take.⁶⁶ 3–45

Traditional economic models often apply a narrow view of society, assuming that all the necessary elements for a market to exist are present. However, Angel identified the essential elements of housing systems which must be in place for such a market to exist. In the context of widespread housing need within the global dominance of markets in housing systems Angel points out that:

... there is little merit in a housing policy that solely focuses on the poor, hoping against hope that “the market” will take care of the rest, without paying any attention to whether the market is functioning properly. When the market is not functioning properly, the poor are squeezed as well.⁶⁷

⁶⁴ For a contemporary analysis of the use of planning law to combat social exclusion in housing see Ponce, J, “Land Use Law, Liberalization, and Social Cohesion Through Affordable Housing in Europe: The Spanish Case”, *The Urban Lawyer*, Vol. 36, No. 2. Spring 2004. pp 317–340. See also Planning and Development Act 2000.

⁶⁵ See Angel (1997) pp 11–15.

⁶⁶ See Angel (1997) at p 13.

⁶⁷ See Angel (1997) at p 74.

3-46 Angel identifies the components of the contemporary “enabling policy” model of housing markets systems, as promoted by the World Bank and others, and widely accepted by policy makers and governments.⁶⁸ Functioning housing market systems require legal instruments and State involvement to create five essential elements:

- property rights regime;
- housing finance regime;
- residential infrastructure regime;
- regulatory regime;
- housing subsidies/public housing regime.⁶⁹

The establishment of individual and enforceable property rights in land and housing are seen as the cornerstone of this enabling housing policy regime.

A functional and effective property rights regime must evolve a set of transparent, predictable, non-discriminatory and stable rules that preserve the rights of individuals to use, invest, maintain, rent, mortgage and sell their land and housing properties without hindrance and with the full protection against arbitrary action by the authorities.⁷⁰

3-47 Contemporary writers on global development, such as Hernando De Soto,⁷¹ claim that one of the principal reasons for the underdevelopment of nations is the absence of a property registration system to facilitate mortgage lending,

⁶⁸ See *From Plan to Market: World Development Report 1996* (Washington, World Bank, 1996); *The State in a Changing World: World Development Report 1997* (Washington, World Bank, 1997); Buckley, RM and Kalarickal, J, *Thirty Tears of Shelter Lending: What Have We Learned?* (Washington, The World Bank, 2006). See also Andreasson, S, “Stand and Deliver: Private Property and the Politics of Global Dispossession”, 54, *Political Studies*, 3, 3–22 (2006), where he claims that the contemporary international vigour to create property rights in land and housing can be viewed as merely one step beyond the former colonial processes of dispossession of property by force. Such appropriation and commodification, often through appalling means, was once justified in the conception of private property by Lockean writings and later expounded by liberal thinkers. There is an important link between the essentially liberal project of primitive and capitalist accumulation and liberal thinkers, from John Locke to Friedrich Hayek, and the ideology and policy of international financial institutions managing the global economy today – the International Monetary Fund, the World Bank and the World Trade Organisation. The World Bank stresses that clear and enforceable legally defined property rights provide the necessary infrastructure for the global economy. Indeed, the export of US and European legal systems and property law have played a crucial part in the globalisation epoch, providing the means of legitimation for patenting, control, appropriation, and commodification of physical and human resources worldwide.

⁶⁹ See Angel (1997) at p 19.

⁷⁰ *ibid*, p 95.

⁷¹ De Soto, H, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London, Bantam Books, 2000).

consequently prohibiting the development of personal capital and equity growth in land and housing.⁷² The formal and informal rules governing property acquisition, sale, development and use are of critical importance. Housing is by far the most widely distributed form of private wealth, and investment in housing requires law facilitating certainty, exclusivity, transferability and constitutional protection. Complex legal ownership arrangements involving family law systems, with rules on ownership and division of property on marriage, separation, divorce, death and co-habitation are required. Innovative legal mechanisms have also been developed to deal with unregistered land, transfer and conveyancing procedures, disputes and the regulation of actors involved in housing markets.

The housing finance regime requires the creation and maintenance of an effective, enforceable lending and regulatory regime for housing finance, as well as the development of housing finance institutions and sustainable mortgage markets.⁷³ This regime involves legal measures relating to mortgages, equity release, charges, regulation of lenders, market liberalisation and competition, and occasionally consumer credit legislation. Housing finance is now a global issue, and its impact in the collapse of major financial institutions demonstrates the failure of policies which ignore housing systems. 3–48

The third requirement for the enabling market approach is an effective residential infrastructure regime. This requires legislation and regulation in relation to zoning, planning, public health, control of nuisance and sanitation measures, and planning controls on urban land development and supply. Detailed legislation and case law has developed in relation to roads and walkways, water, sewage, drainage, transport, public facilities and other services, which contribute to housing quality. 3–49

The fourth and most important element of this approach is the regulatory regime for quality in housing systems.⁷⁴ There is often a direct parallel between the growth of regulatory measures in this area and the state of development of a country. Building control measures exercised by the 3–50

⁷² *ibid.* But see Geoffrey Payne (ed.) (2002). *Land Rights and Innovation: Improving Tenure Security for the Urban Poor* (challenging De Soto's views on grounds of the cost and pace of formal titling, the existence of a continuum of tenure categories, and the suspicion of the poor toward banks). See generally Woodruff, C., *Review of De Soto's "The Mystery of Capital"*, 39, *Journal of Economic Literature*, 4, (2001) 1215–1218, (suggesting the costs of adjudicating claims may abrogate the gains from titling); Joe Flood, *Secure Tenure: Global Definition and Measurement* (Paper to European Network of Housing Researchers Conference, Vienna, 2002) (explaining that property and tenure rights in Europe grew from feudal and bourgeois concerns and mobilizing the capital of the middle class, and not from any desire to tap the capital controlled by the poor).

⁷³ *ibid.*, Chapter 8.

⁷⁴ See for example *Housing Regulation in Victoria – Building Better Outcomes*, (2005) [http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VCEChousingfinalreport/\\$File/VCEC%20housing%20final%20report.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VCEChousingfinalreport/$File/VCEC%20housing%20final%20report.pdf).

State are critical elements in the development of housing markets. Indeed, such markets actually require a legal and regulatory framework that only governments can provide, if the standard of housing produced is to be at a high level.⁷⁵

- 3–51 Housing subsidies are a central element of housing enablement policies.⁷⁶ World Bank recommendations are that subsidy programmes should be on appropriate and affordable scales, well-targeted, measurable, transparent and not distorting of the housing market.⁷⁷ The presence or absence of housing subsidies (and tax incentives) cannot be understood outside the broader framework of overall fiscal policy. Similarly, investment of capital in housing is part of overall government investment policy (percentage of GDP). Other State legal measures will include control of interest rates, curbs on public expenditure, and stimulation of demand through public spending on housing, tax reliefs, etc. These can be either on the supply side (subsidising producers), or the demand side (supporting purchasers), such as through grants for new homes. Social housing can be viewed both as part of a market support system and as an integral part of political largesse.

However, this “enabling policy” model fails to adequately consider the role of privately rented housing and its impact on other parts of the system, such as first-time buyers and social housing. Indeed, rent control and regulation measures have been imposed by governments of all hues since the 1800s. Rent levels can have significant impacts on housing demand and thus affect the housing for sale market system.

- 3–52 Some legal measures may involve controls on prices or rents, deemed necessary when the market fails to meet a social norm and the State should intervene. Statutory provision of social and affordable housing, with elaborate legal precedents and legislation on allocation, management, control, sale, and inheritance also play a significant role. However, the neo-liberalist inspired contemporary “enabling housing subsidy regime” largely involves a retreat from public housing production, towards privatisation of such stock and abolition of subsidies.⁷⁸

Weaknesses of the Neo-Classical Approach

- 3–53 The classical economics textbook model of housing markets was recently re-adopted by the Irish State following the publication of the Bacon Reports

⁷⁵ See World Bank (1991), p 1; See also UNECE, *Compendium of Model Provisions for Building Regulations* (Geneva, UNECE, 1996) ECE/HBP/81/Rev.1.

⁷⁶ See Angel (2000), at Chapter 9.

⁷⁷ See Mayo (1994). Of course there are many measures which distort the “perfect market” in housing such tax incentives, rent restrictions, etc.

⁷⁸ Cammack, “Attacking the Poor” (2002) 13 *New Left Review* 125; Doherty, *et al. The Changing Role of the State – Welfare delivery in the Neo-liberal Era* (Brussels: FEANTSA, 2005).

in 1998, 1999 and 2000.⁷⁹ This approach placed an almost messianic reliance on measures designed to achieve a better balance between demand and supply of housing. Such measures included rezoning large tracts of land, establishing areas for express planning decisions, reductions in Capital Gains tax and Stamp Duty, increase in residential densities and expenditure by the State on infrastructure designed to facilitate development of housing, especially for owner-occupation. Complex regulatory or holistic approaches to the housing system as a whole were largely absent. This reliance on neo-classical economic models has resulted in a housing crash, unaffordable housing, significant levels of negative equity amongst recent home-owners, many unfinished or “ghost” estates and enormous levels of public resources being transferred to privately-owned lending institutions. There is also a significant level of stratification and inequality arising from the effects of the unregulated housing market.

Drudy and Punch pointed out in 2002 that the housing system and the market-driven policies and State supports which underpin it were inequitable. While for some the Irish housing system is an engine for wealth generation, others face increasing affordability problems in accessing housing or are excluded from housing altogether.⁸⁰

Fox refers to the dominance of the economic discourse in relation to housing, with its efficiency arguments excluding many other criteria. She points out that feminist economic analysis challenges the claim to neutrality and objectivity that characterizes neo-classical economics. This deconstructs the model of “rational economic man” as sexually specific and provides the tools which can broaden the scope of economic analysis. Fox suggest that issues that are often seen as too value-laden by traditional economists are viewed as legitimate areas of enquiry by feminist economists who accept that economic questions involve values and value-judgments.⁸¹

3–54

Nationalist Irish Property Ownership Perspectives

There is a widely promoted perspective on the Irish housing system that it is successful precisely because it expands property ownership among the formerly oppressed Irish people, and involves a cadre of nationalist minded developers whose credentials are therefore unquestionable.⁸² This nationalist or post-colonialist view is regularly promulgated by Irish politicians,

3–55

⁷⁹ Bacon & Assoc, *An Economic Assessment of Recent House Price Developments* (Dublin, The Stationery Office, 1998); Bacon & Assoc, *The Housing Market: An Economic Review and Assessment* (Dublin, The Stationery Office, 1999); Bacon, P and MacCabe, F, *The Housing Market in Ireland: An Economic Evaluation of Trends and Prospects*, (Dublin, The Stationery Office, 2000).

⁸⁰ Drudy, PJ & Punch, M, “Housing Models and Inequality: Perspectives on Recent Irish Experience”, *Housing Studies*, Vol. 17, No. 4, 657–672, 2002.

⁸¹ See Fox, L, *Conceptualising Home; Theories, Laws and Policies* (Oxford, Hart, 2007), p 100.

⁸² O’ Toole, F, *Ship of Fools*, (London, Faber & Faber, 2009); McDonald, F and Sheridan, K, *The Builders* (Dublin, Penguin, 2008).

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

developers and bankers as a counter to critiques of the housing market system or the need for regulation. This perspective is based on restating the inequality in property ownership which persisted during British rule in Ireland. Of course, such inequality did take place and leading writers of the time described it.⁸³ Even English Liberals such as Joseph Kay, writing in 1880 were appalled at the situation:

The total area of Ireland is 20,159,678 acres. Of this-
452 persons own each more than 5000 acres.
135 persons own each more than 10,000 acres.
90 persons own each more than 20,000 acres.
14 persons own each more than 50,000 acres.
3 persons own each more than 100,000 acres.
1 person owns 170,119 acres.
292 persons hold 6,458,100 acres, or about one third of the island.
744 persons hold 9,612,728 acres, or about one-half of the island.
Two-thirds of the whole of Ireland are held by 1942 persons.⁸⁴

3-56 Kay pointed out that since the French Revolution of 1789 the greater part of the land of Switzerland, France, Germany, Austria, Holland, Belgium and Italy had been “released from its feudal fetters”. The land had been broken up into small estates or holdings and this had created a class of conservative, industrious, prosperous and independent yeomen proprietors”.⁸⁵ Ireland and England were the exceptions to the pattern. Indeed, Kay pointed out that many of these great landowners knew little or nothing of the state of their peasantry or farming on their estates. They received as much of their rentals as possible in England or abroad, and left their agents to enrich themselves at the expense of the peasantry. The census of 1841 had divided the houses of Ireland into four different classes, and the lowest class consisted of mud cabins, with one room only, where more than 40% of the population lived.

In common with many Liberals of the time Kay proposed that the large landed estates be broken up, and that a free trade in land should be developed. Associated with this would be land reform legislation.

Ireland requires a law which would enable the peasants, by industry, prudence, and economy to acquire land; which would thus interest the peasants in the support of the government and in the preservation of social tranquillity; which would dissipate the hopelessness and despair which now drives the fine peasantry of that noble island into disaffection and rebellion; which would make the Irish peasant as active and as successful in Ireland, as he is throughout the colonies and the United States... and which would offer him the same inducements to exert himself, and to practice sobriety, economy, self-denial, and industry as presents themselves to him as soon as he lands in

⁸³ See for example, Davitt, M, *The Fall of Feudalism in Ireland or the Story of the Land League Revolution* (London and New York, Harper and Bros., 1904).

⁸⁴ Kay, J, *Free Trade in Land* (5th ed.) (London, Kegan Paul, 1880), p 17.

⁸⁵ *ibid* at p 18.

North America. And we want a law which would bring capital to the land and land to the capitalist.⁸⁶

Over a century later, after the redistribution and peasant proprietorship espoused by Kay and others had taken place, these sentiments are often repeated as the motivation for property development and widespread housing ownership. The social movement for tenant's rights, and ultimately tenant purchase of small holdings, following redistribution and division of the large estates created a population of peasant proprietors. It is estimated that this British land reform had created some 316,000 small landowners by the end of British rule.⁸⁷

Leading Irish social commentator, Fintan O'Toole describes this phenomenon in 2009, in relation to the perspectives of many housing developers during the recent boom years.

3-57

This sense of historical vengeance suffused the mentality of the elite class of property speculators and developers who often came from humble, rural Catholic backgrounds and who rose sufficiently high to accumulate up to 90 billion [euro] of bad debts to Irish banks which the even humbler Irish taxpayer had to take on. They derived a particular pleasure from parading themselves at archetypically British upper-crust events like Royal Ascot racing festival, and at buying historically resonant English buildings ... Yet only rarely did the thought seem to strike any of those who were constructing great fortunes in property that they were themselves the new landed aristocracy.⁸⁸

O'Toole also states that the Irish obsession with having a secure home (rooted in a history of eviction and displacement) meant that the desire to own one's own home remained stronger in Ireland than in many other countries. Yet, new house prices between 1994 and 2007 were increased many times more than housebuilding costs, average incomes or the rate of inflation. The main reason for this, according to O'Toole, was the price of building land. Essentially, a small number of very wealthy land speculators were able to shape the market to ensure that the cost of land took up a larger and larger share of the cost of a home. O'Toole points out that if the control of land is left out of the equation, the sheer scale of the Irish property bubble is impossible to fathom. The owners of these lands and the developers with whom they worked formed a new aristocracy in Ireland.

To call the new super-rich elite an aristocracy is not as whimsical as the absence of blue blood or old money may make it sound. Nor is it simply a reflection of its desire for country mansions and racehorses, or even of its preference for the helicopter view of Ireland. What made the elite an aristocracy was precisely its

⁸⁶ *ibid* at p 308.

⁸⁷ Dooley, T, *The Land Question in Independent Ireland* (Dublin, UCD Press, 2004), p 2.

⁸⁸ See O'Toole, F, *Ship of Fools* (London, Faber & Faber, 2009), pp 98-99.

successful insistence on the privilege that defined the French aristocracy before revolution: exemption from taxes.⁸⁹

Of course, a similar perspective pervades many smaller property owners. In 2005, David McWilliams developed a caricature of “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.⁹⁰

All-Party Oireachtas Committee on the Constitution – Ninth Progress Report - Private Property (2004)

3–58 The *All-Party Oireachtas Committee on the Constitution – Ninth Progress Report - Private Property* (2004) pointed out that a new mindset was needed in Ireland in relation to conceptual approaches to land and property within a modern urbanised society.⁹¹ The Report of 2004 was outstanding and modernising in many ways, but particularly in the way in which it addressed the dynamics of the Irish housing market and the need to reconceptualise land in this country.⁹² Treating development land on the same legal and policy basis as agricultural land, or indeed people’s gardens, has been revealed for the absurdity it has become. The Report of 2004 clearly altered the distinction between traditional nationalist Lockean Irish concepts of land, rooted in an agricultural economy on the one hand, and the contemporary concept of land both as a commodity in the market and as a factor of production of housing for sale, on the other. This shift, as it was described in the, Report to a “different mind-set”, recognises that different legal treatment is required between land as people use it, and land as capital.

In a detailed analysis of how the property market works, the Report of 2004 set out “how urban land is created”.

Clearly, urban property does not exist in nature. It is created through a process of development that is supported by the provision of infrastructure at local, regional, and national levels. What are needed in urban areas to allow people to live, work, and engage in social activities are buildings, infrastructure and services. Without the necessary permissions and the physical structures and services, land itself cannot satisfy most human needs in urban areas. It is only as an ingredient in the process of producing useable space that urban land acquires value. The physical land is not more than the other ingredients, but it is the only

⁸⁹ See O’ Toole, F, *Ship of Fools*, (London, Faber & Faber, 2009), pp 80–81.

⁹⁰ See McWilliams, D, *The Pope’s Children – Ireland’s New Elite* (Dublin, Gill and Macmillan, 2005).

⁹¹ Government of Ireland, All-Party Oireachtas Committee on the Constitution, *Ninth Progress Report – Private Property*.

⁹² Government of Ireland, *The All-Party Oireachtas Committee on the Constitution-Ninth Progress Report-Private Property* (Dublin, The Stationery Office, 2004). Such changes were considered in detail at the time of the last housing boom when the control of development land was leading to presumed cartel conditions, in the *Kenny Report on the Price of Building Land* (1973).

one that cannot be moved elsewhere. Without accessibility, infrastructure, and services, and the capacity to use it, urban land will not have economic value.⁹³

While the Report of 2004 did not consider the internationally established requirements for efficient land markets in other urbanising countries, it proposed a more simplified and efficient land registration system, with transaction prices being made public.

In order to encourage transparency in property markets and research, transaction details should be gathered and published by the State. All land titles should be registered by a specific date. Auctioneers and estate agents, who generate, supply and promote market information should be regulated by either an independent body or the State.⁹⁴

The Report of 2004 made a significant proposal to the effect that the existence of options to purchase, another established and largely secretive device for controlling land use, should be included in the categories of transactions to be revealed publicly. A progressive tax on zoned and serviced development land which was not being developed by the owners, was also proposed in the Report. 3-59

The government should devise a scheme comprising a structure of progressive charges, whereby planning authorities can secure the release of development lands where development is not being actively pursued by the owners, or the development land is not being placed on the market by them.⁹⁵

The Committee fulfilled an historic function in offering a new theoretical basis for considering development land in contemporary Ireland. However, it is one which has yet to penetrate many political and housing system institutions.⁹⁶

The rate of change may have outpaced the change in our underlying understanding of the exigencies of urban life and the economics of urbanised property rights. Managing and controlling urban land and planning for the physical development of towns and cities requires a different approach to that required for managing a rural and agricultural environment. It demands a different mind-set.⁹⁷

⁹³ *ibid*, p 68.

⁹⁴ *ibid*, p 75.

⁹⁵ *ibid*, p 87.

⁹⁶ In July 2004, the Minister for State for Housing and Urban Renewal refused to make a Government-commissioned report by Goodbody Economic Consultants on “hoarding” of land by developers available to the joint *Oireachtas* Committee on the Environment and Local Government. See *The Irish Times*, 15 July 2004, Goodbody Economic Consultants, *Rationale for and Impact of a Use It or Lose It Scheme* (Dublin, Department of the Environment, 2003).

⁹⁷ *The All-Party Oireachtas Committee on the Constitution. Ninth Progress Report - Private Property*, p 68.

Significantly, only the proposal for a “betterment” tax on the increase of value arising from rezoning of land has been progressed by 2010.⁹⁸

It can be seen that a distinct Irish perspective exists on property in land, which has led to the acclamation of Irish property developers and landowners in some political and social circles, despite their contribution to the property crash. It is questionable if such political and social tolerance to developers would exist if they had been non Irish nationals.

Marxist Perspectives

- 3–60** Marx and Engels examined classical economic theories to society, and deconstructed these to sets of relations between capital and labour. Marxist approaches to housing systems are based on the principles of dialectical materialism, which argues that the dynamics of change in all societies is based on the outcomes of class conflict at different times and in different States. This struggle between classes in society, such as today, between capitalists and workers, will be reflected in the housing situation.

In the earlier epochs of history, we find almost everywhere a complicated arrangement of society into various orders, a manifold gradation of social rank. In ancient Rome we have patricians, knights, plebeians, slaves; in the Middle Ages, feudal lords, vassals, guild-masters, journeymen, apprentices, serfs; in almost all of these classes, again, subordinate gradations.

The modern bourgeois society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones.

Our epoch, the epoch of the bourgeoisie, possesses, however, this distinct feature: it has simplified class antagonisms. Society as a whole is more and more splitting up into two great hostile camps, into two great classes directly facing each other—Bourgeoisie and Proletariat.

From the serfs of the Middle Ages sprang the chartered burghers of the earliest towns. From these burgesses the first elements of the bourgeoisie were developed.⁹⁹

- 3–61** For both Marx and Engels the problems of housing were closely associated with the capitalist system and once this had been overthrown then these problem could be easily resolved. Although this prophetic approach remains unfulfilled, by relating historical, social, political and analytical interpretations of the relationship of housing to the means of production and the position of wage labourers in the capitalist system, Marxist analysis can add a valuable perspective to decipher contemporary housing policies. In relation to housing, there have been many policy approaches derived from these writings, ranging from co-operative housing, to social

⁹⁸ Schedule 3, Part 10 of the National Asset Management Agency Act 2009 amends the Taxes Consolidation Act 1997, s 644, to create a new windfall tax of 80% on profits or gains attributable to rezoning of land where the rezoning occurs after 30 October 2009.

⁹⁹ Marx, K and Engels, F, *Manifesto of the Communist Party* (1848).

or public housing, to socialist, social-democratic and communist housing policies.¹⁰⁰

In the *German Ideology*, Marx wrote “[t]he first premise of all human existence is ... that man must be in a position to live in order to make history. But life involves before anything else eating and drinking, a habitation, clothing and many other things”.¹⁰¹ He wrote at a time of appalling housing conditions associated with emerging capitalist industries drawing people from the countryside to the emerging cities and towns, with their poor housing and slums. The growth and conditions of this proletariat was described in the *Manifesto of the Communist Party*:

3–62

In proportion as the bourgeoisie, i.e. capital, is developed, in the same proportion is the proletariat, the modern working class, developed—a class of labourers, who live only so long as they find work, and who find work only so long as their labour increases capital. These labourers, who must sell themselves piecemeal, are a commodity, like every other article of commerce, and are consequently exposed to all the vicissitudes of competition, to all the fluctuations of the market.¹⁰²

Engels – “The Housing Question”

In the 1870s Engels published his major work on housing in the *The Housing Question*,¹⁰³ at a time when there was a major debate among the German workers and democrats on the shortage of housing available to workers in major cities. The influx and increase of the proletariat had led to a major housing crisis. In the *Preface to the Second German Edition* (1887) he describes the development of a housing problem arising from the migration of workers to the industrialising towns and cities:

3–63

The period in which an old civilized country makes such a transition from manufacture and small-scale production to large-scale industry, a transition which is, moreover, accelerated by such favorable circumstance, is also predominantly the period of “housing shortage.” On the one hand, masses of rural workers are suddenly drawn into the big towns, which develop into industrial centres; on the other hand, the building plan of these old towns does not any longer conform with the conditions of the new large-scale industry and the corresponding traffic; streets are widened and new ones cut through, and railways run through the centre of the town. At the very time when masses of workers are streaming into the towns, workers’ dwellings are pulled down on a large scale. Hence,

¹⁰⁰ See for example the Housing Code of the Russian Federation (2006).

¹⁰¹ See Marx, K & Engels, F, *The German Ideology* (London, Lawrence & Wishart, 1965), p 39.

¹⁰² See Marx, K & Engels, F, *Manifesto of the Communist Party* (1848).

¹⁰³ Engels, F, (1872) *The Housing Question*. Published (and re-published) as a pamphlet. Reprinted by the Co-operative Publishing Society of Foreign Workers; Transcribed: Zodiac, June 1995. Available at: <http://www.marxists.org/archive/marx/works/1872/housing-question/index.htm>.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

the sudden housing shortage for the workers and for the small traders and small businesses which depend for their custom on the workers.

Engels emphasised that all oppressed classes in early capitalist industrialisation suffer from a housing shortage, from peasant to worker, and as the problem grows it affects even the *petty bourgeois* group:

This shortage is not something peculiar to the present; it is not even one of the sufferings peculiar to the modern proletariat in contradistinction to all earlier oppressed classes. On the contrary, all oppressed classes in all periods suffered more or less uniformly from it. In order to make an end of *this* housing shortage there is only one means: to abolish altogether the exploitation and oppression of the working class by the ruling class. What is meant today by housing shortage is the peculiar intensification of the bad housing conditions of the workers as the result of the sudden rush of population to, the big towns; a colossal increase in rents, a still further aggravation of overcrowding in the individual houses, and, for some, the impossibility of finding a place to live in at all. And *this* housing shortage gets talked of so much only because it does not limit itself to the working class but has affected the petty bourgeoisie also.¹⁰⁴

3-64 Engels explains the relationship between landlord and tenant, but clearly distinguishes this from the relationship between worker and capitalist:

In the housing question we have two parties confronting each other: the tenant and the landlord or house owner. The former wishes to purchase from the latter the temporary use of a dwelling; he has money or credit, even if he has to buy this credit from the house owner himself at a usurious price as an addition to the rent. It is simple commodity sale; it is not an operation between proletarian and bourgeois, between worker and capitalist. The tenant—even if he is a worker—appears as a man with money; he must already have sold his own particular commodity, his labour power, in order to appear with the proceeds as the buyer of the use of a dwelling, or he must be in a position to give a guarantee of the impending sale of this labour power. The peculiar results which attend the sale of labour power to the capitalist are completely absent here. The capitalist causes the purchased labour power first to produce its own value and secondly to produce a surplus value which remains in his hands for the time being, subject to its distribution among the capitalist class. In this case therefore an extra value is produced, the total sum of the existing value is increased. In the rent transaction the situation is quite different. No matter how much the landlord may overreach the tenant it is still only a transfer of already *existing*, previously *produced* value, and the total sum of values possessed by the landlord and the tenant *together* remains the same after as it was before. The worker is always cheated of a part of the product of his labour, whether that labour is paid for by the capitalist below, above, or at its value.

The tenant, on the other hand, is cheated only when he is compelled to pay for the dwelling above its value. It is, therefore, a complete misrepresentation of the relation between landlord and tenant to attempt to make it equivalent to the relation between worker and capitalist. On the contrary, we are dealing here with a quite ordinary commodity transaction between two citizens, and this

¹⁰⁴ Engels, F, *The Housing Question: Part One, How Proudhon Solves the Housing Question* (1872).

transaction proceeds according to the economic laws which govern the sale of commodities in general and in particular the sale of the commodity, land property. The building and maintenance costs of the house, or of the part of the house in question, enters first of all into the calculation; the land value, determined by the more or less favourable situation of the house, comes next; the state of the relation between supply and demand existing at the moment is finally decisive.¹⁰⁵

Engels also points out that it is not the legal title of the house which gives it its economic value, but rather the economic conditions (which may have social recognition in the form of legal titles), which ensure that it can be let, and generate income over many years.

Marx and Engels also undertook detailed analysis of Irish housing and labour conditions at that time. Engels stated in an interview in 1888: 3-65

A purely socialist movement cannot be expected in Ireland for a considerable time. People there want first of all to become peasants owning a plot of land, and after they have achieved that mortgages will appear on the scene and they will be ruined once more. But this should not prevent us from seeking to help them to get rid of their landlords, that is, to pass from semi-feudal conditions to capitalist conditions.¹⁰⁶

Engels undertook a historical analysis of housing conditions in Manchester in 1844 and his writings provide a valuable account of housing conditions in the urban industrialisation of Britain. One area described was known as Little Ireland, for many years one of the worst slums in Manchester.

Little Ireland has long ago disappeared and on its site there now stands a railway station built on a high foundation. The bourgeoisie printed with pride to the happy and final abolition of Little Ireland as to a great triumph. Now last summer a great inundation took place, as in general the rivers embanked in our big towns cause extensive floods year after year owing to easily understood causes. And it was then revealed that Little Ireland had not been abolished at all, but had simply been shifted from the south side of Oxford Road to the north side, and that it still continues to flourish. Let us hear what the Manchester Weekly Times, the organ of the radical bourgeoisie of Manchester, has to say in its number of July 20, 1872:

‘... And so finally we came to Squire’s Court where we found a buxom and healthy-looking Irishwoman busy at the washtub. She and her husband, a night watchman, had lived for six years in the court and had a numerous family.... In the house which they had just left, the water had risen almost to the roof, the windows were broken and the furniture was reduced to ruins. The man declared that the occupant of the house had been able to keep the smells from becoming intolerable only by whitewashing it every two months.... In the inner court, into which our correspondent then went, he found three houses whose rear walls abutted on the rear walls of the houses

¹⁰⁵ *ibid.*

¹⁰⁶ Engels, F, From an interview published in the “New Yorker Volkzeitung”. 20 September 1888. Published in Marx/Engels, *Ireland and the Irish Question* (London, Lawrence and Wishart, 1971), p 460.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

just described. Two of these three houses were inhabited. The smell there was so frightful that the healthiest man would have felt sick in a very short space of time.... This disgusting hole was inhabited by a family of seven, all of whom had slept in the place on Thursday evening (the first day the water rose). Or rather, not slept, as the woman immediately corrected herself, for she and her husband had vomited continually the greater part of the night owing to the terrible smell.¹⁰⁷

3-66 Engels pointed out that this is a striking example of how the bourgeoisie solves the housing question in practice. The breeding places of disease, the infamous holes and cellars in which the capitalist mode of production confines workers night after night, are not abolished, but are merely shifted elsewhere. He states that the same economic necessity which produced them in the first place, produces them in the next place also. As long as the capitalist mode of production continues to exist, it is folly to hope for an isolated solution of the housing question or of any other social question affecting the fate of the workers. The solution, according to Engels, lies in the abolition of the capitalist mode of production and the appropriation of all the means of life and labor by the working class itself.¹⁰⁸

Engels described how the measures to improve poor housing conditions were inspired by a number of motives, among them the protection of the both the *petty bourgeoisie* and the “big” *bourgeoisie*, from contagious diseases arising from slums:

Modern natural science has proved that the so-called “poor districts” in which the workers are crowded together are the breeding places of all those epidemics which from time to time afflict our towns. Cholera, typhus, typhoid fever, small-pox and other ravaging diseases spread their germs in the pestilential air and the poisoned water of these working-class quarters. In these districts, the germs hardly ever die out completely, and as soon as circumstances permit it they develop into epidemics and then spread beyond their breeding places also into the more airy and healthy parts of the town inhabited by the capitalists. Capitalist rule cannot allow itself the pleasure of creating epidemic diseases among the working class with impunity; the consequences fall back on it and the angel of death rages in its ranks as ruthlessly as in the ranks of the workers.

As soon as this fact had been scientifically established the philanthropic bourgeois began to compete with one another in noble efforts on behalf of the health of their workers. Societies were founded, books were written, proposals drawn up, laws debated and passed, in order to close the sources of the ever-recurring epidemics. The housing conditions of the workers were examined and attempts were made to remedy the most crying evils. In England particularly, where the greatest number of large towns existed and where the bourgeoisie itself was most immediately threatened, great activity began. Government commissions were appointed to inquire into the hygienic conditions of the working classes; their reports, honorably distinguished from all continental

¹⁰⁷ Engels, F, *The Housing Question. Part Two. How the Bourgeoisie Solves the Housing Question* (1872); Kiernan, VG, *The Condition of the Working Class in England by Friedrich Engels* (London: Penguin, 1987).

¹⁰⁸ *ibid.*

sources by their accuracy, completeness and impartiality, provided the basis for new, more or less, radically effective, laws. Incomplete as these laws are, they are still infinitely ahead of everything that has been done in this direction up to the present on the continent. Nevertheless, the capitalist order of society reproduces again and again the evils which are to be remedied with such inevitable necessity that even in England the remedying of them has hardly advanced a single step.¹⁰⁹

Other *bourgeois* efforts to deal with the housing crisis are outlined by Engels, 3–67 such as the establishment of English workers' dwellings close to each big rural factories and mines, as well as the French and Austrian *bourgeois* barrack system of large buildings containing numerous workers' dwellings, as in Paris, Vienna, etc. He points out that the building of workers' dwellings is profitable from the capitalist point of view, even when all the laws of hygiene are not trodden under foot. Any investment of capital which satisfies an existing need is profitable if conducted rationally.

In relation to the emerging building societies in England at the time, 3–68 Engels was rather suspicious of their motives. Significantly, however, he described the thinking of many of the founders:

These building societies are not workers societies, nor is it their main aim to provide workers with their own houses... The building societies are essentially of a speculative nature, the smaller ones, which were the original societies, not less so than their bigger imitators. In a public house, usually at the instigation of the proprietor, in whose rooms the weekly meetings then take place, a number of regular customers and their friends, small shopkeepers, clerks, commercial travelers, master artisans and other petty bourgeois—with here and there perhaps an engineer or some other worker belonging to the aristocracy of his class found a building society. The immediate occasion is usually that the proprietor has discovered a comparatively cheap plot of land in the neighborhood or somewhere else. Most of the members are not bound by their occupations to any particular district. Even many of the small shopkeepers and artisans have only business premises in the town and not any dwelling; whoever is in a position to do so prefers to live in the suburbs rather than in the centre of the smoky town. The building plot is purchased and as many cottages as possible erected on it ... This is the life history of nine out of ten of the English building societies. The others are bigger societies, sometimes formed under political or philanthropic pretexts, but their chief aim is always to provide the savings of the petty bourgeoisie with a more profitable mortgage investment at a good rate of interest, with the prospect of dividends as a result of speculation in real estate.¹¹⁰

In a revealing passage from the *petty bourgeoisie* nature of the promotional 3–69 literature of the Birkbeck Building Society, Chancery Lane, London, Engels

¹⁰⁹ Engels, F, *The Housing Question. Part Two. How the Bourgeoisie Solves the Housing Question* (1872).

¹¹⁰ *ibid.*

illustrates the logic of using mortgages to purchase houses over a 150-month period.

Most people are acquainted with the so-called three-year system of the piano manufacturers according to which anyone hiring a piano for three years becomes the owner of the piano after the expiration of that period. Prior to the introduction of this system it was almost as difficult for people of limited income to acquire a good piano as it was for them to acquire their own house. Year after year such people paid the hire money for the piano and expended two or three times as much money in this way as the piano was worth. But what is feasible with regard to a piano is feasible with regard to a house. However, as a house costs more than a piano, a longer period is necessary to pay off the purchase price in rent. In consequence the directors have come to an agreement with house owners in various parts of London and its suburbs, as a result of which they are in a position to offer the members of the Birkbeck Building Society and others a great selection of houses in all parts of the town. The system according to which the board of directors intends to work is the following: it will let these houses for twelve and a half years and at the end of this period, providing that the rent has been paid regularly, the tenant will become the absolute owner of his house without any further payment of any kind. The tenant can also contract for a shorter space of time with a higher rental, or for a longer space of time with a lower rental. People of limited income, clerks, shop assistants and others can make themselves independent of landlords immediately by becoming members of the Birkbeck Building Society.¹¹¹

3-70 Engels was reluctant to speculate on future socialist housing policies, after the impending revolution which would overthrow capitalism. He believed that the housing situation reflected the political and economic system of the time. Any housing shortages could be remedied by the reallocation of the current housing stock, particularly the housing of the bourgeoisie once it had been confiscated by the proletariat/workers.

How is the housing question to be solved then? In present-day society just as any other social question is solved: by the gradual economic adjustment of supply and demand, a solution which ever reproduces the question itself anew and therefore is no solution. How a social revolution would solve this question depends not only on the circumstances which would exist in each case, but is also connected with still more far-reaching questions, among which one of the most fundamental is the abolition of the antithesis between town and country. As it is not our task to create utopian systems for the arrangement of the future society, it would be more than idle to go into the question here. But one thing is certain: there are already in existence sufficient buildings for dwellings in the big towns to remedy immediately any real "housing *shortage*," given rational utilization of them. This can naturally only take place by the expropriation of the present owners and by quartering in their houses the homeless or those workers excessively overcrowded in their former houses. Immediately the proletariat has conquered political power such a measure dictated in the public interests will be just as easy to carry out as other expropriations and bilettings are by the existing state.¹¹²

¹¹¹ *ibid.*

¹¹² *ibid.*

Clearly, workers being paid subsistence wages could not hope to secure expensive housing or, much less, aspire to owner-occupation. In any case, the traditional Marxist view on home ownership, tied up with property rights, is that it produces a society of unequal, isolated and self-interested individuals. Engels perceived the security of tenure of housing and ownership of property, with gardens and fields, as a hindrance to workers, blocking mobility, especially to urban areas large-scale industry. He emphasised the semi-rural isolation and political insignificance created by “the bourgeois and petty-bourgeois utopia which would give each worker the ownership of his own dwelling, and thus chain him in semi-feudal fashion to his own particular capitalist...” Engels addresses this issue in *The Housing Question*, with the example of German rural-based dwellers who also owned a garden and a field, but who suffered greater exploitation than if they could migrate to urban industrialised centres.¹¹³ 3-71

Other Marxist Approaches

Lenin did not write any significant analysis of housing and adopted the Marx/Engels position, though supporting housing co-operatives. Of course, the housing situation in St. Petersburg in the early 20th century compared with Dublin, in terms of poor housing conditions and infant mortality rates. After the 1917 revolution, and after World War II when the communist parties took control, the expropriation of property from the *bourgeoisie* was inadequate to provide housing for all and poorer people in the towns and countryside lived in thatch and stone houses lacking sanitation and amenities. The Marxist solution was to produce large-scale housing for workers and their families and in many cases to establish a right to housing for all in their new constitutions and laws. 3-72

Marxists view class as facilitating the underlying dynamic of social change. Class can be seen in two ways—first a shared relationship to production (as workers, exploited people, oppressed groups) and secondly, having specific forms of social organisation. Marx described these two elements as a class-in-itself and a class-for-itself. Marxists see social mobility, not just in relation to individuals, but in terms of the movement of groups of people toward their collective empowerment.¹¹⁴ Indeed, it may be that class is encoded in people’s sense of self worth and in their attitudes to an awareness of others—in how they carry themselves as individuals.¹¹⁵ Bradley and Hebson argue that there has been a “sequestration of class” from the sociological mainstream, and the concept has been confined into a specialist area within some rather traditional enclaves of research, committed 3-73

¹¹³ Engels, F. (1872) *The Housing Question. Preface to the Second German Edition.*

¹¹⁴ See Sommerville, P, “Housing, class and social policy”, in Sommerville P & Spriggins, N, *Housing and Social Policy* (London, Routledge, 2005), p 104.

¹¹⁵ *ibid* at p 107.

to specific and limited methodologies.¹¹⁶ Aside from the development of Marxism by Lenin and Trotsky, and their followers, other Marxist analyses of society have developed in academia, alongside structural Marxism¹¹⁷ within the Frankfurt School of critical theory,¹¹⁸ as well as a host of other Marxist writers on the State.¹¹⁹

3–74 The Marxist perspective on class can be contrasted with Weberian-based approaches to housing policy, which view class not in terms of the relationship to the means of production, but as an outcome of market-based distribution. Weberians see class as more or less finely graded hierarchy of position clusters or strata, and class is described as social stratification. For Weberians, social justice in relation to class is entirely a matter of the positioning of individuals at the right levels in the hierarchy. Weberians see class not as a system of domination, but as a structure of opportunity, “not as something to be transformed, as something to be used for one’s own benefit”.¹²⁰

3–75 The concept of housing classes, in Weberian terms, based on common life-chances was developed by Rex and Moore in the 1960s in a study of the Sparkbrook area of Birmingham.¹²¹ In this study, urban social groups are conceptualised in terms of a struggle over the allocation of scarce resources, the main focus being access to desirable suburban housing. In Birmingham, ethnicity was a key issue in determining access, linked both with disadvantage in the market and the bureaucratic regulation of public-sector housing allocation. Immigrants to the city from abroad lacked the sizeable and secure income necessary to raise a loan for house-purchase, and were excluded from local authority housing by a prior-residence qualification, which forced them into sub-standard multi-occupied dwellings supplied by private landlords in the inner city. The outcome of this struggle is expressed in terms of the formation of different housing classes.¹²²

3–76 The concept of housing class has been subject to much criticism. One objection is that position in the housing market is in fact determined

¹¹⁶ Bradley, H & Hebson, G, “Breaking the Silence: The Need to Re-articulate Class”, *International Journal of Sociology and Social Policy*, Vol. 17, Part 9/10 pp 187–213, 1999; See also Bourdieu, P, *Distinction* (London, Routledge, 1984).

¹¹⁷ See Althusser, L & Baliba, E, *Reading Capital* (London, New Left Books, 1965); Lévi-Strauss, C, *Structural Anthropology* (London, Penguin, 1968); Miliband, R, *The State in Capitalist Society* (London, Weidenfeld and Nicholson, 1968); Offe, C, *Contradictions of the Welfare State* (London, Hutchinson, 1984); Poulntzas, N, *State, Power and Socialism* (London, Verso, 1978).

¹¹⁸ See Habermas, J, *Moral Consciousness and Communicative Action* (Cambridge, Mass. MIT Press, 1990); Fromm, E, *Fear of Freedom* (London, Routledge, 1941).

¹¹⁹ Gramsci, A, *Selections from the Prison Notebooks* (New York, International Publishers, 1971).

¹²⁰ See Sommerville, P, “Housing, class and social policy”, in Sommerville P and Springings, N (2005) *Housing and Social Policy*. London: Routledge, p 104.

¹²¹ Rex, J & Moore, R, *Race, Community and Conflict: A Study of Sparkbrook* (OUP, 1967).

¹²² Saunders also uses the Weberian concept of class in his many writings on housing policy. See Saunders, P, *Social Theory and the Urban Question* (London, Hutchinson, 1981).

by position in the labour-market; that is, by social-class position with reference to the sphere of production. The Weberian social stratification perspective ignores all consideration of the issue of power in housing systems, avoiding analysis of the elite super-class of rich and powerful individuals who effectively control the housing system. It also neglects the existence of an underclass of continued socially excluded people in contemporary urban societies.

The Pathways Approach

The pathways approach to housing represents a new way of analysing housing and housing systems. This rejects the positivist and quantitative approaches to housing research, where statistical and other research data is used to explain the relations between the State and market and the patterns of behavior of individuals in the housing system.¹²³ It builds on the approach of Giddens, and offers a different perspective to view housing policy making and implementation in key areas.¹²⁴ It operates at the level of identifying individual requirements at different stages in the housing pathway. In this way it is a very valuable theoretical perspective relating to people who require assistance from the State, and in gearing the supply of housing to varying individual and household needs. Indeed, it has been adopted as part of *The Way Home* (2008) government strategy on homelessness for years 2008–2013, and is used to justify Irish State subsidised low cost homeownership schemes and the incremental purchase offered to new local authority tenants.¹²⁵

3–77

David Clapham in *The Meaning of Housing – A Pathways Approach* (2005), points out, following the work of Giddens, that:

3–78

... housing has increasingly become a means to an end rather than an end in itself. The end is personal fulfillment and the main task of housing research is to elucidate the links between housing and this overall aim. In this pursuit the concepts of identity and lifestyle are key. The achievement of self-esteem and a positive identity through a chosen lifestyle are said to be an important element of household's housing choices.¹²⁶

¹²³ See Kemeny, J, "Society versus the State; The Social Construction of Explanatory Narratives in Social Policy Research", *Housing, Theory and Society*, Vol. 19, (2002) pp 185–195.

¹²⁴ See Giddens, A, *The Constitution of Society; Outline of the Theory of Structuration*, (Cambridge, Polity Press, 1984). The sociological basis of this approach is known as "social constructionism" which builds on the approaches of Berger, P and Luckmann, T, *The Social Construction of Reality* (Harmondsworth, Penguin, 1971). For a critique of this approach see Sommerville, P and Bengtsson, B "Constructionism, Realism and Housing Theory", *Housing Theory and Society*, Vol. 19 (2002), pp 121–136.

¹²⁵ See Smith, A, *The Housing Pathways Approach – A Review of the Literature* (Dublin, Centre for Housing Research, 2009).

¹²⁶ Clapham, D, *The Meaning of Housing: A Pathways Approach* (Bristol, The Policy Press, 2005), p 1.

Defining the Pathways Approach

3–79 Clapham distinguishes the pathways approach from other approaches to housing research. He argues that the social policy approach to housing which concentrates on State policies can fail to focus on the unintended consequences of these policies, or the context of the attitudes, perceptions and behaviour of other actors in housing systems. Clapham points out that the neo-classical approach views housing systems through the framework of markets and tends to marginalise the involvement of the State, usually characterizing it as “intervention”, when in fact the State often controls the context in which markets are able to operate. Similarly, he points out that this approach is built on simplistic and universal assumptions of behavior, such as rational actions and utility maximisation of consumers. Positivist approaches in geographical and sociological research also fail to provide a convincing focus on the behaviour of actors in the housing system, particularly households. The assumption that households are rational and instrumental in their approach to housing decisions, as an underlying hypothesis for housing research is unsound. He points out that analytic approaches in the housing field have failed to keep up with contemporary developments in sociology that have taken the agency-structure interface as their focus. In order to understand the fulfillment that housing provides, it is necessary to employ a framework that places the subjective nature of the meanings held by households at the centre of analysis.

3–80 The fundamental tool for the analysis of housing is the concept of the housing pathway. Clapham defines this as patterns of interaction (practices) concerning house and home, over time and space.

The concept of a pathway is offered as a way of ordering the housing field in a way that foregrounds the meanings held by households and the interactions that shape housing practices as well as emphasising the dynamic nature of housing experience and its interrelatedness with other aspects of household life.¹²⁷

The housing pathway refers to the household forms in which individuals participate and the routes they take over time in their experience of housing. It is different to a “housing career”, which focuses on consumption patterns as the households evolves. The housing pathway approach includes these elements, but also seeks to capture the social meanings and relationships associated with this consumption in the different locales. However, a major feature of the pathways approach is the absence of any assumption that households have a universal set of preferences and act rationally to meet them.

¹²⁷ *ibid* at p 27.

The housing pathway is linked to many other areas of life and runs alongside an employment pathway. The housing pathway is influenced by changes in household structure relating to marriage, the birth of children, or divorce. Along the housing pathway individuals and households make choices among the opportunities open to them. Some have more opportunities than others, depending on a number of factors, such as decisions already made, employment, income, labour market position, the housing finance and subsidy institutional structure, and other matters. **3-81**

This focus on meanings is a significant part of the approach. Meanings are socially constructed through interaction. A particular focus is on the interactions between households and housing organisations and structures, and the strategies that households adopt to achieve their objectives through these interactions. Illustrating the relevance of this perspective, Clapham demonstrates how the social construction of the “good” tenant has a different meaning for housing officers and tenants, who usually come from a different social class. Similarly, a change in rhetoric used by government or the media may change the meaning that a household gives to its tenure status.¹²⁸

While the pathways approach requires a disaggregation of research data to counter the over-generalisation of traditional approaches to housing, some degree of generalisation is necessary to understand the relevant prevalence of different pathways, in designing housing policy or carrying out comparative studies. While the basic unit is the pathway of the individual household, general pathways may be discerned and constructed from empirical research. Clapham uses the analogy of roads in this instance, positing that some pathways may be small tracks, while others may be motorways in the sense that the route is shared by many other households.¹²⁹ **3-82**

At the level of the household, Clapham highlights the lack of information on how households make housing decisions, or achieve their search for identity and fulfillment through housing as significant factors in research on the pathways approach. The impact of globalisation on housing finance and employment as well as the introduction of the “flexible labour market”, regional development policies, mobility and commuting requirements, have important implications in pathways analysis. The impact of household access to housing finance and mortgage availability, household budgets and housing costs, wealth accumulation in housing and how households deal with payment difficulties all form elements of pathways research. **3-83**

¹²⁸ The Irish State has changed the concept of housing need to “eligibility for social housing support” in the Housing (Miscellaneous Provisions) Act 2009, where the concept of “affordable” housing connotes a higher status than ordinary renting of similar or identical housing.

¹²⁹ Clapham, D, *The Meaning of Housing—A Pathways Approach* (Bristol, The Policy Press, 2005), p 27.

3–84 House and home are two key concepts of the analysis of housing pathways. A house provides physical shelter for households, and can be seen as a machine for living in, but it is also a home. This is the setting for our most important emotional and intimate relations and behaviour. Clapham highlights a significant difference in the understanding of objective minimum standards in public health and housing law with people’s perceptions of the quality of their housing, arguing that it is very difficult to arrive at an objective standard.¹³⁰ In a rather unusual rejection of the capability of the courts to make an independent and objective finding of a violation of housing standards, Clapham states “there is no universal and objective way of measuring poor housing conditions because people’s perceptions of them and reaction to them differs”.¹³¹

In relation to housing design, Clapham highlights the competing rationalist and empiricist approach emphasising logical reasoning and people’s use of home, respectively. He describes the overwhelming tendency to associate design with the exterior of houses, buildings and neighbourhoods, rather than the needs of households. Clapham attributes the growth of “self-provided” housing to the rejection by households of standardised suburban house designs (although costs were found to be a major factor in 40% of such decisions).¹³² Clapham explores the housing pathways of young people leaving home, those of older people and the development of special needs discourses.

Pathways Approach and Homelessness

3–85 The concept of a homelessness pathway was developed by Fitzpatrick in her study of homeless young people in Glasgow, where she explored the dynamic nature of the experience of these young people.¹³³ In Ireland, there is a movement towards using the pathways approach, and recent studies on adult and children’s homelessness have evidenced the analytical benefits and complexity of research findings.¹³⁴ Pillinger points out this provides a more dynamic and comprehensive picture of the experiences of homeless people, with consequent benefits for policy making and implementation. Homelessness is neither a group characteristic or a static situation. Instead she points out that it is a process that can be viewed as part of a continuum within some people’s life cycle. The pathways approach provides useful

¹³⁰ *ibid* at pp 120–121.

¹³¹ *ibid* at p 153.

¹³² *ibid* at p 135.

¹³³ Fitzpatrick, S, *Young homeless people* (Basingstoke, Macmillan, 1999).

¹³⁴ See Pillinger, J, *Homeless Pathways: Developing effective strategies to address pathways into, through and out of homelessness*, (Dublin, Focus Ireland, 2007); Mayock, P & O’Sullivan, E, *Lives in Crisis: Homeless Young People in Dublin* (Dublin, Oaktree Press, 2007); Anderson, I & Tulloch, D, *Pathways Through Homelessness: A Review of Research Evidence: A summary series of recent research commissioned by Scottish Homes for the Homeless Task Force, No 121* (Edinburgh, Scottish Homes, 2000).

insights into the complexity and diversity of people's routes into, through and out of homelessness, by locating people's housing experiences, attitudes and perceptions, to identify what works.

The pathways approach also breaks new ground in this sense as it focuses on the experiences, constraints, interactions and behaviours of homeless people, in areas such as household planning and decision-making, so that these experiences can be used to inform appropriate pathways out of homelessness. By bringing to the centre of the research process how individuals and households experience their housing pathways can reveal insights into the extent to which individuals and households are in control of their housing pathways and how their experiences of services can enable them to live autonomously. This approach provides both a long-term and dynamic approach that is relevant to developing evidenced based policy and practice.¹³⁵

Pillinger states that the use of the pathways approach, involving examining people's housing careers, has tended to find that key life course events, such as adulthood, marriage, divorce, separation, employment and income, can impact on housing careers, while key factors impacting on housing choices are associated with location, quality, type, availability and cost of housing. Problematic and traumatic life experiences and social exclusion can negatively affect a person's housing career during their lifetimes. Poverty, coupled with weak or broken family and social ties, are common underlying risks of homelessness, and there are differential pathways experienced by homeless women and men. 3-86

There are important lessons from this approach for policy makers. Rather than concentrating on immediate emergency responses to homelessness with emergency housing, followed by the transmission belt approach model of referral to "move-on" accommodation, more attention is required in addressing and improving people's capacity to have control over and choice in their housing situation. This must decrease or remove the risk of homelessness, particularly where this is triggered by a significant or traumatic life event. By improving understanding of the causes and complexity of people's homelessness within a preventative approach, it is possible for people to be supported in tackling personal problems or life events that can lead to homelessness or repeat homelessness. Thus, resources need to be targeted at people's individual needs and support requirements, rather than traditional approaches to increased emergency housing provisions.¹³⁶ 3-87

¹³⁵ Pillinger, J, "Pathways into, through and out of homelessness", in *Perspectives on Irish Homelessness, past present and future* (Dublin, The Homeless Agency, 2008), pp 64-5; See also Clapham, D, "Pathways approaches to homeless research" in *Journal of Community and Applied Social Psychology*, Vol.13, (2003) pp 119-127.

¹³⁶ This perspective presents new challenges to traditional charitable and other emergency housing providers, who have developed a range of shelter and housing facilities with significant numbers of housing management staff. See Brownlee, A, "Paradise Lost or Found - The Changing Homeless Policy Landscape in Ireland", in *Perspectives on Irish Homelessness, past present and future* (Dublin, The Homeless Agency, 2008), pp 34-42.

- 3–88 Pillinger points out that homeless people often have little or no control over their housing options, living from day to day with little security of knowing where their bed will be for the next night. She also points out that it is difficult and problematic to categorise people’s pathways into homelessness into a single causal factor since there are a range of complex factors that impact on a person’s pathway into homelessness. The pathways research also showed that a large number of homeless people are not visibly homeless in the initial stages of their homelessness, often because they are staying with friends or family members, sleeping rough or living in various forms of temporary accommodation.¹³⁷
- 3–89 There is, of course, a need for access to suitable accommodation, perhaps with long-term support, as well as access to emergency accommodation when required. However, support and preventative measures are equally, if not more important. Training, work, personal support services, education and incentives for personal development take on greater significance within this perspective in dealing with homeless people. The Homeless Agency report, *Pathway to Home* (2009), sets out a comprehensive implementation plan, which the Board of the Homeless Agency Partnership considers as the most appropriate way in which the agreed target of ending long-term homelessness. It also builds, in some ways, on the contemporary popular approach to homelessness known as “Housing First”. This approach seeks to move the homeless individual or household immediately from the streets or homeless shelters into their own apartments. Housing First, developed by the Pathways to Housing non-profit organisation in New York, is based on the concept that a homeless individual or household’s first and primary need is to obtain stable housing, and that other issues that may impact the household can and should be addressed once housing is obtained.¹³⁸

¹³⁷ Pillinger, J, “Pathways into, through and out of homelessness”, in *Perspectives on Irish Homelessness, past present and future* (Dublin, The Homeless Agency, 2008), p 68.

¹³⁸ *Pathways to Home* (Dublin, The Homeless Agency, 2009). The Agency has developed a *Pathways to Home* model for the organisation of services to homeless people. “Housing First is an approach that centers on providing homeless people with housing quickly and then providing services as needed. What differentiates a Housing First approach from other strategies is that there is an immediate and primary focus on helping individuals and families quickly access and sustain permanent housing ... A Housing First approach rests on the belief that helping people access and sustain permanent, affordable housing should be the central goal of our work with people experiencing homelessness. By providing housing assistance, case management and supportive services responsive to individual or family needs (time-limited or long-term) after an individual or family is housed, communities can significantly reduce the time people experience homelessness and prevent further episodes of homelessness ... Housing First is an approach used for both homeless families and individuals and for people who are chronically homeless. Program models vary depending on the client population, availability of affordable rental housing and/or housing subsidies and services that can be provided”. See website: <http://www.endhomelessness.org/section/tools/housingfirst>.

The pathways approach minimises the role of housing providers, arguing that housing can be provided either through socially-funded schemes, private sector leased properties or individually accessed rented housing.¹³⁹ However, this reduction of homelessness to a lack of housing and a need for personal support residualises the issue of housing need to a set of personal misfortunes and poor “life chances”. The structural issues surrounding homelessness and the persistent marginalisation and alienation of groups of homeless people may be relegated to a lower priority to individual case-work type interventions. 3–90

One consequence of this approach on homelessness policy has been the shift towards private leased housing or homeless people rather than direct provision by housing agencies. Remarkably, this policy appears to coincide with the provisions in the Housing (Miscellaneous Provisions) Act 2009 for long-term rental accommodation availability agreements with private owners of multiple properties and the transfer of many housing schemes to NAMA. The system of private sector leasing has been in operation in the UK for over a decade.¹⁴⁰ 3–91

Pathways Approach and Policy Making

Clapham argues that it is increasingly difficult for the State to act as a central intelligence, defining and meeting needs, because of the emphasis on individualisation and lifestyle choices. Yet, the State is making assessments of housing need and on the basis of these is making land available. It is expending resources in public funding and paying for housing provision contracts with the private sector. Clapham refers to the dominant cybernetic model of rational planning of the State, where policy making follows a process of defined steps. The first is analysis by the decision-making organisation (the State) in order to quantify problems and needs, followed by the identification of goals or objectives in order to meet those needs. 3–92

¹³⁹ See, for example, the recommendation of the Homeless Agency Evaluation of Homeless Services 2008, where the UK model of Private Sector Leasing to Housing Associations is promoted under the RAS scheme for homeless people moving from emergency accommodation and hostels. “*If the tenants are in need of additional supports, this will be provided by a Housing Support Team*”. p 76.

¹⁴⁰ The Report - *Private Sector Leasing Study* (2002) by the Housing Corporation of England and Wales highlighted the financial risks to housing associations in this area of activity. This is particularly important where there are delays or bad debts in rent payments, or where assessments of income are required for differential rents to be charged. Turnover of tenants and levels of rent covered by the Irish SWA Regulations are also significant. Of course, this form of subsidy for private sector landlords will not result in a greater stock of social housing and there are many concerns about the management resources of some large housing organisations, especially in relation to dealing with anti-social behaviour within mixed housing schemes. There have been concerns that the area of private sector leasing has been driven more by the requirements of large housing associations business plans than any genuine assessment of the needs or pathways of the people living in such housing.

Different ways of meeting these objectives are chosen with the aid of cost-benefit analysis. The policies are then implemented and their impact is assessed through the use of costs-effective techniques, such as performance indicators. This is hailed as a circular and continuous process, with the results of the impact analysis feeding back into the assessment of need.¹⁴¹

This model was first implemented in the private sector in the 1960s and the widespread use of performance indicators in housing services form part of its legacy. This “rational” planning approach with its emphasis on facts, “what works” acclamations and “evidence-based policy making” faces many criticisms. Chiefly, the questions arise is as to who decides which facts are to be relevant, who defines what works and which or whose evidence is to be used to shape policy, according to Clapham.

3-93 He contrasts this approach with Lindblom’s model of “muddling through”, where a good policy is not one that meets any test of costs effectiveness, but rather is one that everyone can agree on. Indeed, this model is essentially a political view of policy making, the outcome of bargaining between concerned groups each with its own perception of what is “fact”, and its own interests. Although this process has been criticised for its acceptance of a pluralist view of a wide dispersion of power, the outcome will depend on the distribution of power between the groups. Clapham suggests that the post-modern State needs a policy process that is attuned to the importance of subjective perception and to multiple definitions of reality.¹⁴² He proposes that an alternative way of evaluating policy would be not to focus on housing outcomes, but to concentrate on the control that households have in their housing pathway.¹⁴³

The weakness of the pathways approach lies in its failure to identify power relations within the housing system, or indeed, within the creation of housing policy. Indeed, the avoidance of consumer rights perspectives weakens its use as an instrument of social change. It is entirely possible to consider the pathways to housing policy as compatible with liberal free market approaches, where the role of the State is minimised and housing choices in the market are the essential elements of housing systems.

3-94 The politically and socially neutral meritocratic implications of housing pathways stands in contrast to many other perspectives on housing. It appears to accept that there will be failures in the housing pathways, and that no real structural reasons exist for this, beyond a collation of individual circumstances. Similarly, this individualisation of homelessness, a model adopted in the US, highlights its orientation towards viewing homelessness as a personal issue, rather than a condition more likely to apply to working class and poor households. The approach avoids consideration of the

¹⁴¹ Clapham, D, *The Meaning of Housing. A Pathways Approach* (Bristol, The Policy Press, 2005), pp 247–248.

¹⁴² *ibid* at p 249.

¹⁴³ *ibid* at p 251.

structural stratification of housing access and the small number of people who control key elements of the housing system. It does not view the use of housing support intervention in terms of potential emancipatory opportunities from oppressive structural disadvantage and discrimination.

Indeed, within housing studies, the debate has been split between those who see housing and homelessness as a site of wider class relations and struggles, and those who see housing relations and struggles as independent of wider concerns. Typically, housing tenures are constituted by law and involve characteristic forms of control relations and exchange relations.¹⁴⁴ One key issue is that ownership rights create and perpetuate a clear distinction between different classes of occupiers. It has been shown that owner-occupation as a tenure tends to reinforce existing class relations, acting as a means whereby the middle-class “hoard” their opportunities and transfer them to the next generation, while non-owning households have poor access to credit and less security. In many ways, housing status, or position in the housing market, whether owner-occupier, social housing tenant or homeless person acts a surrogate for class.¹⁴⁵

3–95

The Concept of Home

The concept of “home” is often portrayed as central to Irish housing law and policy.¹⁴⁶ There is a very well known Irish poem which exemplifies the unachievable quest for a home by a homeless woman. It also encompasses all the iconic phenomenological elements of home, alongside the physical structure, but ignores all legal definitions or rights.

3–96

O, to have a little house!
 To own the hearth and stool and all!
 The heaped up sods upon the fire,
 The pile of turf against the wall!
 To have a clock with weights and chains
 And pendulum swinging up and down!
 A dresser filled with shining delph,
 Speckled and white and blue and brown!
 I could be busy all the day
 Clearing and sweeping hearth and floor,
 And fixing on their shelf again
 My white and blue and speckled store!
 I could be quiet there at night
 Beside the fire and by myself,
 Sure of a bed and loth to leave
 The ticking clock and the shining delph!

¹⁴⁴ See Barry, B, *Why Social Justice Matters* (Cambridge, Polity Press: 2005).

¹⁴⁵ See Sommerville, P, ‘Housing, class and social policy’, in Sommerville P and Sprigings, N, *Housing and Social Policy* (London, Routledge, 2005), Chapter 5.

¹⁴⁶ The concept of respect for home and family life will now have to be addressed by State agencies under the provisions of the ECHR Act 2003, Art 8. See Chapter 8 for relevant case-law.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

Och! but I'm weary of mist and dark,
And roads where there's never a house nor bush,
And tired I am of bog and road,
And the crying wind and the lonesome hush!
And I am praying to God on high,
And I am praying Him night and day,
For a little house—a house of my own—
Out of the wind's and the rain's way.¹⁴⁷

- 3-97** This concept of home has been widely researched in many disciplines, and it is held that there is hardly a more emotionally loaded word, since it epitomises situations of family, affection, love and other human experiences.¹⁴⁸ It is seen by many as central to the development of family and social life.¹⁴⁹

Home is a place where individuals and families can be themselves for better or worse, can obtain peace and security and can flourish both mentally and physically. It should be an effective base for family life, providing rest and relaxation and strength for participation in our highly pressurised and competitive society.¹⁵⁰

House and home stand at the centre of people's lives, giving them shelter for sleep and for their waking activities, shielding them from the world, yet admitting it in a controlled and selective fashion, and providing storage and a showcase for their possessions.¹⁵¹

- 3-98** The concept of home is widely viewed as central to housing and housing rights—a critical element of the basic physiological needs of food, clothing and shelter, established by Maslow.¹⁵² In contemporary societies home is associated with safety, love/belonging, esteem and self-actualisation needs. Housing and home are connected to health, child development, poverty and opportunity in general. The emotional and symbolic significance of housing and home relate to the sense of permanence and security, as well as fixing a person's place in society and community.¹⁵³ Thus, "home" can be seen as a physical structure, a territory implying security, control and rootedness, as

¹⁴⁷ "An Old Woman of the Roads" by Padraic Colum (1881–1972), *The Oxford Book of English Verse, 1250–1918*, Sir Arthur Quiller-Couch, ed. (New ed., rev. and enl., Oxford University Press, 1939).

¹⁴⁸ See Fox, "The Meaning of Home: A Chimerical Concept or a Legal Challenge?" (2002) 29(4) *Journal of Law and Society* 580; Fox, L. *Conceptualising Home: Theories, Laws and Policies* (Oxford, Hart, 2007).

¹⁴⁹ Giddens ascribes to home the basis of "ontological security", which is "confidence or trust that the natural or social worlds are as they appear to be, including the basic existential parameters of self and social identity". See Giddens, A, *The Constitution of Society*, (Cambridge, Polity Press, 1984), p 375.

¹⁵⁰ Shelter UK, *Homelessness and Health* (1997), p 4.

¹⁵¹ Donnison & Ungerson, *Housing Policy* (London, Penguin, 1982), p 11

¹⁵² See Maslow, AH, "Theory of Human Motivation". Originally published in *Psychological Review*, (1943) 50, 370–396.

¹⁵³ See Bratt, RG, Stone, ME & Hartman, C, *A Right to Housing: Foundation for a New Social Agenda* (Philadelphia, Temple University Press, 2006).

identity, and as a social and cultural phenomenon or a base for relationships. It also acts as a geographical space from where a person or household can access other services and amenities.

Gurney has pointed out that home is the setting for our most intimate relationships, and the emotional discourses of family, intimacy and love are the most significant factors in the meaning of home.¹⁵⁴ Home is constructed through “emotional labour,” which creates and supports intimate relationships in the home.

Of course, the idea of house is usually central in the legal treatment of home, but there is also a further set of factors which distinguishes the home from a physical structure that provides shelter and experience. It has been suggested that home needs to be conceptualised as house plus an “x-factor”.¹⁵⁵ This “x-factor” represents the social, psychological, and cultural values that a physical structure acquires through use as a home.

3-99

Home as a physical structure offers material shelter; home as territory offers security and control, a locus in space, permanence, security and privacy; home as a centre for self-identity offers a reflection of one’s ideas and values and acts as an indicator of personal status; and home as a social and cultural unit acts as the locus for relationships with family and friends, and as a centre of activities.¹⁵⁶

The concept of “home” is therefore much wider than a physical or legal concept. It involves important subjective, cultural, emotional, social status and social relational issues. However, the women’s or feminist perspective on home is often absent from the legal contemporary conceptual frameworks on home. Indeed, Oakley pointed out by 1976 that home and family were virtually interchangeable terms, with particular consequences for the position of women.¹⁵⁷

The home has also been correlated with a site of hierarchical relations and a place of oppression for women, a base of domestic violence, a forced workplace for cooking, cleaning, nurturing and child rearing, inherently denying women access to wider societal participation.¹⁵⁸ The gender roles expressed in the archetypal literature on home often involve an idealised wife/mother figure as the homemaker and the perfect mother.¹⁵⁹ The notion

3-100

¹⁵⁴ Gurney, C, “Pride and prejudice; discourses of normalization in public and private accounts of home ownership”, *Housing Studies* (1999) vol. 14, no. 2, 163–183.

¹⁵⁵ Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?* p 590.

¹⁵⁶ *ibid.*

¹⁵⁷ Oakley, A, *Housewife* (Harmondsworth, Penguin, 1976).

¹⁵⁸ See for example, McDowell, L, “Place and Space”, in Eagleton, M (ed.) *A Concise Companion to Feminist Theory* (Oxford, Blackwell, 2003); Adams, ML, “There’s No Place Like Home: On the Place of Identity in Feminist Politics”, *Feminist Review* (1989) 31, 22–33.

¹⁵⁹ See Watson, S and Austerberry, H, *Housing and Homelessness: A Feminist Perspective* (London, Routledge, 1986).

of the husband as the breadwinner and active labour market participant, with the wife as principal child-rearer and homemaker is at variance with contemporary labour market participation levels in Ireland, but continues to persist. Feminist writers have deconstructed this model and portrayed home as a negative phenomenon, a site of patriarchy and oppression, and occasionally a place of violence against women.¹⁶⁰

3-101 In Ireland, the level of domestic violence has been monitored by Sonas Housing Association among others:

In 2007, there were 1,889 specific incidents of child abuse disclosed to the Women's Aid National Freephone Helpline. In an additional 3,491 calls it was disclosed that children were living in homes where there was domestic violence against their mother. Some 64% of Irish women who experienced domestic violence reported that their children had witnessed the violence ... A report on domestic violence in Ireland, (Kearns, Coen and Canavan, 2008) found that 55% of victims of domestic violence vacated the family home. Another study found that 88% of women in a domestic violence situation do not leave because they have nowhere to go. (Women's Aid, 1995)... One in five Irish women have experienced some form of domestic violence from a current or former partner. One in seven women in Ireland have experienced some form of severe abusive behaviour from a partner. Some 1,952 women and almost 3,000 children were accommodated in refuges in Ireland in 2006. In 2007 there were 11,374 applications for protective orders under the Domestic Violence Act (1996). Almost one in four of perpetrators of sexual violence against women in Ireland were intimate partners or ex-partners. Some 146 women have been murdered in the Republic of Ireland between 1996 and 2008. Of these, 92 women were murdered in their own homes. Of the 107 resolved cases, 50% of women were murdered by a partner or ex-partner.¹⁶¹

The meaning of home for children in relation to child development security, socialisation and education merits important consideration.¹⁶² Although the position of children in orphanages and institutions has been examined widely, little attention has been paid to the relationship of children and home. Cowan and Dearden point out that housing and home are dominated by the disciplines of property law and contract law, and as such children are marginalised as they are not players in these legal arenas.¹⁶³ There are particularly negative consequences for children in the loss of home and homelessness.¹⁶⁴

¹⁶⁰ See Barnett, H, *Introduction to Feminist Jurisprudence* (London, Cavendish, 1998).

¹⁶¹ See Sonas Statistical Leaflet, available at: www.sonashousing.ie/wpcontent/uploads/sonasleafletdl.pdf.

¹⁶² For an examination of these issues see Fox, L, *Conceptualising Home; Theories, Laws and Policies* (Oxford, Hart, 2007), Chapter 9.

¹⁶³ See Cowan, D & Dearden, N, "The Minor as (a) Subject: The Case of Housing Law", in Fionda, J (ed.) *Legal Concepts of Childhood* (Oxford, Hart, 2001).

¹⁶⁴ Fox, L, *Conceptualising Home; Theories, Laws and Policies* (Oxford, Hart, 2007), p 440-441.

Fox points out that as yet, there is no coherent concept of home in law. Indeed, she points out that in many ways “home-type” interests are anathema to legal reasoning, especially as “home” is seen as essentially a subjective phenomenon. 3-102

It does not appear to be easily quantifiable, and the value of home to its occupiers is not readily susceptible to legal proof. Nevertheless, there are compelling arguments to support further analysis of the idea of home in law. For one thing, while it may be true to say that the nature of home attachments presents obvious impediments to the development of a coherent legal concept of home, and that this explains, to a certain extent, the relative neglect of home-oriented analysis in law, the centrality of ‘home’ to human dealings and the deep significance of rights and obligations relating to home render the lack of rigorous analysis in this area difficult to defend.¹⁶⁵

According to Fox, the idea of home is not wholly absent from legal spheres. It has been recognised in tax law, where residence is a defined concept, and in the capital gains tax legislation where profits on sale of principal residence is untaxed. Family law legislation is directed at home related issues, such as ownership and occupation of family home, and legislation on domestic violence. Legislation since 1976 in Ireland renders void a conveyance of an interest in the family home, without the express consent of a married (or civil) partner. Even compulsory purchase laws place a value on home loss. The creation of life interests is a clear example of the law permitting the grant of property as a home, to be occupied by the grantee for life. The recognition of purchase money resulting trusts are a recognition that property ownership may incorporate elements where protecting the interests of family arrangements are important.

In Ireland, the new procedure for obtaining possession of a property by a mortgagee where the loan is classed as a “housing loan” under Part 10 of the Land and Conveyancing Law Reform Act 2009 demonstrates that housing and home loans should be treated differently to other mortgages.¹⁶⁶ At the level of rented housing, the concept of security of tenure with implied covenants for quiet enjoyment by tenants is a recognition that rented housing is more than a leasing arrangement. The recognition of the unregistered interests of persons “in actual occupation” has been applied to family members living in family homes, and these overriding rights will bind a purchaser who has not made sufficient enquiries of these occupiers.¹⁶⁷ 3-103

¹⁶⁵ Fox, L, *Conceptualising Home; Theories, Laws and Policies* (Oxford, Hart, 2007), p 4–5.

¹⁶⁶ s 101 of the Act of 2009 makes it obligatory for lending institutions to commence orders for possession or sale in the case of housing loan mortgages in the Circuit Court rather than the High Court. See Fox, L, *Conceptualising Home; Theories, Laws and Policies* (Oxford, Hart, 2007), Chapter 3 on balancing creditor’s claims against ‘home’ interests in the English courts.

¹⁶⁷ Registration of Title Act 1964, s 72(1)(j) protects the unregistered rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed. See also *Williams and Glyn’s v Boland* [1981] AC 487; *Kingsnorth Trust Ltd. v Tizard* [1986] 1 WLR 783.

The Irish Constitution and Home

3–104 In Ireland, the Constitution accords that education can be provided by parents in the home, and it adopts a particular view of the role of women in society. Article 41 states:

41.2.1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

41.2.2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

The All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report - The Family*, (2006), pointed out that Article 41.2.1° reinforced the position of the traditional family incorporated in the Constitution in Article 41.1°, by asserting the particular value of the contribution of the woman in the home. Articles 41.2.1° and 41.2.2° have been attacked by supporters of the equality model of the family as being outdated, stereotypical, biologically deterministic, and even insulting to women. The import of the attack is that these Articles should be deleted or at least amended so that they are gender neutral.¹⁶⁸

3–105 The Report of 2006 stated that, in reality, De Valera did not intend that the clause would confine women to the home, citing the views of a modern Supreme Court judge on the issue:

Moreover, Denham J in *Sinnott v Ireland* has recently stated that Article 41.2 was ‘not to be construed as representing a norm of a society long changed utterly’ but rather was to be construed ‘in the Ireland of the Celtic Tiger’.

She continued:

Article 41.2 does not assign women to a domestic role. Article 41.2 recognises the significant role played by wives and mothers in the home. This recognition and acknowledgement does not exclude women and mothers from other roles and activities. It is a recognition of the work performed by women in the home. The work is recognised because it has immense benefit for society. This recognition must be construed harmoniously with other Articles of the Constitution when a combination of Articles fall to be analysed.¹⁶⁹

In its submission to the All Party Oireachtas Committee The Law Society of Ireland, Irish Council for Civil Liberties, Irish Human Rights Commission and others pointed out that the role of carers in the home should be gender neutral. Indeed, the UN Convention on the Elimination of Discrimination Against Women (CEDAW) Committee had already raised this issue in its Concluding Comments on the Irish report, and requested the State not only to address this gender discrimination, but to actively pursue the achievement

¹⁶⁸ The All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report - The Family* (Dublin, The Stationery Office, 2006), p 106.

¹⁶⁹ *ibid* at p 108.

of substantive equality between men and women. Even the submission of the Irish Catholic Bishops' Conference stated:

The reference is frequently dismissed as dated and this would seem just if it were read to suggest that women only have a contribution to make in the home or that work in the home were to be the exclusive duty of women. The provision may, however, be seen as a 'pedestal rather than a cage'.¹⁷⁰

The All Party Oireachtas Committee concluded that a great number of people strongly support the retention of Article 41.2.1 and Article 41.2.2: **3-106**

The courts are disposed to interpret Article 41.2.1^o as applying to either fathers or mothers caring in the home. The need to change the Article to make it gender neutral is therefore not a legal necessity. There is general support for recognition of the value of the work done by those who care for others in the home, and therefore for whatever practical support for them that the Houses of the Oireachtas, relying upon Article 41.2.2^o, can provide.

Many people—they include people from supporters of both models of the family—believe that the language in which the Articles are expressed is outdated and even sexist. They feel the Articles should be rendered in a gender-neutral form. In addition the UN Convention on the Elimination of Discrimination Against Women (CEDAW), which Ireland has ratified, regards the employment of sexist language as a practical obstacle to women's drive for equality with men. They regard the language of the Articles as sexist and require change in them. Change, therefore, in the Articles is at least desirable.¹⁷¹

No change to these Articles has yet taken place.¹⁷²

Home and Housing Policy

Irish housing law and policy, based on legal liberalism, has great difficulties addressing sentimental and "emotive" approaches to home, in contrast to the quantifiable claims of developers, creditors, investors, property owners or capital market issues.¹⁷³ The fundamental reasons for this were succinctly described by Baker: **3-107**

The most plausible explanation of liberal egalitarian neglect of love, care and solidarity is that liberals tend to see these as private matters that individuals should work out for themselves.... More generally, the emotional support people get from family and friends plays a vital role in sustaining their capacity

¹⁷⁰ *ibid* at p 119.

¹⁷¹ The All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report - The Family* (Dublin, The Stationery Office, 2006), p 120.

¹⁷² There is also a right in the Article 42.2 *Bunreacht na hEireann* that parents shall be free to provide education in their homes or in private schools or in schools recognised or established by the State.

¹⁷³ For an examination of this in English law see Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?* p 586.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

to function as workers and citizens. At the same time, the organisation of work and transportation has an obvious impact on the amount of time workers can spend with their families. And the way the State organises residential facilities for disabled people, or denies accommodation for Travellers or homeless people, has a huge impact on their personal relationships.... Were we to construct a more adequate liberal egalitarian approach to love, care and solidarity, the natural place to start would be with ideas of a minimum standard and equal opportunity. We would have to consider how to enable every member of society to develop an adequate range of loving, caring and solidary relationships, and to address those aspects of our societies that frustrate this important human need.¹⁷⁴

In a valuable and innovative examination of the way the home is treated in English common law, Fox finds that it variously encompasses a physical space, an object of investment and ownership, a social and cultural unit, a “family home”, a “women’s place”, a place for children and a human right.¹⁷⁵

3–108

The contemporary view of housing and home as a financial investment is pervasive in Irish social commentary and in popular consciousness. It is a repository of family wealth (unless it suffers from negative equity). It is an asset to be bequeathed to children. Contemporary common law, with its varying feudal and legal liberalist roots faces continuous difficulties in dealing with the variety of relations people have with home, which are complex and changing, positive and negative. Fox points out that:

Home provides the backdrop for our lives, and is often the scene or the subject of legal disputes...while the authenticity of home as a social, psychological, cultural and emotional phenomenon has been recognised in other disciplines, it has not penetrated the legal domain, where the proposition that home can encapsulate meanings beyond the physical structure of the house, or the capital value it represents, continues to present conceptual difficulties.¹⁷⁶

Of course, for some people, the notion of home as involving only a physical structure carries little or no significance. For nomads, children, some people with disabilities, many older people and others, the need and expectation for support, care, communal assistance and trusting relationship usually surpass the requirements of a distinct physical location. Indeed, without proper safeguards in place, there is a danger that even the most well-intended homes provided by organisations can become a “facility” rather than a “real home”.¹⁷⁷

¹⁷⁴ See Baker, *et al*, *Equality, From Theory to Action* (Hampshire, MacMillan, 2004), p 28.

¹⁷⁵ Fox, L, *Conceptualising Home; Theories, Laws and Policies* (Oxford, Hart, 2007).

¹⁷⁶ *ibid* at p 34.

¹⁷⁷ Kendrick, M, “The Choice Between a Real Home and a Program”, *Progress*, (1993) Vol. 2, Issue I, The Commonwealth of Massachusetts, Department of Mental Retardation sets out 14 points for consumers, families and staff striving towards building a proper and rich sense of “home” for people with disabilities. The oppressive, institutionalisation of people with disabilities probably represents the greatest violations of housing rights today.

At another level, and drawing on the definitional shift in the concept in the US over the past 100 years, Retsinas traces the different but changing American image of home. Early immigrants to America saw home as an anchor in a safe harbour. The definition of home was more a state of mind rather than a physical structure. Retsinas describes the US and developed States phenomenon, where the home has become a vehicle for enforced savings, a hedge against inflation, and in more recent times a fungible investment, only to return to the “home as anchor”, in the current turbulent economic times. However, Retsinas also highlights the huge disparity in this concept between rich and poor in the US: 3-109

Poor-to-middle class Americans rarely owned, much less hoped to own such homes. They could not afford them—banks wrote five-year loans and demanded 50 percent downpayments. The wealthy owned mansions, but a peripatetic class that summered in Newport, Rhode Island, wintered in Manhattan, and toured Europe in between did not want anchors. Ironically, while replete with a number of houses the privileged of that era were ‘home-less’.¹⁷⁸

King describes the ubiquitous use of the term “homes” to refer to “brick boxes built by social landlords and private developers”.¹⁷⁹

There is an apparent belief that calling dwellings ‘homes’ connects more with the eventual users. Accordingly, housing and building professionals, as well as politicians, now commonly use ‘home’ instead of ‘house’ when they refer to physical structure, and social landlords manage and build ‘homes’ and not ‘dwellings’ or ‘houses’. All this does, however, is to devalue the concept of home and denude it of any serious meaning. ‘Home’ just becomes another technical term, like ‘dwelling unit’ used by professionals. The reason for this is clearly that ‘home’ is a warmer, more emotive concept, which converts a brick box into something with a much stronger resonance.¹⁸⁰

The misuse of the term “home” is significant as it implies that homes are made by professionals rather than households. This has several consequences, according to King. 3-110

First, because a home is ostensibly created by professionals, this implies that no effort is needed on the part of a household. The suggestion is that homemaking is easy to achieve and can be readily done *for us*. Second, this view carries the apparent belief that a home is transient. Building homes implies that we move from one home to another and do not take *our home* with us. A home is made for us to move into and we should be grateful. Third, this idea implies the standardisation of homes according to professionals “understanding of their clients” needs and aspirations. The result is the provision of identikit homes, based on standard design briefs and models. This creates an increasing homogeneity of styles aimed to fulfil standardised purposes.... Fourth, this

¹⁷⁸ Retsinas, NP, “Definitional Shifts in a Place Called Home”, *Urban Land*, November/December 2008.

¹⁷⁹ See King, P, *Choice and the End of Social Housing* (London, IEA, 2006), p 101.

¹⁸⁰ *ibid.*

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

will tend to impersonalise the notion of home and dwelling more generally; it becomes a commodity that is bought and sold rather than place of intimacy and nurturing. Housing is commodified according to economic rather than human values.... Lastly, ... this notion of home assumes the professionalisation of the role of homemaking: homes can be made only by others, by “the experts”. Professionals tell us what we need or, in other words, they actually dare to tell us what home is.¹⁸¹

Drudy has highlighted important differences in the treatment of housing as a home compared with housing as a commodity.

The ‘commodification’ of housing has important implications. For example, the level of profit to developers and the building industry as well as the return on investment or capital gain to purchasers become key contributions of housing. Its contribution as shelter, as a home or providing a secure place in the community becomes a secondary consideration. In this approach, the acquisition of a house depends above all on ability to pay rather than need. In the case of house purchase, this invariably means the ability to borrow a substantial sum of money from a building society or bank. The standard attributes required by the lending institutions immediately preclude a range of groups on low incomes from competing for housing in the market. On the other hand, those on high incomes will be the main participants and beneficiaries.¹⁸²

Drudy also highlights the contemporary view of housing as an investment item.

The commodification of housing inevitably encourages investment or speculation. Those producing or selling housing tend to urge purchase on the grounds that “it is always a good investment” and “will appreciate in value”, particularly if it is located in a ‘good area’. Those who already own homes are advised (and think) that they are ‘sitting on a goldmine’, and they may be encouraged to further improve their position by becoming multiple home-owners in the expectation of a secure return on such investment. As with stocks and shares, ‘profit-taking’ is an inevitable and much-sought element in the process. Surprisingly, the prospect of losses (which beset stocks and shares on a regular basis) are rarely, if ever, mentioned or contemplated in the case of housing. Rather ‘negative equity’ (where house prices fall and the size of the mortgage is greater than the house price) is seen as an evil to be avoided at all costs.¹⁸³

3–111 Drudy and Punch have devised a table illustrating the implications of the two opposing philosophies—one which sees housing as yet another market commodity, and one which views housing as a home, leading to significantly different policy approaches. Thus, the concept of housing as home offers an increasingly valuable person-centred and consumer oriented prism for the evaluation of housing law and policy.

¹⁸¹ *ibid* at p 101–102.

¹⁸² Drudy, PJ, “Housing in Ireland: Philosophy, Affordability and Access”, JSSISI, Vol. XXXVI, 84–125 at 86.

¹⁸³ *ibid*.

Table 2. Housing as a Commodity or as a Home¹⁸³

Housing as a Commodity	Housing as a Home
Market provision	Non-market provision
Commodity for sale	Housing as a right for shelter
Housing as an economic good	Housing as a merit good
Housing linked to ability to pay	Housing linked to needs
Developer/Speculator profits	Non profit or construction profit only
Personal investment/profit taking, wealth generation	Home, community, shelter, etc.
Speculative acquisition of land & capital gains; monopolies	Public land banking for building and provision
Segregation	Integration

Home as a Human Rights Concept

The concept of home reverberates through international human rights instruments which relate to housing. These are examined in detail in Chapter 8 below. However, the particular reference to home as part of the European Convention on Human Rights (1950) has been the subject of much curial examination. Article 8 of the Convention provides that: 3-112

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

A corpus of jurisprudence has been developed by the European Court of Human Rights (ECtHR), which has led to a fine definition of the concept of home for the purposes of this instrument, now incorporated into Irish law under the European Convention on Human Rights Act 2003.

While Article 8 does not provide a right to a home it does restrict State action in relation to a person's home.¹⁸⁵ Article 8(1) protects the right of individuals to 'respect' for their private life, family life and 'home'. There is a right of access to, occupation of, and peaceful enjoyment of the home. 'Home' is an autonomous concept, which does not depend for classification 3-113

¹⁸⁴ Drudy, PJ & Punch, M, *Out of Reach: Inequalities in the Irish housing system* (Dublin, Tasc, 2005); See also Drudy, PJ & Punch, M (2002) "Housing Models and Inequality; Perspectives on Recent Irish Experience", *Housing Studies*, Vol. 17, No. 4, 657-672.

¹⁸⁵ See *X v Germany* (1956) 1 Yearbook ECtHR 202; *Botta v Italy* (1998) 26 EHRR 241; *Marzari v Italy* (1999) 28 EHRR CD 175; *Chapman v the United Kingdom* (2001) 33 EHRR 399. See also Kilkelly, U (ed.) *ECHR and Irish Law*, (2nd edition), (Bristol, Jordans, 2008).

under domestic law.¹⁸⁶ Article 8(2) provides that there shall be no interference by a public authority with the exercise of the right respect for a person's home except in accordance with law and necessary in a democratic society. Recent jurisprudence at the European Court of Human Rights has established that any such interference with respect for home must be proportional and accompanied by appropriate safeguards,¹⁸⁷ and must be necessary in a democratic society. The ECtHR has emphasised that the "procedural safeguards" available to the individual are "crucial considerations" in assessing the proportionality of the interference.¹⁸⁸

3-114 In the case of *Cosic v Croatia*¹⁸⁹, involving the eviction of a teacher tenant from the State flat where she had lived for 18 years, the ECtHR stated that the central question was whether the interference complained of was proportionate to the aim pursued and thus "necessary in a democratic society".¹⁹⁰ The ECtHR again pointed out that the loss of one's home is a most extreme form of interference with the right to respect for the home.

Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end (see *McCann v the United Kingdom*, no. 19009/04, § 50, 13 May 2008).¹⁹¹

3-115 But in *Stankova v Slovakia*,¹⁹² the eviction by the relevant municipality interfered with the applicant's "home" was found to be in accordance with law. The only point at issue was whether that interference was justifiable as "necessary in a democratic society" to achieve the legitimate aim pursued by the eviction. This notion of necessity implies a "pressing social need". In particular, the measure employed must be proportionate to the legitimate aim pursued. The municipality was in charge of public housing, and under an obligation to assist the town's citizens in resolving their accommodation problems. These considerations were sufficient for the ECtHR to conclude that the interference complained of was not 'necessary in a democratic society' and accordingly there was a violation of Article 8 ECHR.

¹⁸⁶ *Chapman v UK* (2001) 33 EHRR; *Buckley v UK* (1996) 23 EHRR 101.

¹⁸⁷ See *McCann v the United Kingdom* [2008] European Court of Human Rights, Judgment of 13 May 2008. See also *Connors v the United Kingdom* [2004] European Court of Human Rights, Judgment of 24 May 2004.

¹⁸⁸ *Connors v the United Kingdom* [2004] European Court of Human Rights, Judgment of 24 May 2004 at para 92.

¹⁸⁹ *Cosic v Croatia* (Application No 28261/06) European Court of Human Rights, Judgment of 15 January 2009.

¹⁹⁰ *ibid*, para. 20.

¹⁹¹ *ibid*, para. 22.

¹⁹² 7205/02 [2007] ECHR 795 (9 October 2007).

The European Court of Human Rights has also found breaches of Article 8 in failure to protect the home and private life in *Lopez-Ostra v Spain*¹⁹³ where a family were forced to move from their home as a result of smells and nuisance from a waste treatment plant, in *Geurra v Italy*,¹⁹⁴ where the State had failed to prevent toxic emissions affecting homes, in *Moreno-Gomez v Spain*¹⁹⁵ where the State failed to tackle night-time noise disturbances caused by nightclubs, and in *Fadeyeva v Russia*,¹⁹⁶ where the Russian government had failed to prevent or adequately regulate the environmental pollution from a steel plant. **3-116**

The concept of home in housing law and policy encompasses many aspects and critiques, yet it is becoming part of the growing body of housing rights law.

Housing and Home as a Lifestyle Choice

Housing consumption theories formulated with household increases and income related variables are the cornerstone of most market commentators. Issues of housing need, i.e., the need for shelter, remain largely in the background although often expounded at critical points in political discourse. However, there are many references to housing in terms of Maslow's hierarchy of needs among advocates for increased social housing provision. Maslow placed the need for shelter among the first level of basic needs alongside food and sex, encompassing the basic needs. The perspective posits that once these basic needs are met, the individual moves on to satisfying higher order needs, ultimately leading to the highest, that of self-actualisation. However, Maslow's third and fourth order needs, such as esteem, prestige and status are also enmeshed in housing needs in contemporary societies. Indeed, Maslow's fifth order need for self-actualisation may actually form part of people's decisions to acquire prestigious homes, or design and develop self-build "trophy" homes.¹⁹⁷ **3-117**

Bourdieu, as an alternative to Maslow, better explains the motivational forces driving housing demands in contemporary societies, where there is largely sufficient housing in place for everyone to have a home.¹⁹⁸ Lifestyles, as expressed in housing choices, enter the equation. These are influenced by prior endowments of cultural capital and economic capital. Cultural capital is defined as the accumulated stock of knowledge about the products of artistic and intellectual traditions.¹⁹⁹ Economic capital is both inherited through family ties and earned in the labour market. **3-118**

¹⁹³ (1991) 14 EHRR 319.

¹⁹⁴ (1998) EHRR 357.

¹⁹⁵ (2005) 41 EHRR 40.

¹⁹⁶ (2005) 45 EHRR 10.

¹⁹⁷ See Clapham above for a further consideration of these issues.

¹⁹⁸ See Bourdieu, P, *Distinction: A Social Critique of the Judgment of Taste* (London, Routledge, 1984).

¹⁹⁹ See Trigg, AB, "Deriving the Engel Curve: Pierre Bourdieu and the Social Critique of Maslow's Hierarchy of Needs", *Review of Social Economy*, Vol. 62, Issue 3, (2004) 393-406.

3–119 Bourdieu develops the concept of *habitus* to describe the disposition of individual agents in the social structure, out of which practices are governed by *taste*. For those at different levels of the social structure or classes, material constraints have different effects on taste, such as the characterisation of manual working class taste for items of necessity. Yet, for Bourdieu, the relationship between economic necessity and taste is not direct. It is determined by *habitus*, the interconnection between levels of economic and cultural capital, and the social conditioning associated with particular combinations of these. Thus, Bourdieu posits that people with the same income may have different patterns of consumption. In terms of housing consumption, there are gradations of need or demand, with socially determined expectations playing an important role, which may vary between different groups of people with the same income levels. The concept of *habitus* captures the competitive struggle where social identity is defined and asserted often through difference. This class-based critique of consumerism recognises the role of cultural capital in housing choices, moving beyond simple Maslow-related or simple economic rationality perspectives.

3–120 Giddens developed the concept of a “reflexive modernity”, where intensified globalisation provides the individual with a range of imagery and information on models of citizenship, styles of consumption, modes of communication etc.²⁰⁰ One of the consequences has been individually increased expectation of personal fulfilment and satisfaction, often reflected in housing consumption, and the lifestyle and status nature of certain housing types and locations.²⁰¹ The requirements of individuals tend to be expressed more and more as individual consumer choices, fashioned to individual lifestyles, in both private and public housing. Yet, housing policy and law tend to reflect earlier times, based on the commodity exchange and producer aspects of housing provision and distribution.²⁰²

Social Justice Perspectives

3–121 Social justice and human rights are often seen as related, although there is a growing corpus of human rights law, based on positive law, which is separate from natural law social justice approaches. In Europe, the governing Treaty contains a commitment that the Union shall promote social justice and protection, thus ensuring that all European Commission and Member State legislation based on European Union law and associated

²⁰⁰ Giddens, A, *The Consequences of Modernity* (Cambridge, Policy Press, 1990).

²⁰¹ See Hudson, A, “Equity, individualisation and social justice”, in Hudson, *et al*, *New Perspectives on Property Law, Human Rights and the Home* (London, Cavendish, 2004).

²⁰² See Kenna, P, “Housing Rights - the New Benchmarks for Housing Policy in Europe?” *The Urban Lawyer* (Winter 2005) Volume 37, Number 1. 87–111; Clapham, D, “Housing Policy and the Discourse of Globalization”, 6 *European Journal of Housing Policy*, 55, 58 (2006).

State actions will be compatible with this objective.²⁰³ There are, of course, different interpretations and sources for social justice arguments, largely associated with particular views of society. For example, Atlantic Philanthropies, the charity which has funded a range of State and non-State agencies in Ireland in recent years uses the term widely in its mission statements, etc.²⁰⁴ Social justice is a concept which is often associated with rights, and particularly housing rights. The term “social justice” is used to

²⁰³ It is significant that Article 2(3) of the Treaty of Lisbon, which is binding EU law applicable in all courts of EU Member States in relation to matters involving the implementation of EU law states: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States”.

²⁰⁴ “At The Atlantic Philanthropies we believe that all people should be treated with dignity, respect and fairness. This belief is at the heart of our vision for social justice in the world and especially in the countries in which we are active. We pay particular attention to people and groups who are systematically disadvantaged by social and economic barriers that result in injustice and inequity. We believe that these barriers can be removed by empowering people to engage in advocacy to create a more equitable and just world”. See website: <http://www.atlanticphilanthropies.org/message-our-ceo>. In a speech in July 2010, entitled *Social Justice: A Guiding Vision for Atlantic’s Final Chapter*, Gara LaMarche CEO of Atlantic Philanthropies stated: “We’ve come to believe that what captures and unites our work best is the notion of social justice. Social justice is woven into the fabric of many organisations trying to effect change, whether or not they embrace the term. It is an unspoken objective for many foundations’ programmes and implicit in many of the problems they seek to address, from poverty and education to peace and environmental degradation. Social justice has long been at the core of much of Atlantic’s funding. It was central to our support for integrated schools in Northern Ireland, which bring Catholic and Protestant children together to learn; our work in Viet Nam to extend health care to the most disadvantaged and poor by developing commune health clinics in rural communities where ethnic communities live; and our support for the fearless and lifesaving Treatment Action Campaign in South Africa, which fights for increased access to treatment, care and support for people with HIV/AIDS and conducts awareness campaigns to reduce new HIV infections. Social justice was also at the core of Chuck Feeney’s support for the University of Limerick, which strengthened higher education in that hardscrabble city in the west of Ireland, and to the University of the Western Cape in South Africa, which opened the doors of access to black Africans and others who were traditionally shut out of higher education. The recognition and pursuit of social justice helped us connect our past and current work, but more importantly it has clarified what we aim to achieve in the future. By looking at our grantmaking through the lens of social justice, we have sharpened our focus for Atlantic’s remaining decade... Our grantmaking is rooted in the pursuit of social justice because, in a sense, our work must begin at the end. We start, as our grantees do, with the vision of the world we want to live in, and then figure out how to get there. We see a world in which peace prevails over histories of conflict. It is a world in which respect for human rights is the basis of policy, not expendable in a crisis. It is a world in which democratic participation and meaningful civic engagement is the norm, and in which the most vulnerable are viewed as most deserving of public support”.

demand a greater degree of economic egalitarianism, income or property redistribution, as well as laws and policies which promote equality of opportunity or equality of outcome for particular groups in society. The term appears ubiquitously in housing policy statements, campaigning and advocacy group literature and indeed is considered by courts in many housing related cases, with inconclusive outcomes. It is indeed, an element of justice generally. Before examining how the term social justice has been addressed in Irish housing law, it is important to consider wider analysis and definitions of the term. Of course, the religious nature of the Irish Constitution, compared to, for example, the American Constitution, means that religious texts, primarily Roman Catholic texts, have been used to assist in the interpretation of such terms by some judges.

Utilitarian Justice and Distributive Justice

3–122 In his iconic book on social justice Miller argues that social justice is an idea often voiced but rarely understood.²⁰⁵ Indeed, he claims that many suspect that it is “nothing more than a useless ornament for rounding off party manifestos or reformers tracts, fine-sounding with no real meaning”.²⁰⁶

The concept of social justice is best understood as forming one part of the broader concept of justice in general. Justice comprises the manner in which benefits and burdens are distributed among people in society, whose qualities and relationships can be investigated. Miller benchmarks three political theorists, Hume, Spencer and Kropotkin, against his three indicators of social justice; distribution of the goods and benefits of society according to rights, to desert, and to merit or need. Each perspective on (social) justice involves a different way of looking at society, and because there are several ways of looking at society, it is understandable that political concepts of social justice should display the diversity they do.²⁰⁷ These reflect broader views on the nature of human beings and society, as well as structural and personal distributions of wealth, status and resources.

3–123 Two political principles underwrite the notion of justice—aggregative/ utilitarian justice and distributive justice, according to Miller. The utilitarian or aggregative principle:

is one which refers only to the total amount of good enjoyed by a particular group, whereas a distributive principle refers to the share of that good which different members of the group have for themselves.²⁰⁸

²⁰⁵ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976). See also Nussbaum, MC, *Sex & Social Justice*, (OUP, 1999); Sen, A, *The Idea of Justice* (London, Allen Lane, 2009); Sen, A, *Development as Freedom*, (OUP, 1999).

²⁰⁶ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976), p v.

²⁰⁷ *ibid* at p 7.

²⁰⁸ *ibid* at p 19.

For instance, the sum total of happiness enjoyed by the group as a whole is aggregative, while the principle that each member of the group or society should enjoy an equal amount of happiness is distributive. Thus, utilitarianism is based on the notion that the greatest sum of happiness for all should be encouraged, but of course, it emanated at the time of large-scale manufacturing at heavy social and environmental costs.²⁰⁹ Often associated with liberalism in economic and political theory, its protagonists have accepted the need for some measure of redistribution. For instance, even Hayek, who argued that substantive equality and distributive (social) justice conflicted with rule of law, nevertheless accepted that the government could provide a minimum level of support for the “unfortunate” in society.²¹⁰

Rawls proposes a contractual theory of justice where:

all social primary goods—liberty and opportunity, income and wealth and the bases of self respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the less favoured.²¹¹

Thus, he establishes a priority among the demands of justice, liberty, opportunity, income, wealth, etc. over the requirements of equality. In this “justice as fairness” approach, Rawls distinguishes three types of justice; perfect procedural justice (characterised by a fair outcome), imperfect procedural justice (where the procedures are most likely to produce a fair outcome), and pure procedural justice (where there is no criteria for a fair outcome, but only fair methods and procedures). Following from his “behind the veil” or reflective equilibrium approach, where decision makers theoretically remove themselves from society in defining objective criteria, Rawls’s approach does not amount to a distributive approach according to need, but rather a small variation on the utilitarian perspective.

3–124

The legal theorist, Kelsen, saw justice as having no substantive content, but is to be used as a terminology of approval to whatever societal phenomena one wishes.²¹² Justice is largely viewed as having some generally approved local, national or international criteria.

Distributive Justice

Miller points out that justice is a distributive concept, and social justice demands that a person’s share of the goods and resources in society be

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²⁰⁹ See Bentham, J, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907); Mill, John Stuart, *On Liberty and Utilitarianism* (London, Longman, Roberts & Green, 1861); Mill, John Stuart *Utilitarianism* (OUP; 1998).

²¹⁰ Hayek, FA, *The Road to Serfdom* (University of Chicago Press, 1944), p 133. “There can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and capacity to work, can be assured to everybody”.

²¹¹ Rawls, J, *A Theory of Justice* (OUP, 1972), p 303.

²¹² Kelsen, H, *What is Justice? Justice, Law and Politics in the Mirror of Science* (Berkeley and Los Angeles, University of California Press, 1957).

distributed according to his or her rights, merits or needs. Social justice concerns the distribution of benefits and burdens or disadvantages throughout a society, as it impacts on the major social institutions—property systems, public organisations, etc. It deals with such matters as the regulation of wages and profits, the protection of a person's rights through the legal system, the allocation of housing, healthcare, education, and welfare.

Three conflicting interpretations of justice arise within the distributive principles; to each according to his rights, to each according to his deserts, and to each according to his needs.²¹³ Miller suggests that rights-based distribution involve a partial distributive principle, since individual rights are usually confined to a specific level of resource being awarded to the person bearing the right. The principle of desert or merit is potentially a complete distributive principle, while the principle of need may or may not involve complete distributive principles, depending on whether more resources can be created than are actually needed. Some claim that needs expand in line with availability of resources.

3–126 According to Miller, there is an inherent conflict between distribution according to desert (deserving) and distribution according to needs, assuming that needs can be defined as opposed to wants or desires. No society can distribute goods in line with both principles, although many may do so partly according to each. Indeed, the concept of justice based upon desert or merit, can often be juxtaposed with rights based on need. This concept of desert is widely promoted and denotes a relationship between an individual (and his conduct) and a reward. Miller proposed three principles as determinant of economic desert; contribution, effort and compensation. In terms of distribution according to rights, there is often a distinction between legal and moral rights, reflected in positive and natural law concepts. Miller refers to the positive law perspective, highlighted by Bentham, who claimed that rights are the fruit of the law and law alone.²¹⁴ Hohfeld proposed that there were four separate terms to describe rights; claim-right, liberty, power and immunity.²¹⁵ In relation to social justice, the former is the most relevant, but all rights generate corresponding duties.

3–127 Miller points out that rights and social justice stand in a close relationship to one another, and an important part of social justice consists in respecting people's rights. The most powerful mechanism for specifying and protecting rights is law, although Miller points out that it is a matter of argument how far the existing legal systems realise justice in protecting contemporary rights.²¹⁶ Miller suggests that international human rights relating to economic, social and cultural rights, such as the *Universal Declaration on Human Rights*

²¹³ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976), p 27.

²¹⁴ *ibid* at p 55.

²¹⁵ Hohfeld, WN, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (London, 1964).

²¹⁶ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976), p 77.

(1948), are relevant to social justice, arising from their human needs base and their universality. Of course, many claim that first generation human rights, such as liberty, property, life, etc. as ordained in the Declarations of the French and American Revolutions, stand in contrast to second generation economic, social and cultural rights, such as subsistence, housing, healthcare etc. First generation rights are held to involve only negative obligations by the State, i.e. not to interfere with their exercise, allowing life and liberty to develop and property to be accumulated. Socio-economic rights, on the other hand are seen as requiring State action of a positive nature, often involving large levels of expenditure. Of course, the distinction is erroneous, since extensive resources are required to promote electoral and political systems, property accumulation and exchange, regulation, justice and the prison system. Indeed, States already expend large resources on securing education, healthcare, employment support, training, and subsidies to private industries without any difficulty in reconciling this with legal, theoretical or constitutional limitations on their socio-economic rights implementation.²¹⁷

Social Justice in Feudal, Market and Organised Capitalist Societies

Miller suggests that substantive ideas of social justice and the principles used to distribute the benefits and burdens among members of society take radically different forms in different types of societies.²¹⁸ Primitive societies do not have a concept of social justice. While much has been written about gifts and assistance to strangers, etc, by primitive tribes, Miller suggests that there was no identifiable perspective of transforming society in those societies and therefore no concepts of social justice could arise. He evidences research on these societies, showing that land tenure, stratified status and membership, occasional reciprocal altruism, division of food and other features, were in essence little more than subsistence requirements. The notions of rights, desert and needs were absent. 3-128

In feudal and hierarchical societies, contracts of allegiance bounded by custom and heredity formed the basis of the social structure. However, Miller points out that the Roman Catholic Church and the merchant class stood outside this agrarian structure. Yet, bishops and clergy often entered into large-scale property ownership and became well-defined parties within 3-129

²¹⁷ Whelan and Donnelly point out that in “Western States” (including the US) on average, social spending as a percentage of GDP increased by more than a fifth between 1980 and 2005, rising from 18% to 22% (although the 2005 figure of 22.1% is slightly below the 1995 figure of 22.8%). As a percentage of government expenditures, social spending rose by 30%, from 39% in 1980 to 51% in 2005, with an unbroken upwards trend. In other words, the typical Western government today spends about half of its resources and a fifth of the nation’s domestic economic output on social insurance. See Whelan, DJ & Donnelly, J, “The Reality of Western Support for Economic and Social Rights: A Reply to Susan L. Kang”, *Human Rights Quarterly*, November 2009, 31, 4, 1030–1054 at 1032.

²¹⁸ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976), p 253.

feudal society. Christian thought came to terms with the existence of social hierarchy, private property, inequality and other features of feudal society, where justice was seen primarily as the protection of legal rights derived from custom, and enforcement of the law. The harmonious preservation of the *status quo* in the interest of common peace and order was the purpose of law and justice. Justice consisted primarily in treating a man according to his station, social position or function, rather than any particular qualities or merits.²¹⁹

3–130 However, some Christian natural law theories suggested that law only became observable when it accorded with the principles of justice. Such natural law was to be defined at various times by kings and popes, rather than any sense of popular justice. Aquinas held that an unjust law is no law at all. He proposed that persons in extreme need could take other people's property to survive, and also that justice consisted in "helping the wretched." But the most significant principle of Christian natural law ordained that those with superfluous wealth should give to those in need. Natural law accepted claims of need and some views were held that all property was given by God, thus requiring a duty of charity from the rich to the poor. This notion of social justice involved preserving the existing social order (however established), respect for hierarchy over equality, and a duty on the rich to satisfy the basic needs of the poor.²²⁰ There was a recognised mutual obligation of personal dependence between the lord and his serf, not as equal, but nevertheless involving some responsibility for the serf's welfare. A condition of need gave a man a just claim on the resources of the privileged. Much of this approach is reflected in Roman Catholic social justice instruments today.

3–131 In market societies, or the early capitalist systems of Europe and America in the 1800s and 1900s, the values of social justice took on a different flavor to the former feudal period. Market societies were characterised not by hierarchical orders, based on custom and loyalty, but on contracts and exchange between formally equal actors. The market principle, later enshrined in law, is that all men are equal as market actors. They may enter contracts freely and gain wealth, property, and other benefits as free persons. In the market society a man's duty was no longer to remain within his station, as it were, but to take on tasks, contracts, etc., and reap what rewards he could. Indeed, a man should seek out the industry most suited to his abilities. In pursuing his private ambitions each man contributed to the common stock of goods. This individualist theory of society, with its corresponding transformations in religious church developments, held that

²¹⁹ Compare Article 40.1, *Bunreacht na hÉireann*, "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function".

²²⁰ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976), p 282.

no barriers of a legal, social or economic type would prevent a man (rarely a woman) with determination from succeeding and gaining his reward or merits. This concept has been described as the myth of the “self made man”, highly acclaimed and admired even today. It invokes the essence of the desert concept and has acquired almost mystical qualities. The whole concept of self-help, with its long standing associated literature and educational influence derives from this perspective.²²¹

An integral part of justice in the market society model involves the rewarding of desert, even to the exclusion of other’s rights and needs entitlements. Indeed, those whose needs were not met in society were often regarded as having flawed characters, moral failings, lacking in effort, and in many ways altogether undeserving. At the arterial core of desert justice, Victorian England, work became a primary virtue in itself, with idleness viewed as an unforgiveable sin. Thus, only the deserving poor—the old, the sick and the disabled, and those with meritorious qualities but who were reduced to poverty through circumstances beyond their control, were to be given assistance. The undeserving poor, as defined by the Charitable Organisation Society of England, had personal failings, such as drunkenness and idleness, directly resulting in their poverty. Any assistance given to these was based on encouraging them to become part of the deserving poor. The workhouse system created by the Poor Law legislation sought to ensure the poor earned the subsistence they received and acquired the habits of industry.²²²

3–132

Merit was to be rewarded in the market, and justice required that it be so. The market is egalitarian and social distinctions are irrelevant. As market relations became more dominant in public policy thinking, demands grew for equal rights in law, human rights, equality before the law, political equality, etc. However, Miller points out that this egalitarianism stops short of economic equality in the strong sense, because the market only requires equality in the formal exchange of values, rather than equal treatment of individuals or equal outcomes. There is no concept of protecting rights or satisfying needs except through market-based exchanges.

3–133

Marxism and Social Justice

The development of capitalism from feudalism through the development of the market system lead to a new formulation and definition of justice and social justice. Engels showed how the concept of social justice varies with the economic relations of society. He set out a detailed analysis of the development of law and legal systems in *The Housing Question* in the late 1880s:

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At a certain, very primitive stage of the development of society, the need arises to co-ordinate under a common regulation the daily recurring acts of production, distribution and exchange of products, to see to it that the

²²¹ See Briggs, A, *Victorian People* (Harmondsworth, Penguin, 1955).

²²² See Webb, S, & B, *English Poor Law Policy* (London, 1910)

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

individual subordinates himself to the common conditions of production and exchange. This regulation, which is at first custom, soon becomes law. With law, organs necessarily arise which are entrusted with its maintenance—public authority, the state. With further social development, law develops into a more or less comprehensive legal system. The more complicated this legal system becomes, the more its terminology becomes removed from that in which the usual economic conditions of the life of society are expressed. It appears as an independent element which derives the justification for its existence and the reason for its further development not out of the existing economic conditions, but out of its own inner logic, or, if you like, out of ‘the concept of will’. People forget the derivation of their legal system from their economic conditions of life, just as they have forgotten their own derivation from the animal world. With the development of the legal system into a complicated and comprehensive whole the necessity arises for a new social division of labor; an order of professional jurists develops and with these, legal science comes into being. In its further development this science compares the legal systems of various peoples and various times, not as the expression of the given economic relationships, but as systems which find their justification in themselves. The comparison assumes something common to them all, and this the jurists find by summing up that which is more or less common to all these legal systems as natural law.²²³

Engels then described the development of the concept of justice.²²⁴ He posits that the variable nature of the notion of justice is the ideologised expression of legal relations in society:

However, the standard which is taken to determine what is natural law and what is not, is precisely the most abstract expression of law itself, namely, *justice*. From this point on, therefore, the development of law for the jurists, and for those who believe them uncritically, is nothing more than the striving to bring human conditions, so far as they are expressed in legal terms, into closer and closer conformity with the ideal of justice, eternal justice. And this justice is never anything but the ideologised, glorified expression of the existing economic relations, at times from the conservative side, at times from the revolutionary side. The justice of the Greeks and Romans held slavery to be just. The justice of the bourgeois of 1789 demanded the abolition of feudalism because it was unjust. For the Prussian Junker even the miserable Kreisordnung is a violation of eternal justice. The conception of eternal justice therefore varies not only according to time and place, but also according to persons, and it belongs among those things of which Mülberger correctly says, ‘everyone understands something different’. While in everyday life, in view of the simplicity of the relations which come into question, expressions like right, wrong, justice, conception of justice, can be used without misunderstanding even in relation to social matters, they create, as we have seen, hopeless

²²³ Engels, F, *The Housing Question, Part Three, Supplement on Proudhon and the Housing Question* (1872). Available at: <http://www.marxists.org/archive/marx/works/1872/housing-question/ch02.htm>.

²²⁴ For development of this notion of law and justice as a superstructure reflecting the economic relations of society, and the conclusion that when the contradictions between these competing forces of capital and labour are resolved i.e. through revolution, law and the State will wither away—see Beirne, P & Sharlet, R, *Pashukanis. Selected writings on Marxism and Law* (London and New York, Academic Press, 1980).

confusion in any scientific investigation of economic relations, in fact, much the same confusion as would be create in modern chemistry if the terminology of the phlogiston theory were to be retained. The confusion becomes still worse if one, like Proudhon, believes in this social phlogiston, 'justice', or if one, like Mülberger, declares that the phlogiston theory no less than the oxygen theory is perfectly correct.²²⁵

Of course, Marx argued that the notion of justice is as much ideological as real, since it denied the reality of the production process, concentrating only on the exchange system. Marx showed that the formal legal rights of equality, freedom of contract and property rights were in fact mere masks for what was in reality, a system of exploitation of wage labour, and which generated the commodification of labour and all human needs to be organised through market supply and demand. **3-135**

The civil, property and contract rights now pervasive in market societies had previously been asserted against monarchs and feudal States by the rising *bourgeoisie* social movements of the French and American revolutions.²²⁶ For Marx, the rights and justice concepts surrounding exchange of commodities in the market were really the formal expression of liberal bourgeois structural frameworks for capitalist production and accumulation. The apparent autonomy of law, based on concepts which sublimated the relations of production based on wage labour as a commodity, protection of commodity exchange through contract law, capital as a property right and the narrow concept of political democracy, was revealed. Marx proposed that democracy be widened to include not just political, but also social and economic democracy. While ostensibly, the State enforced the civil laws in relation to life and liberty, contract and property, its role was in reality, to ensure, through law if possible (and by force if necessary), the conditions for capitalist production and exchange of commodities (including labour), as well as the reproduction of the social relations of society, which ensured its continuance. Justice arguments within this contract for labour were excluded as it was a private law issue. Social justice for Marxists therefore involves not just notions of fairness in distribution of profits or surplus value (whether through taxation etc.), but fairness within the relations of production, i.e. in the production of commodities or services and the reward and treatment of workers within that process. **3-136**

Competing Concepts of Social Justice in Market Societies

Social justice in this context requires that workers be rewarded with the value of the products of their labour. Different perspectives on how this **3-137**

²²⁵ Engels, F, *The Housing Question, Part Three, Supplement on Proudhon and the Housing Question* (1872). Available at: <http://www.marxists.org/archive/marx/works/1872/housing-question/ch02.htm>.

²²⁶ See Marx, K, *Capital, A Critique of Political Economy* (London, Lawrence and Wishart, 1983).

should take place at a collective level were advanced in the late 1800s and 1900s. Indeed, while the middle and upper classes adopted the merit notion of justice (although separate from justice within family life), the working class entered cooperative and solidarity relations with each other through Trade Unions, co-operative societies, insurance organisations, etc. These developed to provide mutual aid to alleviate the greatest unmet needs of workers and their families, as well as to protect them from the often brutal outcomes of the individualist market system.

3-138 Thus, two conflicting ideals of social justice emerged in market societies. On the one hand, social justice was based on desert or reward for individual effort, favourable characteristics, and success in the market. At that time, individual self-help became a ubiquitous feature of working-class thinking, promoted by middle class values in education and literature. Marx and others have described this as “*bourgeois*” or “*petite bourgeois*” thinking imposed by middle-class ideologues and religious groups. Alternately, the collectivist, solidarity-based concept of social justice adopted by working class organisations from the mid 1800s was based on meeting people’s needs. This was often expressed as a fair reward for labour, but increasingly developed into a demand that capital and the means of production be collectively owned with all goods produced being distributed according to need. The statement “from each according to ability, to each according to his need” typified this sentiment. The imposition of legislative terms, to protect worker’s rights and requiring wages to reflect more than mere subsistence, into the private law of employment contracts formed part of Marxist social justice demands.

3-139 Of course, the development of capitalist society since the 1900s has prompted the development of the concept of social justice. Miller describes how ideas of social justice have shifted within the current economic systems described as “organised capitalist” systems.²²⁷ Economically, the market society model does not adequately explain the contemporary situation. Of course, there are some areas of the economy characterised by individual exchange of goods and commodities, but markets for consumer goods and even wage labour are largely fixed between large-scale suppliers with standardised contract terms. The growth of stable oligopolies where a small number of large-scale producers (and employers) provide almost all the goods and services for sale has transcended the relevance of the market society model. New entrepreneurs from humble beginnings in workshops are few and far between. Industrial entrepreneurs usually operate within large organisations, and many have joined as junior salaried staff. Even the contemporary shopkeeper, the archetypal epitome of the market society, is more than likely to be a salaried (with bonus) employee of a large chain.

²²⁷ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976), p 300. This could be described as the competitive neo-corporatist approaches of Irish policy-making today.

Major growth in non-market institutions in the public, private and professional areas of society have led to a proliferation of public and semi-public agencies dealing with regulation, education, healthcare, law, planning, welfare etc. Similarly, trade unions and their political parties have sponsored legislation which have established minimum wages and other working conditions, which override any individual employment contract. Trade unions have become more involved in long-term planning within various industries and economies as a whole, through various mechanisms, although ultimately, control lies with the owners of capital or the means of production. Political decisions, based on parties appeal for popular support have regulated, supported and directed market behaviour and standards. Yet, large corporations control huge areas of production, directing the use of resources and people. These corporate organisations, as well as the growth of organisations of workers, professional, politicians and others has been depicted as the contemporary society of an “organisation of organisations”. Miller described this as “a society constituted by rationally co-ordinated activities of a number of organisations, which themselves co-ordinate the activities of many individuals”.²²⁸ The State may indeed, orchestrate some of this co-ordination in line with policy planning or the achievement of some particular outcome, and this has sometimes been described as “modern corporatism”.

3-140

This contemporary modern neo-corporatist society can be distinguished from the market society model by the emphasis on organisations rather than individuals, with major consequences for any definition of social justice. Social good is viewed as arising from the rational coordination of activities rather than the free play of individual self-interest. Miller argues that service to the corporation or organisation professional group or other institution becomes a primary source of merit reward in this organised capitalist society.²²⁹

3-141

The concept of social justice in organised capitalist society with its organisation of organisations has lowered the notion of desert from its former pedestal and re-introduced the principle of need, according to Miller.²³⁰ The principle of need comes back into the distribution of the goods of society within organised capitalist societies, since service to the “community” (public, institutional or corporate) has become the dominant motive for work. It is important that the needy have a claim of justice to the benefits created by others—“otherwise the notion of service degenerates into paternalistic charity”.²³¹ The concept of citizenship can act as a powerful force in these distribution debates. Marshall identified this basis

²²⁸ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976), p 303.

²²⁹ *ibid* at p 305. See also Reich C, “The New Property”, *73 Yale Law Journal*, 733 (1964), where he describes this society as a type of new feudalism, where organisations and the State demand loyalty and compliance in return for discretionary rewards necessary for any individual to function effectively.

²³⁰ Miller, D, *Social Justice* (Oxford, Clarendon Press, 1976), p 308.

²³¹ *ibid* at p 309.

for expanding the concept of needs-based distribution, but also accepted that there may well be gradations, based on status, income inequality, specific group entitlements etc.²³²

3–142 The idea of social justice, therefore, varies with different models of society. Indeed, all societies carry remnants of earlier society notions of social justice. Thus, many feudal notions of order and charity pervaded market society models, and indeed organised capitalist society models. Individualist market society-based concepts of social justice pervade contemporary organised capitalist societies, whereas their relevance in many cases appears now more ideological than rational. There are important consequences for these spill-overs, in relation to advancing social justice perspectives. For instance, the idea of desert presupposes human inequality, whereas distribution according to need presupposes a model of human equality or egalitarianism.

3–143 There is an incomplete shift from the individualist model to the organised capitalist model of society. Thus, we find a tendency to believe that rewards in the market are a fair basis for distribution of goods in society. There is a contrary tendency to believe that reward for merit must be socially estimated and contained. There is therefore an unresolved tension between desert and considerations of need as the basis for policies for distribution or redistribution. People who try to live as egalitarians (including many whose beliefs are religious-based) believe that equality is the proper interpretation of social justice, according to Miller.

3–144 Social justice, then, may include equality, defined as equality of opportunity within the market society model, or equality of outcome or satisfaction of needs, within organised capitalist societies. For Miller, the three elements of rights, desert and need form the essential social justice analysis, as well an impetus to transform existing society. However, the conflicting interpretations illustrate the disparate notions of social justice and indeed characterise differing political approaches. Those who advance social justice in terms of redistribution according to needs often promote rights-based approaches guaranteeing equal and fair treatment. Some carry feudal notions of preserving social order and obligations of the rich to the poor. Ultimately, the balance between desert and needs-based programmes reflects historical and political development, as well as the level of acceptance of neo-corporatist capitalism models, such as social partnership agreements within the contemporary social order.

Social Justice and Wealth

3–145 Barry in *Why Social Justice Matters*²³³ refers to the British Labour Party Commission on Social Justice under Tony Blair, which concluded that

²³² Marshall, TH, "Citizenship and Social Class" reprinted in *Sociology at the Crossroads* (London, Penguin, 1963).

²³³ Barry, B, *Why Social Justice Matters* (Cambridge, Polity Press, 2005). See also Donnison, D, *The Commission on Social Justice Act Local: Social Justice from the Bottom Up*, Discussion Paper no. 13 (London, IPPR, 1994).

unjust inequalities should be reduced, and as far as possible eliminated. He argues that morally arbitrary inequalities begin before the conception of the children of the nation, since the health and nutritional status of the mother at the time of conception is critical.

Barry points out that there is a major focus on inequality of earnings in debates about social justice to the exclusion of any discussions on wealth inequalities.²³⁴ Earnings are only one source of income and its share of national income in the UK has consistently fallen. Yet, there is a mistaken belief that everything about inequalities of wealth can be captured in discussions about inequality of income. Barry points out that much wealth does not give rise to an income, such as the owners enjoying their Caribbean islands or mansions in Belgravia, where the tax system does not even levy an imputed income tax. Similarly, where capital gains are taxed at a much lower level than income tax, this does not reflect an equity in taxing. Barry refers to asset poverty, pointing out that almost 40 % of the American population would not be able to survive on their assets for three months at the poverty level, and even if the equity of the homes is included only falls to 25 %.²³⁵

3-146

But assets are also important because they provide a measure of independence, a cushion against adversity, and an opportunity to make a one-off capital payment that would otherwise be impossible. Thus, both income and assets are important measures of well-being.²³⁶

Barry points out that the unequal distribution of wealth, as well as asset poverty, create greater ill-effects on the social fabric of society than income inequality.²³⁷ Wealth inequality is far greater than income inequality. The distorting effect of inequality on politics is accentuated by inequality of wealth as against income.

Barry posits that social justice is important as it plays four roles. Firstly, any social programme must be crystallised around a coherent set of principles if it is not merely to become a shopping list. Secondly, the idea of social justice can motivate people in a way that a demand put simply on the basis of interest does not. Only where demands are infused with a sense that justice is at stake do they achieve political weight, especially where some are

3-147

²³⁴ Barry attributes this to the fact that academics writing about social justice are paid employees and concerned about their incomes comparisons with others.

²³⁵ Barry, B, *Why Social Justice Matters* (Cambridge, Polity Press, 2005), p 188.

²³⁶ *ibid.*

²³⁷ Kevin Cahill, in *Who Owns the World: The Hidden Facts Behind Landownership* (Edinburgh, Mainstream Publishing, 2006) claims that thirty five monarchies, including the papacy, rule over one-third of the world's surface. Monarchical rule exists in fifty one States and thirty-six colonies and dependencies of the world's 197 States. He points out that instead of redressing these disparities in land ownership, human rights instruments, such as the UN Universal Declaration on Human Rights and the European Convention on Human Rights, have actually consolidated this unequal ownership by requiring compensation to be paid on confiscation or redistribution.

required to make sacrifices. Thirdly, a sense of social justice can motivate people who do not expect to gain personally from its realisation. Finally, a conception of social justice can stabilise changes even if they were brought about in the face of resistance that was thought to be morally justified.²³⁸

- 3–148** Clayton and Williams in *Social Justice*²³⁹ point out that issues of social justice, in the broadest sense affect the distribution of benefits and burdens between different or groups. They argue that Locke’s account of justice rests on the right of self-preservation though labour and property, whereas Hume’s is premised on justice as a facilitator of mutually beneficial co-operation. Hume also theorises justice as respect for rules on the distribution of private property, but rejecting desert-based arguments and egalitarian concepts of social justice, favours systems which allow private property to reward industry, allow exchange, facilitate inheritance, and enforce contracts. Thus, there are significant social justice issues in relation to ownership of wealth, which are routinely avoided in discourses on income inequality etc.

Social Justice and the Capabilities Approach

- 3–149** Amartya Sen suggests that the central focus of social justice should be on what people are actually capable of being able to do and be.²⁴⁰ The overriding objective of development should be the expansion of human capabilities. This concept known as “the capabilities approach”, developed by Sen can act as a critique of traditional utilitarian and welfare economics. Sen argues that wealth and the possession of commodities are merely useful for the sake of something else, which is really the full development of people’s lives.²⁴¹

- 3–150** He also suggests that a concentration on greater equality of goods available to all does not necessarily address differences between groups. Different people and different societies vary in their capacity to convert income and commodities into valuable achievements. For example, a disabled person may require extra resources, such as wheel-chair, ramp, lift etc, to achieve the same as an able bodied person. Similarly, a child typically has very different nutritional requirements to a manual worker or a pregnant woman. Sen also points out that there are more complex requirements for social achievements, such as appearing in public without shame or entertaining family and friends. These typically include cultural factors, such as social convention and custom, or status and class.²⁴²

²³⁸ Barry, B, *Why Social Justice Matters* (Cambridge, Polity Press, 2005), pp 249–250.

²³⁹ Clayton, M & Williams, A, *Social Justice* (Oxford, Blackwell, 2004).

²⁴⁰ See McNaughton, C, Housing, Homelessness and Capabilities. *Housing, Theory and Society*, 27, Issue 1 (March 2010), 23–41.

²⁴¹ Sen, AK, *Inequality Re-examined* (Oxford, Clarendon Press, 1992).

²⁴² See Sen, AK, *Development As Freedom* (Oxford, Oxford University Press, 1999), pp 70–71. See also Clark, DA, *The Capability Approach: Its Development, Critiques and Recent Advances*, GPRG-WPS-032. Global Poverty Research Group. See website: <http://www.gprg.org/>.

Sen posits that instead of examining the availability of goods and services available we must analyse the level and nature of such goods which enable people to function effectively in society. This leads to his two constructs for examining social justice, based on human function(ing)s, and the capability to achieve valuable function(ing)s. A “functioning” is an achievement of a person; what she or he manages to do or to be. It reflects a part of the state of that person. Achieving a functioning (e.g. being adequately nourished) with a given bundle of commodities (e.g. bread or rice) depends on a range of personal and social factors (e.g. metabolic rates, body size, age, gender, activity levels, health, access to medical services, nutritional knowledge and education, climatic conditions etc). A functioning, therefore, refers to the use a person makes of the commodities at his or her command. A capability reflects a person’s ability to achieve a given functioning.²⁴³ Social justice is violated if people are in want of the capability to be adequately nourished, housed etc., to enjoy life and participate in political life.²⁴⁴ The capabilities approach also recognises that people have values and goals that transcend and sometimes even conflict with personal well-being.

Martha Nussbaum develops this theoretical approach by developing a definite list of human capabilities, or the requirements of a “well-lived” life, drawn from Aristotlean philosophical writings.²⁴⁵ These are (a) life, (b) bodily health, (c) bodily integrity, (d) senses, imagination and thought, (e) emotions, (f) practical reason, (g) affiliation, (h) play, (i) political and material control over one’s environment. All of these are of central importance to all human life and should be embodied in constitutional guarantees, human rights legislation and development policy.

Sen did not have such a fixed list, but rather suggested that such a list should not be chosen by (economic) theorists, but through fruitful public participation, public discussion and reasoning. This effectively adopts a normative approach to many of the basic needs of people in society.²⁴⁶

The capabilities approach has not yet been applied explicitly applied to housing as an enabling or constraining force for realising the functionings established in this theoretical approach, although a number of writers are addressing homelessness.²⁴⁷ Clearly, the basic premise is that the “capabilities” or “functionings” of people cannot be realized without

3-151

²⁴³ See Clark, DA, *The Capability Approach: Its Development, Critiques and Recent Advances*, GPRG-WPS-032, Global Poverty Research Group.

²⁴⁴ See Alexander, JM, *Capabilities and Social Justice, The Political Philosophy of Amartya Sen and Martha Nussbaum* (Farnham, Surrey, Ashgate, 2008).

²⁴⁵ Nussbaum MC, *Women and Human Development: the Capabilities Approach* (Cambridge, Cambridge University Press, 2000).

²⁴⁶ See Alexander, JM, *Capabilities and Social Justice, The Political Philosophy of Amartya Sen and Martha Nussbaum* (Farnham, Surrey, Ashgate, 2008).

²⁴⁷ But see McNaughton, C, “Housing, Homelessness and Capabilities”, *Housing, Theory and Society*, 27, Issue 1, (March 2010), 23–41; Fernandez, G, “Poverty, Homelessness and Freedom; An Approach from the Capabilities Theory”, *European Journal of Homelessness* (forthcoming) for an application of the theory to homelessness.

adequate housing. Indeed, housing is a key enabling or constraining force in the realization of the “good life”.

Bunreacht na hÉireann and Social Justice

3–152 The term “social justice” takes pride of place within *Bunreacht na hÉireann*, and has been considered in many cases, usually relating to balancing property rights with some social objectives. It is regularly subsumed under its close relative “the common good”, to such an extent that it may even have become absorbed by that even more ubiquitous phrase.

Despite much ambiguity as to its meaning, social justice is recognised as a principle of Irish constitutional law, and *Bunreacht na hÉireann* uses the term in relation to the regulation of property rights in Article 43.2.1.:

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.

However, this is followed by Article 43.2.2., which in many ways has usurped the role of social justice in defining constitutional propriety:

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.²⁴⁸

3–153 In one of the first constitutional cases after 1937, *Hanna J, in Pigs Marketing Board v Donnelly (Dublin) Ltd*²⁴⁹ considered whether State measures involving price controls in the price of bacon for the consumer could be consistent with the concept of social justice, and therefore compatible with the Constitution. In this decision the relativity of the notion of social justice was illustrated:

As to the meaning of social justice, opinions will differ even more acutely than on the question of good Government. I cannot conceive social justice as being a constant quality, either with individuals or in different States. What is social justice in one State may be the negation of what is considered social justice in another State. In a Court of law it seems to me to be a nebulous phrase, involving no question of law for the Courts, but questions of ethics, morals, economics, and sociology, which are, in my opinion, beyond the determination of a Court of law, but which may be in their various aspects, within the consideration of the Oireachtas, as representing the people, when framing the law.²⁵⁰

²⁴⁸ The Irish text simply refers to “*teorainn a chur*”.

²⁴⁹ [1939] IR 413.

²⁵⁰ [1939] IR 413 at 418.

In *Foley v Irish Land Commission*²⁵¹ the power of the Land Commission to take away the landholding of a person who no longer resided on his farm was found to be compatible with social justice requirements. The Supreme Court held that the Land Purchase Acts, including legislation in 1946, constituted a very important branch of Irish social legislation, whose object was to create a peasant proprietorship of a certain standard. The Land Commission allotted a parcel of land to the plaintiff and built a house on the lands at no expense to him. The Land Commission, in deciding as to the suitability of applicants, was required to be satisfied as to their competence to work the land and their intention to do so and not to sell, let or assign it. The object of the legislation was not to forfeit the rights of the allottee, but to ensure, under the penalty of possible forfeiture, that the allottee should reside on the lands and work them satisfactorily. The Supreme Court held that that the imposition of the condition as to residence, with the statutory sanction for failure to comply, did not offend Article 43 in reconciling their exercise with the exigencies of the common good, and in accordance with the principles of social justice. 3-154

There have been a long line of cases where restrictions on properties were examined in relation to their compatibility with the provisions of Article 43, but increasingly the terms social justice and common good have been used interchangeably, without any clear definition of “social justice”.²⁵²

The *Report of the Constitutional Review Group* (1996) recommended that the Constitution should expressly provide that constitutional property rights can be qualified, restricted, etc. by legislation where there are clear social justice or other public policy reasons for doing so. It did not define the notion of “social justice”, grouping it together with the concept of the “common good”, although it did include the redistribution of wealth among its attributes.²⁵³ 3-155

In the opinion of the Review Group, few would argue with the principle underlying these provisions. If the State is to function, property rights must yield to a wide variety of countervailing interests, among them the redistribution of wealth, the protection of the environment, the necessity for consumer protection. This in turn means that the State must have extensive taxation powers, powers of compulsory acquisition and a general capacity to regulate (and even in some cases to extinguish) property rights.

The language of Article 40.3.2 and Article 43 has given rise to difficult questions of interpretation, although it seems that some of these difficulties have

²⁵¹ [1952] IR 118.

²⁵² See *Re: Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321; *Blake v The Attorney General* [1982] I.R. 117; *Madigan v Attorney General* [1986] ILRM 136; *Dreher v Irish Land Commission* [1984] ILRM 94; *Re: Article 26 and the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181; *Buckley & Others (Sinn Féin) v The Attorney General* [1950] IR 67; *O Brien v Bord na Móna* [1983] IR 255; *An Blascaod Mór Teo. v Commissioners of Public Works (No 3)* [2000] 1 IR 6; [2000] 1 ILRM 401.

²⁵³ *Report of the Constitutional Review Group* (1996). See: <http://www.constitution.ie/reports/crg.pdf>.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

been clarified by the contemporary case law. Contemporary judicial thinking seems to stress that, while the State may regulate and interfere with property rights, it may not do so in a manner which disproportionately interferes with such rights. As Costello P said in *Daly v Revenue Commissioners* [1996] 1 ILRM 122:

But legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved. When, as in this case, an applicant claims that his constitutionally protected property rights referred to in Article 40.3.2° have been infringed and that the State has failed in the obligation imposed on it by that Article to protect his property rights he has to show that those rights have been subjected to an 'unjust attack'. He can do this by showing that the law which has restricted the exercise of his rights or otherwise infringed them has failed to pass a proportionality test...

The Review Group report pointed out that there had been only about seven cases where a plaintiff has established an unconstitutional interference with his or her property rights and in nearly every such case the potential arbitrariness of the interference in question was fairly evident. Thus, in the leading case of *Blake v Attorney General*,²⁵⁴ the Supreme Court invalidated the provisions of the Rent Restrictions Act 1946 because it was evident that such legislation operated in a palpably arbitrary fashion. The properties to which the legislation applied were selected on a haphazard basis; the rents for such properties were fixed by reference to either 1914 or, in some instances, 1941 monetary values and severely inhibited the right of landlords to recover possession of such controlled dwellings. In the opinion of the Supreme Court these provisions restricted:

... the property rights of one group of citizens for the benefit of another group. This is done without compensation and without regard to the financial capacity or the financial needs of either group, in legislation which provides no limitation on the period of restriction, gives no opportunity for review and allows for no modification of the operation of the restriction. It is, therefore, both unfair and arbitrary.

Despite the fact that the meaning of Articles 40.3.2 and 43 has, to some extent at least, been clarified by judicial decision and that, contrary to some fears, the courts have refrained from endorsing an absolutist attitude to property rights, the Review Group does not consider that Article 40.3.2° and Article 43 are satisfactory in their present form.²⁵⁵

3–156 The promotion of social justice by the legislature must not be allowed to fall on the property rights of any particular group. In *Re: Article 26 and the Employment Equality Bill 1996*, Hamilton CJ stated that the Bill had the totally laudable aim of making provision “for such of our fellow citizens as are disabled”.

²⁵⁴ [1982] IR 117.

²⁵⁵ Report of the Constitutional Review Group 1996, p 339.

Clearly it is in accordance with the principles of social justice that society should do this. But prima facie it would also appear to be just that society should bear the cost of doing it... But the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society's problems on to a particular group. The difficulty the Court finds with the section is not that it requires an employer to employ disabled people, but that it requires him to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work unless the cost of the provision of such treatment or facilities would give rise to "undue hardship" to the employer.²⁵⁶

The Supreme Court referred to the word "accordingly" which appears at the commencement of Article 43.2.2, and held that this relegates the social justice obligations to considerations behind legislation, and not in a way which is open to judicial interpretation of that legislation in relation to the concept itself.

In reading article 43 of the Constitution it is important to stress the significance of the word 'accordingly' which appears in Article 43, section 2, sub-section 2. It is because the rights of private property 'ought' in civil society to be regulated by 'the principles of social justice' that the state may, as occasion requires delimit their exercise with a view to reconciling it with 'the exigencies of the common good'. It is because such a delimitation, to be valid, must be not only reconcilable with the exigencies of the common good but also with the principles of social justice that it cannot be an unjust attack on a citizen's private property pursuant to the provisions of article 40, section 3 of the Constitution (see judgment of Walsh J in *Dreher v Irish Land Commission* (1984) ILRM 94).²⁵⁷

In *Shirley v O'Gorman & Company Limited, Ireland and The Attorney General*²⁵⁸ the High Court rejected the plaintiff's argument that the statutory scheme contained in the Landlord & Tenant (Amendment) Act 1984, for the enlargement of tenants' interests to acquire the fee simple interest in business premises offended against Article 40.3 and Article 43 of the Constitution. The Court was asked to find that the scheme no longer pursued any aim which accorded with any principle of social justice, even if it had done so in times past when circumstances in the State were not as they are now. In this case Professor Tony Fahey of the ESRI gave evidence on the concept of distributive or social justice. He stated that:

... generally it would refer to situations where people who are disadvantaged in society are held to have an entitlement to have their disadvantage addressed by society at large, by the state, and to have the cost of that borne in some way out of the public purse. So it is, if you like, it is to rectify extreme inequalities or extreme forms of disadvantage, whether it be poverty or illness or disability of one sort or another.²⁵⁹

²⁵⁶ [1997] 2 IR 321 at 367. This approach marks a fundamental difference with the early and contemporary Christian approach to social justice, which holds that property owners have a duty to others and that those who hold property do so for a common purpose.

²⁵⁷ [1997] 2 IR 321 at 367.

²⁵⁸ [2006] IEHC 27. This case has been appealed to the Supreme Court and but that judgment was not available at time of writing.

²⁵⁹ [2006] IEHC 27.

3-158 Professor Fahey pointed out that there was a social justice element to the Irish policy of land distribution since many of the beneficiaries were impoverished tenant farmers. In addition there was a broader social good justification for it, since owner-occupation could be seen as enabling even those less impoverished farmers to operate their holdings more efficiently, and the whole agricultural economy to be more productive.

In relation to this landlord and tenant legislation, which enfranchised long leaseholders Prof. Fahey sought to differentiate between social justice and the common good.

Well, I would draw a distinction between a social justice argument and a common good argument. I think they are slightly different things. A social argument would make a case for something on the basis of some kind of a social need on the part of the person receiving the benefit and I don't—I find it very hard to see that there is a social justice argument in this case. I am not sure that anyone is making one. Now, it is somewhat different, though, to make a common good argument for this legislation. In the case of a common good the beneficiary may not be in particular need, but the measure is followed through with because the beneficiary can provide a larger common good. In other words, if a business ... say for example, a business person is running a successful business—is employing a lot of people and he makes an argument that if I am not enabled to make this purchase my business is in danger—now, I won't be impoverished by that, but look at all the people who will lose their jobs. The local economy will go down and, therefore, in order to benefit the common good of this area—the State might say we are not particularly concerned only with the good of this individual, but for the broader common good, it might be necessary. I think it is an arguable issue in this instance whether there is a common good or not. I wouldn't adjudicate on that. It would need to be examined very carefully, and as far as I know in broad policy terms, the Ground Rents Commission certainly didn't examine it in those terms.²⁶⁰

3-159 In this case also, Mr Moore McDowell, of UCD, in evidence, stated that unless there was a clear failure of ordinary market forces, the use of non-market allocation of resources (i.e. government intervention to affect resource allocation) was generally an inefficient method, even though it might be rationalised on the basis that it is advancing the economic welfare of society, since sometimes the market fails or social justice considerations indicate that resources in the State ought to be redistributed.

3-160 It was submitted by the plaintiff that an example of a system of property ownership which would not accord with principles of social justice would be one where all the property in the country was held by a few very wealthy people, and that on such a basis social justice can be said to be a form of distributive justice involving the transfer of assets from the wealthy to the underprivileged. That legislation which aimed at achieving such a transfer of property in order to achieve a more balanced distribution of wealth in

²⁶⁰ *ibid.*

the country could be said to accord with principles of social justice as provided in Article 43.2 of the Constitution. The plaintiff also pointed to the fact that under the impugned scheme there was no distinction made between residential and business premises and suggested that such an argument on grounds of social justice could not be even attempted in respect of business premises. He suggested that it might conceivably be possible to put forward an argument that society has an interest in ensuring that homes are owned absolutely, and that this would be encompassed within the principles of social justice, but such an argument would be very difficult to mount in relation to commercial property, and would require evidence to establish it.

Perhaps the conceptual differences outlined in these interpretations can be understood through Miller's analysis of social justice principles developed consequently under feudal, market and neo-corporatist societies, but with the principles from earlier societies overhanging within newer interpretations. The original social justice imperatives contained in the land reform and tenancy rights legislation were grounded in the move from feudal to market-based societies. However, applying these in a modern neo-corporatist or organised capitalist society to business premises appears absurd. Today the corporate and welfare notions of social justice are pervasive, although the market-based approaches are still widely expressed by economists such as McDowell.

3-161

In the case of *Re: Article 26 and the Health (Amendment) (No. 2) Bill 2004*²⁶¹ the Supreme Court considered the property rights of those who had paid nursing home charges on the basis of an illegal claim by the State in its interpretation of the law. Section 1(b) of the Bill of 2004 provided for the insertion after s 53(2) of the Act of 1970 of certain new subsections with retrospective effect. This defined "relevant charge" for the purpose of declaring as lawful, retrospectively, the imposition of certain charges for in-patient services by Health Boards, under s 53(2) of the Act of 1970, even though the imposition of such charges was unlawful at the time they were imposed. The Court held that:

3-162

That the right to recover monies for charges unlawfully imposed was a property right of the persons concerned, which was protected by Articles 43 and 40.3.2 of the Constitution from, inter alia, unjust attack by the State. It would strain the meaning of the reference in Article 43.2.1. of the Constitution to "the principles of social justice" to extend it to the expropriation of property solely in the financial interests of the State.²⁶²

The Court also held that:

Article 43.2.1. therefore, declares that these rights, 'ought, in civil society, to be regulated by the principles of social justice'. The property of persons of modest

²⁶¹ [2005] IESC 7; [2005] 1 IR 105.

²⁶² [2005] IESC 7, at para. 18.

means must necessarily, in accordance with those principles, be deserving of particular protection, since any abridgement of the rights of such persons will normally be proportionately more severe in its effects.²⁶³

3–163 The European Court of Human Rights regularly balances the interests of property owners under Article 1 of Protocol 1 of the Convention, with legislation and State action taken on grounds of the common good. One of the leading cases is *James v United Kingdom*, where English legislation enfranchising long-standing tenants without compensation in the interests of social justice was considered. The court held that:

The court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest' such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the state's wide margin of appreciation in this domain.²⁶⁴

3–164 Clearly, the legal battle between property rights and definitions of acceptable social justice measures has many more engagements to endure before defining conclusively what is meant by social justice in the Constitution. While the courts have clearly rejected the expropriation or placing of undue burdens on any particular group of property owners, especially those of limited means, it is remarkable that there was no judicial examination of the constitutionality of recent legislation transferring many billions euros of public funds to a small group of property owners, i.e. those holding deposits, bonds and bank shares. The NAMA legislation of 2009²⁶⁵ did not refer to the common good in its Preamble, unlike other recent policy oriented legislation, thus avoiding questions as to whether this enormous and historic transfer of resources from the public to a small group of property owners was compatible with social justice and common good provisions of the Constitution. The decisions in *Dellway Investment Ltd & Ors -v- National Asset Management Agency & Ors*.²⁶⁶ also avoided any consideration of the social justice constitutional issues in the legislation.

²⁶³ *ibid* at para. 120.

²⁶⁴ [1986] 8 EHRR 123, pp 355–356.

²⁶⁵ National Asset Management Act 2009.

²⁶⁶ [2010] IEHC 375 and [2010] IEHC 364.

Roman Catholic Perspectives on Social Justice

The Roman Catholic Church has made moral statements about economic and social matters since the beginning of industrialisation.²⁶⁷ In earlier times the primary vehicle for Catholic Social teaching was the jurisprudence of canon law. The social doctrine of the Church became the purview of papal encyclicals during the 19th century when the Church struggled with the rise of the modern industrial society with its new structures for the production of consumer goods with its new concept of a just society, with the rise of the secular state, and with the modern world's new forms of labour and ownership.²⁶⁸ 3-165

The encyclical *Rerum Novarum: On the Condition of Workers* (1891) sought to develop a path between capitalism and the rising socialism and communism of workers organisations across Europe for the Roman Catholic church. It sought to emphasise the dignity of work and rights of workers to organise, but not the overthrow of the system, and in a feudal type approach it raised the obligations of property owners to workers.

“Social Catholicism” has been described in the book on Father Coughlan, the famous American proponent of social justice.²⁶⁹

Its leaders were chiefly Catholic priests and aristocrats who hoped to halt the growing popularity of socialism which they regarded as anti-Christian—by improving the life of the workingman. Social Catholicism opposed the policy of *laissez-faire*, holding that the state must be active in opposing the evils brought about by the Industrial Revolution. Its philosophy sanctioned the efforts of workers to form unions and to have collective bargaining rights. But unions were not to become involved in class conflicts; instead they would work with employers to establish contracts fair to both sides. Governments were to pass legislation regulating working hours, prohibiting child labor, and restricting the labor of women.²⁷⁰

In *Quadragesimo Anno: On the Reconstruction of the Social Order* (1931), 40 years after *Rerum Novarum*, the pope again raised the need for a balance between capital and labour and immorality of keeping economic control in 3-166

²⁶⁷ See Dorr, D, *Options for the Poor – A Hundred Years of Vatican Social Teaching* (Dublin, Gill and Macmillan, 1992); Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, (Dublin, Veritas, 2004); Cassidy, E, *The Common Good in an Unequal World Reflections on the Compendium of the Social Doctrine of the Church*, (Dublin, Veritas, 2007); Himes, KR (ed.) *Modern Catholic Social Teaching: Commentaries and Interpretations* (Washington, DC, Georgetown University Press, 2006); Hornsby-Smith, *An Introduction to Catholic Social Thought* (Cambridge University Press, 2006); Jesuit Centre for Faith and Justice, *Catholic Social Teaching in Action* (Dublin, Columba Press, 2005).

²⁶⁸ See website: <http://faculty.cua.edu/pennington/Law111/PapalSocialEncyclicals.htm>.

²⁶⁹ Marcus, S, *Father Coughlan: The Tumultuous Life of the Priest of the Little Flower*. (Boston, Mass: Little, Brown & Co., 1973).

²⁷⁰ *ibid* at p 180.

the hands of a few. It recognised the principle of subsidiarity, which held that higher levels of authority should act only when lower levels cannot deal with a problem. In *Mater et Magistra: Mother and Teacher* (1961) on Christianity and social progress, the encyclical gave an updated interpretation of the classic theme of private property and introduced the notion of private initiative as an extension of private property. *Mater et Magistra* placed some of the responsibility for social justice in the hands of the State. In *Pacem in Terris: Peace on Earth* (1963) Pope John XXIII established principles that featured in some of the documents of the Second Vatican Council and of later popes. It reacted to the then Cold War and emphasised the importance of respect of human rights as an essential consequence of the Christian understanding of men. The encyclical established that “every man has the right to life, to bodily integrity, and to the means which are suitable for the proper development of life ...”. This encyclical provided material for the decision of Kenny J, in *Ryan v Attorney General*²⁷¹ to define the nature of the unenumerated rights under Article 40.3.1. guarantees that the State will defend and vindicate the personal rights of its citizens.

3–167 Social Justice Ireland provides access to all the papal encyclicals on Roman Catholic teaching including Charity in Truth—*Caritas in Veritate* in 2009.²⁷²

A new encyclical has been published calling for a new business order governed by ethics and the common good. In the encyclical letter entitled *Charity in Truth (Caritatis in Veritate)* Pope Benedict XVI’s main message is that various “malfunctions” have taken place in the economy which are threatening human development in all its various forms. He points out that the current turmoil in world economies is being caused by a blind pursuit of profit and that our various social institutions have shifted their focus away from protecting people towards the narrower focus of profit.

The solution, according to Pope Benedict, is the creation of a business culture that is dedicated to the common good. Along the way, he calls for our various social institutions to be retooled back to their purpose of supporting true human development. In a time of global economic turmoil, Pope Benedict’s call to re-examine the role of the economy and its structures needs to be carefully considered. After all, the economy exists to collectively serve us, not the other way around. Farmers, some of whom are struggling greatly with challenges brought on by changing markets and social support, may find much that they can agree with in the encyclical’s analysis and recommendations.²⁷³

The Irish Housing System by the Jesuit Centre for Faith and Justice

3–168 The Report on *The Irish Housing System* by the Jesuit Centre for Faith and Justice (2009) expressed the view that “the scandal of all scandals

²⁷¹ [1965] IR 294.

²⁷² A full list of all papal encyclicals is available on the website of Social Justice Ireland at: <http://www.socialjustice.ie/node/268>.

²⁷³ See website of Social Justice Ireland - <http://www.socialjustice.ie/content/01-charity-truth-caritas-veritate>.

during the Celtic Tiger years was the failure of government to control house prices".²⁷⁴ The moral criticism of the housing system described what it refers to as "the cosy, symbiotic relationship between the political, construction and banking fraternity".²⁷⁵ The Report, which contains much valuable and detailed analysis of housing data and policy, offers a contemporary Roman Catholic faith-based vision for the housing system:

The vision is forward-looking and hopeful. It has what theologians call transcendent and eschatological dimensions. It bears witness even now to the possibility and expectation that humanity and the world will come to healing and wholeness and fullness of being in the end. At the same time, it is not just about some vaguely perceived and distant time of salvation.²⁷⁶

The Report states that the core values of the vision outlined are dignity, human rights and social justice. This amounts to references from the bible in relation to dignity such as the following: **3-169**

The dignity of the human person is affirmed in Scripture through the emphasis on the essential goodness of creation and the insistence that each individual is made in the image and likeness of God... The social teaching of the Church emphasises that 'respect for human dignity' is not solely a question of respecting the dignity and rights of the individual but also a more general question of social justice and the building of a 'good' society. This requires a meaningful and practical commitment to the broader well-being of our communities and societies. These points are inherently related: social justice can only be realised in respecting the transcendent dignity of all people (CCC, 1929).

The implications for the issue of housing are clear: we need to recognise that exclusion from appropriate housing infringes people's dignity, erodes their sense of value and belonging, and contradicts the principles of social justice. We are required, therefore, to confront harmful inequalities and structural injustices so as to ensure that people's right to housing is respected.²⁷⁷

The Jesuit Report outlined another value for the Roman Catholic vision for housing systems as a preferential option for the poor, stating that the rights of people who are poor and/or powerless have a claim to special recognition or priority. A further value is that policy should be needs-based and allow for people-centred development. This means that the central focus of development is human flourishing, not economic growth as an end in itself. **3-170**

The Report offers a critique of an ideology of consumerism, materialism and egoism. This suggest that a part of the reason for the national and global financial crisis is that the neo-liberal ideological tide has promoted values of this kind as central organizing principles for **3-171**

²⁷⁴ See Punch, M, *The Irish Housing System, Vision, Values, Reality* (Dublin, Jesuit Centre for Faith and Justice, 2009), Foreword.

²⁷⁵ *ibid.*

²⁷⁶ *ibid* at p 46.

²⁷⁷ *ibid* at p 48.

society. These constitute an impoverished philosophical view of what constitutes development. The report does not propose any specific role for consumer rights in housing policy, or in the development of housing rights, referring to the “corrosive dominance of a consumer ideology, whereby the meaning and value of life are reduced to the accumulation of material goods as an end in itself (Catholic Bishops’ Conference of England and Wales, 1996: 18, 84)”.²⁷⁸

3–172 The Jesuit Report outlines another value as “Universal Destination of Goods and the Common Good”. This means that the “goods of creation are intended to meet the needs of all people and to serve the common good”. However, this does not mean common ownership, but a responsibility on those with property, in a similar approach to that of early feudal Christian philosophies on the responsibility of property owners.

A general right to private ownership exists; however, this is not an absolute right, but one that is balanced with the interests of the common good and the requirements of social justice. We should not consider our outward possessions our own, but as common to all and to be shared when others are in need (RN: 19). The use of private property always entails a social responsibility. Some balance is needed in these concerns:

‘The right to private property, acquired by work or received from others by inheritance or gift, does not do away with the original gift of the earth to the whole of humankind. The universal destination of goods remains primordial, even if the promotion of the common good requires respect for the right to private property and its exercise. (CCC: 2403)’.

Thus, while the Report states that a situation where the exercise of private property rights results in the denial of the right to housing must be redressed in the interests of social justice and the common good, it does not set out the legal measures which would achieve this outcome. It proposes an alternative value system for housing, drawing on various relevant encyclical letters from the pope.

The core values proposed in the Jesuit Report for a new vision for housing are as follows:

- Authentic Development: development should be people-centred and integrated, taking account of all of the diverse needs, including housing, which must be met in order to secure human flourishing;
- A Right to Housing: everyone should have a right to appropriate housing since this is central to human dignity and social justice;
- Priority of the Most Vulnerable: we need to bring to the fore the urgent needs of the most vulnerable – those in situations of poverty whose housing requirements are being inadequately met or are not being met at all;
- Promotion of the Common Good: while private property rights are valid and important, the principle of the common good also allows for (and demands) robust public intervention in systems of housing and land provision in order to

²⁷⁸ *ibid* at p 49.

safeguard the housing rights of all people and to assist those who are suffering the injustices of poor housing conditions or homelessness.²⁷⁹

The Jesuit Report suggests exploring the potential role of a diverse range of housing providers, such as private development for sale or supply by non-profit organisations such as local authorities, housing associations, co-operatives, community organisations and other groups. It suggests promoting tenure choice and a “more vibrant and varied private rental system”. The Report proposes regular assessment on the caps on Rent Supplement, and a new deal for social housing. This involves increasing social housing stock, cross-subsidising new construction by leveraging capital from existing housing assets and rental income, similar to that proposed by the Grant Thornton Report on Housing Associations in 2009.²⁸⁰ However, the Report provides a valuable calculation of the housing investment potential of redirecting the amounts paid in Rent Supplement towards increasing the supply of social rented housing. It takes a figure of €391.5m, which is presumably equivalent related to a recent year’s payment of Rent Supplement and multiplies this by twenty, amounting to €7.8bn. This could produce some 26,100 acquired units at €300,000 per unit, or some 39,150 built units at a cost of €200,000 per unit. The Report calculates the tax foregone through the incentive schemes of Rural Renewal Scheme, Town Renewal Scheme and Living Over the Shop Scheme as amounting to some €1.3bn. It suggests that this could provide 6,400 housing purchased at the above price, or 9,665 built units.²⁸¹

The Report recommends that social housing units which are sold must be replaced and the discount levels should reflect the true costs of the transition, with claw-back provisions for windfall profits. It proposes that legislation should be enacted to provide that land required for housing, either for rent or sale, can be purchased by the State at existing use value, “plus a reasonable addition for disturbance”.

The Report proposes in relation to regeneration of city quarters, rural districts and individual housing estates that the use of Public Private Partnership should not be the only option, and alternatives such as direct public investment should be considered, with demolition only as a last resort. Tenants and residents should be empowered to participate in regeneration decisions in their areas. Participation should be conducted in a spirit of respect recognising the equal dignity of all affected by any plans for the area. The Report adopts the pathways perspective on homelessness suggesting that there is a need to implement effective pathways for people who are homeless to move from emergency housing into permanent homes,

²⁷⁹ *ibid* at p 54.

²⁸⁰ Grant Thornton/Fitzpatrick Associates, *Strategic Review of the Capital Funding Schemes for Voluntary and Co-operative Housing* (Dublin, Grant Thornton, 2009).

²⁸¹ See Punch, M, *The Irish Housing System, Vision, Values, Reality* (Dublin, Jesuit Centre for Faith and Justice, 2009), p 57.

with system of supports. In relation to planning and environment the Report recommends that more resources be expended in ensuring effective urban, regional and rural housing planning, with compulsory purchase laws being used to bring empty properties into use in strategic locations.

- 3-175 The Jesuit Report proposes an increase in capital gains tax for investor properties, and a focusing of tax incentive schemes towards affordable and social rental properties. It also suggest a substantial land tax or capital gains tax on betterment. In relation to housing and the economy, the Report suggest that the development of a substantial and regular social housing programme can act as a counter-cyclical measure bringing stability to the construction sector, while in the financial sector there is a need for economically and socially responsible lending guidelines and financial regulation.

Social Justice Ireland

- 3-176 Social Justice Ireland (formerly known as Conference of Religious in Ireland, CORI) was established in 2009. Its website states that it subscribes to the values of both human dignity and the centrality of the community. The person is seen as growing and developing in a context that includes other people and the environment. Justice is understood in terms of right relationships and in the biblical tradition as a harmony that comes from fidelity to right relationships with God, people, institutions and the environment. A just society is one that is structured in such a way as to promote these right relationships so that human rights are respected, human dignity is protected, human development is facilitated and the environment is respected and protected.²⁸²

- 3-177 In its section on an introduction to *Catholic Social Thought*,²⁸³ Social Justice Ireland (SJI) states that:

The Catholic social tradition is grounded in the values and principles of Judeo-Christian religious experience which are reflected in the Christian scriptures and the church's lived tradition. It has evolved as each generation has attempted to live in society with reflective fidelity to those values and that religious vision. An active commitment to social justice is now recognized as essential to authentic Catholic faith.

As an intellectual tradition, Catholic Social Thought includes the work of great patristic and classical theologians, such as Augustine, Suarez and Thomas Aquinas, as well as the continuing reflection of individuals and contemporary schools addressing the issues and institutions of social living, such as Liberation Theology, African Theology, Asian Theology, Eco-theology and Feminist Theology.

²⁸² See Healy, Sean and Reynolds, Brigid, 11 February, 2002, *The Church as Economic, Political, Cultural and Social Actor: Social Partnership in Ireland*. Paper presented to Boston University/CORI Justice Commission conference on Church and Theology in the Contemporary World, 11 February, 2002. See www.cori.ie/Justice/Catholic_Social_Thought/59-OtherDocuments/320-THE_CASE_SOCIAL_PARTNERSHIP_IRELAND.

²⁸³ Available at: <http://www.socialjustice.ie/node/260>.

In 1891, Pope Leo XIII began a tradition of official Catholic Social Teaching with his encyclical letter *On the Condition of Labour*. A second social encyclical was issued by Pope Pius XI on the 40th anniversary of Leo's in 1931, *The Reconstruction of the Social Order*.

Thirty years later, the third encyclical in the series, Pope John XXIII's *Christianity and Social Progress*, however, initiated an explosion of social teaching, with major official teaching statements being issued every two or three years since. They represent the rising social consciousness and concern in the church as it searches for more just and sustainable ways for the peoples of the earth to live together in peace.

The heart of both Catholic social thought is simple and forceful: the sacred dignity of every individual as a member of the community of creation. This grounds the full panoply of human rights and responsibilities, a special option for those in poverty and on the margins of society, the call to stewardship and global solidarity.²⁸⁴

SJI lists among its objectives:

to be one of the leading advocates of the changes required to build a society characterised by justice" and "to explore and develop a spirituality that is capable of underpinning commitment to, and work in, the area of social justice."²⁸⁵

The organisation produces detailed and analytical research reports and books and references to a wide range of materials.

The SJI *Socio-economic Review/Agenda for a New Ireland* (2010) sets out its core policy objective in relation to housing and accommodation as "To ensure that adequate and appropriate accommodation is available for all people and to develop an equitable system for allocating resources within the housing sector".²⁸⁶ In its section on Values, the Review points to a two-tier society in Ireland:

3-178

In Ireland we regularly hear the questions; 'Where did the wealth go?' 'When we had the resources what did we as a society fix?' We are conscious of much fear, anxiety and anger in our communities. Today, more and more of society are questioning how the policies and decisions of the past decade could have failed Irish society so badly.

These reflections brings to the fore the issue of values. Our fears are easier to admit than our values. Do we as a people accept a two-tier society in fact, while deriding it in principle? The earlier chapters of this review document many aspects of this two tiered society. This reality is made possible by the support of our value system. This dualism in our values allows us to continue with the status quo, which, in reality, means that it is okay to exclude almost one sixth of the population from the mainstream of life of the society, while substantial resources and opportunities are channelled towards other groups in

²⁸⁴ See website: <http://www.socialjustice.ie/node/267>. See also Healy, Sean, (SMA), and Reynolds, Brigid, (SM1), "Rooting the Catholic Social Thought Perspective in the National Consciousness and in the Development of Social Policy: An Irish Experience", Paper presented at conference on: The Call to Justice The Legacy of *Gaudium et spes* 40 Years Later, 17 March, 2005, Vatican City. Available at: <http://www.socialjustice.ie/node/257>.

²⁸⁵ See website: <http://www.socialjustice.ie/content/about-us>.

²⁸⁶ Available at: <http://www.socialjustice.ie/>.

society. This dualism operates at the levels of individual people, communities and sectors.²⁸⁷

The SJI Review also repeats that Christian values it seeks to promote, referring to “right relationships” as a core element, although these are not defined. The Review suggests that past charitable models based on an alms giving type approach are not an appropriate method for dealing with poverty or the problems of today. It repeats the early Christian view that private property is not an exclusive ownership but carries social responsibilities. Indeed, it also states that:

These early leaders also established that a person in extreme necessity has the right to take from the riches of others what s/he needs, since private property has a social quality deriving from the law of the communal purpose of earthly goods (*Gaudium et Spes* 69–71).²⁸⁸

The SJI Review goes on to suggest that “most people in Irish society would ascribe to the values articulated here”.

Housing Rights Approach

3–179 The housing rights approach to housing is contained with a range of international, regional and national instruments and practices which have developed from human rights, but also from political developments, consumer rights and other public and private law areas. These are considered in detail in Chapter 8 below. There is an important question in relation to the application of a housing rights approach in the context that housing markets now the predominant providers of housing across the world.

3–180 Both neo-liberal and social democratic governments accept the market as the primary provider of housing, with government intervention to regulate the excesses of the market and to intervene when the market fails. Marcuse and Keating point out that the only disagreement between these two dominant political perspectives is on how serious that failure is, and just what government should do about it.²⁸⁹ These approaches to housing can be contrasted with a right-to-housing position “in which government’s first obligation is to see that all are decently housed, and the for-profit market is managed and regulated in a way subservient to that goal”.²⁹⁰ The for-profit market is the default position for neo-liberal and social democratic policies, with public action limited to countering its failure. Government support for

²⁸⁷ *Socio-economic Review/Agenda for a New Ireland 2010*, (Dublin, Social Justice Ireland, 2010), p 229.

²⁸⁸ *ibid* at p 231.

²⁸⁹ See Marcuse, P & Keating WD, “The Permanent Housing Crisis: The Failures of Conservatism and the Limitations of Liberalism”, in Bratt, *et al*, *A Right to Housing* (Philadelphia, Temple University Press, 2006).

²⁹⁰ *ibid* at p 139.

decent and affordable housing for all who need it is the default position of the right-to-housing approach, with the for-profit market functioning where it does not interfere or frustrate that provision.

The UN Special Rapporteur on adequate housing, Raquel Rolnik pointed out in October 2008 that markets alone cannot ensure housing for all.

The belief that markets will provide housing for all has failed. The current crisis is a stark reminder of this reality. A home is not a commodity—four walls and a roof. It is a place to live in security, peace and dignity, and a right for every human being.²⁹¹

Social Partnership and NESC “Vision of Society”

Social Partnership

As Ireland became reliant on Foreign Direct Investment (FDI) and international corporations (mainly American) for growth, the pressures of creating “competitive corporatism”, alongside a popular imperative of social equity, required that new structures be established.²⁹² Since 1987, the concept of “social partnership” agreements between the interests of capital and labour has grown to inform all social policymaking in the Irish State, and since 1997 selected voluntary organisations were involved. An array of “social partnership” agreements from 1987 to the breakdown of the system in 2010 have characterised Irish governance approaches.²⁹³ This has been compared to neo-corporatism, derived from Austrian or Scandinavian post-war alternatives to pluralism.²⁹⁴ It has been described by Rory O’ Donnell, one of the most influential writers in NESC, as “a form of negotiated governance”.²⁹⁵ O’ Donnell suggests that social partnership addresses three dimensions

3–181

²⁹¹ See UN Press Release, 23 October 2008. [http://www.unog.ch/80256EDD006B9C2E/\(http://NewsByYear_en\)/2FC845D6FF54A6F0C12574EB00342538?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(http://NewsByYear_en)/2FC845D6FF54A6F0C12574EB00342538?OpenDocument).

²⁹² Nolan, *et al*, *Bust to Boom: The Irish Experience of Growth and Inequality* (Dublin, IPA, 2000), p 288.

²⁹³ See Government of Ireland, *Programme for National Recovery (1987–1990) Programme for Economic and Social Progress (1991–1994) Programme for Competitiveness and Work (1994–1996), Partnership 2000, for Inclusion, Employment and Competitiveness (1997–2000), Programme for Prosperity and Fairness (2000–2003), Sustaining Progress (2003–2005) and Towards 2016—Ten Year Framework Social Partnership Agreement (2006–2015)*.

²⁹⁴ See O’Donnell, R, “The partnership state: building the ship at sea,” Chapter 4, in Adshead, M, Kirby, P & Millar, M (eds.) *Contesting the State – Lessons from the Irish case* (Manchester University Press, 2008). Coincidentally, it also corresponds with Roman Catholic social teaching on relations between capital and labour, and it significant that many of the leading promoters of the process at political, trade union and civil servant level were practicing Catholics. See further—Jesuit Centre for Faith and Justice, *Catholic Social Teaching in Action*, (Dublin, Columba Press, 2005).

²⁹⁵ See O’Donnell, R, “The partnership state: building the ship at sea,” Chapter 4. in Adshead, M, Kirby, P & Millar, M (eds.) *Contesting the State – Lessons from the Irish case* (Manchester University Press, 2008).

of the State – State relations with the external environment, the State as a political, administrative and legal order and State relations with civil society. Social partnership aims to make consistent three broad types of policy – macro-economic, distributional and structural or supply side.²⁹⁶

- 3–182** Roche and Cradden trace the development of neo-corporatist approaches across Europe in recent times, ranging from the “classical neo-corporatism” of post-war Scandinavian countries, to the more contemporary “competitive neo-corporatism” approaches.²⁹⁷ This is distinguished from the pure “corporatist” approaches of fascist Italy and Germany in the 1930s, where independent employers and union organisations were abolished and replaced with State controlled organisations.²⁹⁸ Neo-corporatism involves tripartite agreements between unions, employers and the State. It is described as a:

Political structure within advanced capitalism, which integrates organised socio-economic producer groups through a system of representation and co-operative mutual interaction at leadership level and mobilisation and social control at mass level.²⁹⁹

- 3–183** Classical neo-corporatism was characterised by fairness as an objective, with the expression of social justice and social solidarity ideals being part of the process. The development of progressive welfare States, with high levels of social protection, including large-scale social housing provision, were significant results. Competitive neo-corporatism, on the other hand, is more concerned with enhancing national competitiveness, sustainable levels of public expenditure, promoting the flexibility and quantity of labour, and far reaching “settlements” involving minimum levels of agreement.

- 3–184** Although Roche and Cradden place the Irish social partnership agreements within the neo-liberal competitive neo-corporatist agreements, it is significant that the *Programme for Prosperity and Fairness* (2000–2003) began to involve the social partners in a range of policy areas, under the *aegis* of frameworks. Framework III for Social Inclusion and Equality addressed social and affordable housing, the private rented sector, homelessness and Traveller accommodation. This development led to a plethora of reports and other documents in relation to many issues including housing, by NESC and others. Roche and Cradden describe the working groups involved in

²⁹⁶ See O’ Donnell, R, “The partnership state: building the ship at sea,” Chapter 4. in Adshead, M, Kirby, P & Millar, M (eds.) *Contesting the State – Lessons from the Irish case* (Manchester University Press, 2008), p 79.

²⁹⁷ See Roche, WK & Cradden, T, “ Neo-corporatism and social partnership”, in Adshead, M & Millar, M, *Public Administration and Public Policy in Ireland – Theory and Methods* (London, Routledge, 2003).

²⁹⁸ It is also distinguished from the corporatist vocationalism of Ireland in the 1930 and 1940s, seeking to steer a path between liberal capitalism and socialism.

²⁹⁹ Allen, *Fianna Fail and Irish Labour* (London, Pluto Press, 1997), p 113.

these frameworks addressing policy development and implementation as complaining of “partnership fatigue”.

The partnership agreement *Towards 2016* led to the redefining of Irish policy formulation in terms of the life cycle approach.³⁰⁰ Indeed, *Towards 2016* contains major statements of social policy within its many frameworks, and the “machinery” of partnership, involving numerous groups made up of participating social partner organisations, addressed most areas of policy. *Towards 2016* states that it contains the rationale for the longer-term perspective being adopted in the agreement, as well as key national and sectoral policy instruments and strategies in place to meet the challenges ahead. It considers the wider policy framework, including macroeconomic policy, and building a new social policy perspective, founded on the lifecycle approach. It also outlines the role of social partnership, and the implementation arrangements for the Agreement, including an agreed protocol for engagement between Government and the Social Partners. **3–185**

O’Donnell recognises that a partnership approach must operate within the constitutional, political, administrative and legal framework, but some elements may be changed “if they are seen to constrain measures that would solve problems and most importantly, if that perception is shared by government, since it is the key gatekeeper of policy, law and administration.”³⁰¹ He also suggests that social partnership has involved creating systems for making, monitoring and delivering policy in areas where the Irish State was historically both weak and thin. Thus, NESC Reports on *Housing in Ireland; Performance and Policy* (2004) and *The Developmental Welfare State* (2005) could be interpreted as examples of the State-building dimension of social partnership in Ireland. Indeed, O’Donnell points out that there has been a remarkable scarcity of detailed empirical research on particular parts of the Irish State and public policy, compared with work on elections and political culture.³⁰² **3–186**

These partnership agreements are credited with creating the climate for economic success in Ireland.³⁰³ But there have been criticisms, including one that the important decisions which the partnership agreements are designed to “approve”, have already been taken by Government Departments and **3–187**

³⁰⁰ *The Developmental Welfare State*, Report no. 113 (Dublin, NESC, 2005).

³⁰¹ See O’Donnell, R, “The partnership state: building the ship at sea,” Chapter 4 in Adshead, M, Kirby, P & Millar, M (eds.) *Contesting the State – Lessons from the Irish case* (Manchester University Press), p 87.

³⁰² *ibid* at p 79.

³⁰³ See MacSharry & White, *The Making of the Celtic Tiger* (Cork, Mercier Press, 2000). For a critique of this approach, see O’Cinneide, “Democracy and the Constitution” (1999–2000) *46 Administration* 41.

others in powerful positions.³⁰⁴ Trade unions and other organisations have been described as somewhat “governmentalised” in the partnership process,³⁰⁵ operating in a centralised bureaucratic and hierarchical way. The effects of this form of governance on democratic government has been criticised.³⁰⁶ By taking part in national and local “partnership” structures, the community and voluntary groups have been absorbed into a culture “which appears more comfortable focusing on disadvantage than tackling deeper structural causes of inequality of opportunity”.³⁰⁷

3–188 Indeed, the “Partnership” process has led to the creation of many new institutions, working groups, committees and other arrangements including monitoring arrangements through the Office of the Taoiseach, and involving representatives of the “Social Partners.” This has also led to various networks which are included in the policy making process, and of course, many organisations and groups have complained that they are ignored as they are excluded from this State defined “sphere of influence”.³⁰⁸

In relation to housing law, rights and policy, NESC has produced a type of discourse on rights which seeks to avoid the use of courts and traditional rights building processes, such as the traditional liberal democratic model, where elected political parties advance their manifesto by preparing legislation advancing rights for particular groups and these are then enforced by the courts and the Executive. The role of judicial activism in advancing the interpretation of rights is not considered in this perspective.

Housing and Social Partnership Agreements

3–189 The position of housing policy in the social partnership arrangements has been curious, to say the least, as it was only included very late in the process. However, the partnership approach has had significant implications for the development of housing law, rights and policy from the 1980s to the present day. It has reframed Irish housing policy debates in terms of competitive

³⁰⁴ See Allen, *The Celtic Tiger: The Myth of Social Partnership in Ireland* (Manchester, Manchester University Press, 2000); Nolan, *et al*, *The Irish Experience of Growth and Inequality* (2000), p 303; See also O’Sullivan, “Voluntary Agencies in Ireland – What Future Role,” (1999–2000) 47(4) *Administration* 54.

³⁰⁵ There are a range of publications which both promote and challenge the democratic basis, corporate nature and political ideology of social partnership. See for instance, Baccaro, L (2002), “Civil Society Meets the State: A Model of Associational Democracy”. International Institute for Labour Studies, Discussion Paper No. 138, Geneva, International Labour Organisation; O’Donnell, R and Thomas, D, “Partnership and policy making”. In Healy, S and Reynolds, B, *Social Policy in Ireland* (Dublin, Oak Tree Press, 1998); Allen, K, *The Celtic Tiger: The Myth of Social Partnership in Ireland* (Manchester University Press, 2000).

³⁰⁶ See O’Cinneide, S, (1998) “Democracy and the Constitution”, *Administration* (1999–2000) 46: 41–58.

³⁰⁷ Nolan, *et al*. *The Irish Experience of Growth and Inequality* (2000) p 352.

³⁰⁸ See, for example, the recent experiences of the Community Workers Cooperative and Ogle, B, *The Story of ILDA* (Currach Press, 2004).

neo-corporatism, resulting in new legislation in 2009 giving legal expression to some elements of these perspectives. However, the inclusion of housing providers, developers and builders in the process, without any representation of a counter balance of tenant, consumer or housing needs interests was a significant weakness.

References to housing law and policy were not visible in the *Programme for Prosperity and Fairness 2000–2003*, when a crisis of affordability was high on the public agenda after reports had pointed to affordability problems at the end of the 1990s.³⁰⁹ Indeed, by 1999, the State and social partnership process had adopted an approach of almost complete deference to the housing market, and this was set out in the Department of Environment and Local Government *Statement of Strategy 1998–2001*.³¹⁰ Of course, increasing housing equity acted as powerful compensation for wage increases at or below inflation for established workers. The *Programme for Prosperity and Fairness* (2000–2003) contained a section on housing supply and affordability, yet there was no attempt to define such affordability. Seven actions were planned in the life of the Agreement until 2003 to address the housing shortage and lack of affordable housing, and these represented the corporately approved housing policy of Ireland at the time.³¹¹

3–190

The 2003 partnership agreement contained commitments to provide some 10,000 new “affordable” housing units for low-paid workers.³¹² Indeed, it was questionable whether this measure was intended to exclude non-Irish workers, possibly in breach of EU and equality law.³¹³ The agreement repeated the policy commitments to social and affordable housing for low-income groups, but at the time the lowest proportion of social housing was being produced for decades. The partnership agreement introduced new US-style public-private partnership proposals for social and affordable housing to increase supply. A “Housing Forum” (without consumer representation) was established to provide the social partners with an opportunity to contribute to the housing policy development of the Department of the Environment, Heritage and Local Government. Of course, the Department of Finance continued to act as the primary director of the housing system and market, and the supremacy of the market was acknowledged.

3–191

The agreement *Towards 2016* (described below) contains significant proposals for the housing system, advocating significant social housing, as

³⁰⁹ Goodbody Stockbrokers, *More than Bricks and Mortar* (Dublin, Goodbodys, 1999); OECD, *Economic Survey of Ireland* (Paris, OECD, 1999); Downey, *As Safe as Houses. The Nature, Extent and Experience of Debt in the Irish Housing System* (Dublin, Threshold, 1997).

³¹⁰ Government of Ireland, *Statement of Strategy 1998–2001*.

³¹¹ Government of Ireland, *Programme for Prosperity and Fairness* (2000), p 63.

³¹² Government of Ireland, *Sustaining Progress* (2003).

³¹³ See Kenna, “Allocation schemes for affordable housing must be open to all”, *The Irish Times*, 14 July 2003.

well as confirming the central role of the monitoring body made up of the social partners—the Housing Forum.

National Economic and Social Council (NESC)

- 3–192** The National Economic and Social Council (NESC) was established in 1973. Its function is “to analyse and report to the Taoiseach on strategic issues relating to the efficient development of the economy and the achievement of social justice and the development of a strategic framework for the conduct of relations and negotiation of agreements between the government and the social partners.”³¹⁴ NESC is chaired by the Secretary General of the Department of the Taoiseach and contains representatives of trade unions, employers, farmers’ organisations, NGOs, key government departments and independent experts. In 1986, the NESC formulated an agreed strategy “to escape from Ireland’s vicious circle of real stagnation, rising taxes and exploding debt”.³¹⁵ That Strategy formed the basis upon which government and the social partners negotiated the *Programme for National Recovery*, to run from 1987 to 1990, and subsequent Agreements.
- 3–193** NESC provided a forum within which a consensual analysis of important economic and social issues could be worked out, thus avoiding political conflict on social issues. NESC Strategy Reports were prepared before social partnership discussions, providing the analytical basis of relevant issues. As such, NESC sets out the terms of reference for the social partnership discourse, defining the perspectives, ideologies and acceptable political parameters of the social partnership negotiations and structures, from which the framework for Irish State housing policy has now emerged.³¹⁶
- 3–194** NESC has promoted the need for supply-side issues in the provision of goods and services in both the public and private sectors to be addressed

³¹⁴ See website: <http://www.nesc.ie/>. In 1993 the National Economic and Social Forum (NESF) was established to focus on issues of long-term unemployment and social exclusion, again with a wide range of members, from trade unions to farming organisations, but with no consumer or user representation. According to its website, it is a government-appointed social partnership body that provides advice on economic and social policies, especially those that seek to achieve greater equality and social inclusion in our society. It is the largest and most representative of the partnership bodies. With the implementation of The National Economic and Social Development Act 2006 NESF has now been subsumed into the National Economic and Social Development Office. NESF produced a significant report on *Social and Affordable Housing and Accommodation: Building the Future Forum. Report No. 18. (2000)*. See website: <http://www.nesf.ie>.

³¹⁵ See website: <http://www.nesc.ie/>.

³¹⁶ The NESC Strategy reports which underpin the Social Partnership Agreements are: *No. 83, A Strategy for Development 1986–1990*; *No. 89, A Strategy for the Nineties: Economic Stability and Structural Change*; *No. 96, A Strategy for Competitiveness, Growth and Employment the Council*; *No. 99, Strategy into the 21st Century*; *No. 105, Opportunities, Challenges and Capacities for Choice*; *No. 111, An Investment in Quality: Services, Inclusion and Enterprise*; *No. 114, NESC Strategy 2006: People, Productivity and Purpose*.

by the State through social partnership, and while valuable, these cannot be seen as a politically neutral development. This one-sided support in the balance of power in housing towards suppliers/developers without including representatives of consumers and tenants has significant implications for this approach to the development of Irish housing policy. As a result there is an inbuilt bias against granting or developing rights for housing consumers, tenants and others affected by the housing system. It is not surprising therefore that the response by the Irish State to the ratification of Article 31 of the Revised European Social Charter on the right to housing was that such rights were unnecessary within the social partnership approach. Thus, in some ways, the social partnership system has acted as a barrier to the development of housing and housing consumer rights in Ireland. Equally, NESC has resiled from advancing any housing rights approaches, raising a question on the independence of that agency.

The NESC Report—Housing in Ireland: Performance and Policy (2004)

The NESC Report *Housing in Ireland: Performance and Policy* (2004)³¹⁷ 3–195 offered a comprehensive examination of the Irish housing system. It set out a range of proposals, offering thematic approaches in relation to stability of the housing market, the degree of inequality in housing opportunities, the difficulties experienced during the housing boom, as well as the sustainability of existing settlement patterns and neighbourhoods developed in recent decades. The Report pointed out that a significant minority of households experienced affordability problems, while many were insulated from increasing property rises.

The Report of 2004 suggested that the sharp contraction of local authority construction in the late 1980s and early 1990s has been a significant factor in increasing problems of affordability and access. That contraction reflected both fiscal problems and the poor quality of some earlier local authority estates. Yet, despite its dynamism, the private market for owner-occupied housing had not met the housing needs of many, while the market for private rental accommodation had displayed rent levels that were not affordable for some households. In addition, rapidly rising property prices have been an independent source of significant change in the distribution of 3–196

³¹⁷ NESC, *Housing in Ireland: Performance and Policy*, No. 112, November 2004. Dublin: NESC. Available at: <http://www.nesc.ie/dynamic/docs/NESCHousingReport.pdf>. This major report was based on detailed research set out in seven background analyses: *Housing in Ireland: 1. Performance and Policy. Background analysis; 2. Analytical Approaches to Housing; Background analysis; 3. The demand for housing in Ireland; Background analysis; 4. The supply of housing in Ireland; Background analysis; 5. The Interaction of Supply and Demand; Background analysis; 6. The Provision of Social and Affordable Housing; Background analysis; 7. Approaches to Land Management, Value and Betterment.* Available at: <http://www.nesc.ie/dynamic/docs/Background%20Paper%202.pdf>.

wealth and income in Irish society. The patterns of settlement, neighbourhood design and density in the past decade were storing up significant social, environmental, budgetary and economic problems in years to come.

NESC's view was that the Irish housing system had 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 between the provision of private and social housing ... in the views of some, but not all, there has been an unbalanced distribution, between landowners and wider society, of the increase in land values or 'betterment' that arises as a by-product of general economic and social development.³¹⁸

3-197 The NESC Report of 2004 proposed a significant level of additional housing output over the following decade. However, it suggested that there were a number of difficulties in estimating the future provision of social and affordable housing and the scale of future housing need. Both housing-specific measures (such as local authority waiting lists, estimates of affordability problems and take-up of SWA Rent Supplement), and wider social and economic trends (in benefit dependency, disability, low earnings and single earning households), suggested that a gap would remain between the projected provision of social and affordable housing and the number of households unable to achieve home ownership on the open market, or who would face affordability problems in private rental accommodation.

The Report identified four key policy challenges:

1. To achieve high-quality, sustainable, development in both urban and rural areas;
2. To provide an effective range of supports to households that fall below the affordability threshold;
3. To assist the market to continue to provide a high level of supply;
4. To ensure a tax and subsidy regime that supports these goals.

The Report suggested that instruments to address these challenges were to be found more in the areas of planning, urban design, infrastructural investment, land management and public service delivery, rather than in manipulating tax instruments to alter the supply or demand for land or housing. Secondly, NESC rejected the idea that a greater quantity of housing must be at the expense of quality development, and sustainable neighbourhoods and integrated development must take primacy. These involve sustainable urban densities, consolidated urban areas, compact urban satellites, rapid communication networks and sustainable rural settlement.

³¹⁸ NESC, *Housing in Ireland: Performance and Policy*, p 3.

Sustainable neighbourhoods have lower levels of car dependence, greater inter-generational and social integration, combined with greater independence for old and young people, easier access to social, community and sporting organisations and higher levels of social and commercial services. This does not necessarily imply high-rise development or city centre living. **3-198**

The NESC Report suggested that there was also a need to promote social and affordable housing. It recommended an expanded and more flexible stock of housing available at a social rent, to ensure an adequate safety net for vulnerable households, a wider range of graduated supports for “intermediate” households, and provision of adequate resources for social and affordable housing. NESC believed that an increase of permanent social housing units, owned and managed by local authorities and voluntary and co-operative housing bodies, in the order of 73,000 in net terms between 2005 and 2012, was necessary to meet the need for social housing. This would bring the level of social housing stock to 200,000 units, or 12% of projected housing stock in 2012. **3-199**

The NESC Report supported the Rental Assistance Scheme (RAS) whereby the State would contract with private landlords for long-term “social” housing provision. At the time, policies to provide “Affordable and Shared Ownership” housing enabled 5 to 6% of home buyers to secure their housing at a discount. NESC supported a cost-rental segment to be developed in the Irish market and suggested that Mortgage Interest Tax Relief (MITR) should be retained in its current restricted form. It supported targeted supply subsidies, such as s 23 and s 50 tax relief, and tax relief to tenants on rent payments. NESC did not propose the abolition of stamp duty on house purchases, an idea which was being advocated by many political parties at the time. The Report of 2004 pointed out that there were arguments in favour of property taxes, on both equity and efficiency grounds and consideration should be given to a separate tax on second homes. **3-200**

The NESC Report also suggested that Government should explore possible ways of providing support to those who need assistance in achieving a deposit for owner-occupied housing.

Such support could take the form of tax relief on saving for a deposit or a loan from the State to cover the deposit. In considering whether to adopt either of these approaches, attention should be paid to the position of the housing cycle, overall levels of indebtedness and the vulnerability to interest rate increases. Furthermore, any such measure must not place an excessive burden on the public finances.³¹⁹

In relation to land, land management and “betterment” the NESC Report highlighted some major problems with the existing legal situation.

³¹⁹ NESC, *Housing in Ireland: Performance and Policy*, p 8.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

The evolution of the Irish land market, building industry and planning system underlines the degree to which the supply of land can be variable and uncertain. This variability and uncertainty means that the land and housing markets work very imperfectly. Sites sold for development are unlikely to be adjacent to each other and development tends to sprawl across the landscape. Planning often attempts to control such development, but in doing so can increase the scarcity value of land and housing. Planning of the type undertaken in Ireland cannot ensure that land allocated for development is actually built upon. In some countries, large-scale public land banking is used to combine a smooth supply of land with integrated development, while in other countries, including Ireland, activist land management is used in a more selective way. The uncertainty and variability of land supply and the planning system shape the business practice of developers and others in the market. They prompt them to invest in land-banks to ensure that they have an ongoing supply of suitably located sites. Planning and perceived land scarcity give particular land owners the power to influence the timing and location of development.³²⁰

The Report suggested that one policy challenge was to achieve sufficient zoned and serviced land in areas of greatest need. NESC believed that an effective policy on land required a combination of four approaches:

- A land-use strategy over a long horizon, including zoning and servicing of land;
- Land for enhanced social and affordable housing programmes;
- Sufficient active land management to ensure delivery of housing;
- Betterment-sharing measures, designed in a way that does not damage supply.³²¹

3–201 This latter proposal (which was also advanced in the *All Party Oireachtas Committee Report on Private Property*, 2004), called into question the traditional assumption that “betterment” value taxes would adversely impact on the supply of land. NESC stated that many elements of land policy—land-use strategies, zoning and active land management, can reduce the degree of land value “betterment”. Nevertheless, there can remain a high level of land value “betterment”, reflected in extremely high land prices and the high share of land value within house prices:

In particular contexts, where a high level of betterment-value remains after appropriate zoning and existing betterment-sharing measures, the goals of housing policy could be advanced by selective use of additional betterment sharing instruments. Where an element of active public land management exists and a high scarcity value of land remains, an opportunity arises for a negotiated form of betterment sharing. Indeed, development is increasingly undertaken in partnership with private developers. The terms on which land is made available can include a fair sharing of betterment value between the private sector and the public interest. Likewise, were compulsory purchase of un-zoned land to

³²⁰ *ibid* at p 8.

³²¹ *ibid* at p 9.

be used to manage the provision of land for social and affordable housing, the power to zone the land and to negotiate its provision to developers would allow a sharing of betterment.³²²

The Report provides a unified rationale for a housing policy that addresses the need for social and affordable housing and sustainable neighbourhoods.³²³ It pointed out that active land management has developed independently in a number of different contexts, but has yet to be seen as an essential element of Irish housing policy. NESC stated that a key to delivering on each of these goals set out in this Report lies in the flexible use of a combination of the policies on land, land management and betterment. However, the fundamental power of landowners/developers to skew the market is not fully addressed. **3–202**

The Developmental Welfare State

The Agreement *Towards 2016* adopts the life cycle policy making framework established in the NESC Report – *The Developmental Welfare State*.³²⁴ In this Report NESC has argued that Ireland should aspire to create an effective and world-class set of institutions and policies in the social sphere. It suggests that there is a need to recast the Irish social debate. **3–203**

Those debating Ireland's social progress risk being at cross purposes. One group believe Ireland's economic development has sacrificed compassion, social standards and solidarity; another that an increased emphasis on social protection must necessarily erode the economy's cost competitiveness. The Council is convinced that the development of a dynamic, knowledge-based economy has inherent social implications that can serve social justice and a more egalitarian society, *and* that the development of Ireland's welfare state as outlined in this report is integral to sustaining the dynamism and flexibility of its economy. In a globalised world, the strength of Ireland's economy and the attractiveness of its society will rest on the same foundation—the human qualities of the people who participate in them.³²⁵

The *Developmental Welfare State* represents a shift in paradigm governing public service delivery towards a new model.³²⁶ This conceptual framework sought to fashion an Irish welfare state appropriate to Ireland's globalised

³²² NESC, *Housing in Ireland: Performance and Policy*, p 10.

³²³ See Department of Environment, (2007) *Statement of Housing Policy, Sustaining Homes, Building Communities*; (2007) *Quality Housing for Sustainable Communities, Best Practice Guidelines for Delivering Homes, Sustaining Communities*. available at: <http://www.environ.ie/en/DevelopmentandHousing/Housing/HousingPolicy/PublicationsDocuments/>

³²⁴ NESC, *The Developmental Welfare State*, Report no. 113 (Dublin, NESC 2005). Available at: http://www.nesc.ie/dynamic/docs/NESC%20DWS_RZ%20Text+Cover.pdf.

³²⁵ NESC, *The Developmental Welfare State*, p xxiii.

³²⁶ For a comparison between the Former Welfare State and this model see NESC, *The Developmental Welfare State*, p 169.

role, yet which remains a form of welfare state.³²⁷ This description has been criticised by Kirby and others, who suggest that in fact, the Irish State is nothing more than one which facilitates a neo-liberal global economic model, and is devoid of any commitment to promoting equality and redistribution of wealth.³²⁸ It is a “competition state” giving priority to economic competitiveness over welfare and equity rather than a developmental state advancing coherent economic and social development.³²⁹

3–204 The core structure of the proposed “Developmental Welfare State” would consist of three overlapping areas of welfare state activity. These are first; services, which include education, health and housing, secondly; income supports, which include welfare benefits, pensions, etc. and thirdly; activist measures, which include novel approaches, particular community/group projects, emerging new needs, a focus on outcomes and evaluation and mainstreaming. The strategic and operational requirements for moving forward include effective coordination across the public sector, and the exercise of governance to integrate the contributions of non-public bodies, integration of local and national bodies, organisational changes to meet operational requirements and supporting people across the life cycle.

The introduction of the life cycle approach to policy making and evaluation marks a change in perspective in Irish social policy. The NESC Report points out that:

A fundamental standpoint from which to judge the adequacy and effectiveness of overall social protection is to assess the risks and hazards which the individual person in Irish society faces and the supports available to them at different stages in the life cycle. The life cycle also provides a good framework for choosing among competing priorities and mobilising the social actors to implement the Developmental Welfare State...³³⁰

The life cycle stages proposed by NESC are Children (aged 0–17 years), People of Working Age (18–64 years), Older People (65 years and older) and People challenged in their personal autonomy or People with Disabilities.³³¹

3–205 It has been suggested that the life cycle approach has been given major prominence in Irish social policy, but without any systematic link with its

³²⁷ See Ó Riain, Seán, “The Flexible Developmental State: Globalisation, Information Technology and the “Celtic Tiger”, *Politics & Society*, Vol. 28, No. 2, (2000) pp 157–93.

³²⁸ See Kirby, P, *The Celtic Tiger in Distress: Growth with Inequality in Ireland*, (Basingstoke: Palgrave, 2002); Kirby, P, and Murphy, M, “Ireland as a ‘competition state’”, IPEG Papers in *Global Political Economy*, No. 28 (2007), available at: <http://www.bisa.ac.uk/groups/ipeg/ipegpapers.htm>.

³²⁹ Kirby, P, & Murphy, M, *A Better Ireland is Possible* (Galway, Community Platform, 2008) Available at: http://www.eapn.ie/documents/1_A%20Better%20Ireland%20-%20pdf.pdf. p 9.

³³⁰ NESC, *The Developmental Welfare State*, p xxii.

³³¹ There have been criticisms of the framework for policy making as it may exclude groups in need who transcend these categories, such as Travellers, migrant workers and refugees.

usage in the broader literature relating to the concept.³³² Whelan and Maitre point out that it has been presented simply as a question of identifying key age groups and discussion around the tripartite distinction between children working age adults and older people.³³³ While it is widely accepted that the effects of globalised economy has been to create much more widely diffused levels of risk, yet inequality and poverty vary between phases in the average working life. However, the analysis carried out in relation to the indicators of social exclusion in Ireland showed that the magnitude of social class differences varies across the life cycle, with for example, class differences being a great deal more important for children than for older people. Thus, life cycle and class differences are enmeshed in a fashion that makes it arbitrary to attempt to partition their influence.³³⁴

The pre-occupation with work and employment within the NESC Report highlights a focus on the world of paid work, disregarding to some extent, unpaid work, child care and non-commercial cultural and artistic development. This life-cycle approach has been criticised on grounds of its gender blindness, failing to recognise the inequality experienced by women in income and social position, as well as the caring roles in which they engage. It is based on a view of work which is attached to the paid labour market and ignores unpaid work, such as childrearing and caring. One result of this is a move towards “work-fare” type social welfare policies. It does not recognise the barriers created by cumulative exclusion from education and long-term poverty. The model does not contain any significant concepts of distributional justice nor does it seek to address structural inequalities in Irish society.³³⁵

3–206

In relation to rights-based approaches within the NESC *Developmental Welfare State* Report, there is a significant reference to a limited role for courts, which could have important consequences for public interest law perspectives on housing rights. While, in many ways this Report epitomises the corporatist welfare approach to social justice identified by Miller as the

3–207

³³² See Whelan, CT & Maitre, B, “New” and “Old” Social Risks: Life Cycle and Social Class Perspectives on Social Exclusion in Ireland, *ESRI Working Paper No. 228*, February 2008. This Paper is based on a systematic analysis of the impact of life cycle and social class, in relation to “at risk of income poverty”, “economic vulnerability”, “level of multiple deprivation” and “patterns of multiple deprivation”, and the manner of their interaction, on a wide range of indicators of social exclusion.

³³³ Whelan and Maitre also point out that the NESC approach also involves building sustainable communities, which has facilitated the incorporation of groups such as the travelling community, people with disabilities and homeless people.

³³⁴ Whelan, CT & Maitre, B, “‘New’ and ‘Old’ Social Risks: Life Cycle and Social Class Perspectives on Social Exclusion in Ireland”, *ESRI Working Paper No. 228*, (February 2008), p 27.

³³⁵ See Kirby, P & Murphy, M, *A Better Ireland is Possible* (Galway, Community Platform, 2008) Available at: http://www.eapn.ie/documents/1_A%20Better%20Ireland%20-%20pdf.pdf. Murphy, Mary and Millar, Michelle, “The NESC Developmental Welfare State: Opportunity or Threat?”, *Administration*, Vol. 55, No. 3 (2007) pp 75–100.

contemporary industrialised model of social justice, yet it fears a rights-based approach to welfare rights. Of course, corporatist welfare systems can have many forms, and could involve rights-based approaches to particular welfare, education, health and housing services. Indeed, many advanced industrialised societies organise their welfare system along the lines of enforceable rights, without any adverse results.³³⁶

Rights and standards. Complexities and tensions *within* the rights tradition throw light on how Ireland's welfare state needs to develop. Vindicating socio-economic rights—or even specifying what they mean—is not in the power of courts or of governments acting on their own, but requires wide societal engagement in creating the policies and institutions that establish their content and meaning in a specific context. It becomes of paramount importance to concentrate on specifying, attaining and monitoring the standards that should govern the various areas of service provision (health, education, social welfare, housing, employment services, etc.).

Standards are both statements to service users and statements by service deliverers. They allow service users to see the content of their social and economic rights in the context in which they are living, and express what the individual has a right to expect *and* what she or he is committed to support being provided on her/his behalf for others. Standards also express how service deliverers understand what it is within their competence to provide (based on current technological, knowledge and organisational frontiers) and what constitute the hallmarks of doing so professionally.³³⁷

3–208 While there is a clear policy of excluding any curial examination of socio-economic rights within the policy approaches outlined here, there appears to be a concession to public administrative law principles of legitimate expectation in the delivery of services.

The NESC Report seems to accept that legally enforceable rights are necessary in relation to anti-discrimination and the prevention of racism. There also appears to be some appreciation that socio-economic rights may be necessary for people's development.

There is a greater, including State-assisted, vigilance for human rights and recognition of the social evils of discrimination and racism. It is accepted that the role of the State is not just to see that people's individual rights are not interfered with but goes further to ensure that each person has access to the social and economic resources that underpin the individual's development and participation in society. Prominent examples are in the area of disability and special needs education for children.³³⁸

On the one hand, society's attainment of higher general standards (of educational attainment, life expectancy, median income, standard of housing, individual autonomy, etc.) influences the perception and articulation of just what it is that the individual has a right to. What otherwise are vague rights (to 'employment', an 'income', 'housing', 'health care', etc.) become specified

³³⁶ See for example the right to housing in France, rights to childcare in Finland.

³³⁷ NESC, *The Developmental Welfare State*, p xxi.

³³⁸ *The Developmental Welfare State* (NESC, Dublin, 2005), p 113.

in terms of what is necessary to a person's development in a given context and in terms of what well-functioning systems can actually deliver. Stronger institutional and policy capabilities, which are in part the fruit of an increase in resources, thus, enrich the content and meaning of rights and lead to the formulation of new ones. On the other hand, the articulation of rights propels the development of institutions and policies. A greater appreciation of the human person and of the conditions that constitute the essential framework for personal development (including as a social being) in a given context results in the articulation of the individual's social and economic rights. The moral need to realise these rights and, where appropriate, the legal obligation to do so, then spurs and is inseparable from the development of institutional and policy innovations for doing so.³³⁹

Remarkably, there is no major consideration of the EU Charter of Fundamental Rights, which was accepted by Ireland at the time, and is now part of binding EU law. This major omission places severe limitations on the analysis of this NESC Report.

Towards 2016

The current Social Partnership Agreement *Towards 2016*³⁴⁰ which was agreed by the social partners in 2009 is being implemented in State policy, although some of its commitments on wages and labour issues have not been honoured. Although the trade unions have declared that social partnership has ended in 2010, the impact of the agreement on public policy development is pervasive, not least in the power to direct policy making by the small group of people involved in NESC. *Towards 2016* provides legitimacy for the NESC "vision" to permeate all public policies, including housing policies, although the approach is poor in relation to redistribution, taxation, legislation, accountability, regulation and many other areas of State policy.

As with previous social partnership agreements, the contemporary NESC Strategy (*NESC Strategy 2006: People Productivity and Purpose*) (2005), provided the background for the negotiations. The negotiating parties involved the Government, trade unions, employers, farming organisations and the community and voluntary sector. The organisations which took part in the negotiations were:

- Irish Congress of Trade Unions (ICTU)
- Irish Business and Employers' Confederation (IBEC)
- Construction Industry Federation (CIF)
- Small Firms' Association (SFA)
- Irish Exporters' Association (IEA)

³³⁹ *The Developmental Welfare State* (NESC, Dublin, 2005), p 233.

³⁴⁰ Government of Ireland, *Towards 2016 – Ten-Year Framework Social Partnership Agreement* (2006–2015) (Dublin, The Stationery Office, 2006).

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

- Irish Tourist Industry Confederation (ITIC)
- Chambers Ireland
- Irish Farmers' Association (IFA)
- Irish Creamery Milk Suppliers' Association (ICMSA)
- Irish Co-Operative Organisation Society Ltd. (ICOS)
- Macra na Feirme
- Irish National Organisation of the Unemployed (INOUE)
- Congress Centres Network
- Conference of Religious in Ireland (CORI) Justice Commission
- National Youth Council of Ireland (NYCI)
- National Association of Building Co-Operatives (NABCO)
- Irish Council for Social Housing (ICSH)
- Society of Saint Vincent de Paul
- Age Action Ireland
- The Carer's Association
- The Wheel
- The Disability Federation of Ireland
- Irish Rural Link
- The Irish Senior Citizens' Parliament
- The Children's Rights Alliance
- Protestant Aid³⁴¹

The concluded partnership agreement stated that the:

The Social Partners subscribe to the NESC vision of Ireland in the future, the key foundations of which are: a dynamic, internationalised, and participatory society and economy, with a strong commitment to social justice, where economic development is environmentally sustainable, and internationally competitive.³⁴²

3–211 *Towards 2016* set out 23 high level goals associated with a set of actions based on the NESC developmental welfare state approach. In relation to the housing goal, it set out a new approach to housing policy, with much new language, in Section 13 - *Housing Policy Framework – Building Sustainable Communities*.³⁴³

³⁴¹ The Community and Voluntary sector had been included in the partnership discussions from 2000. It has been described as introducing “civil society” and legitimising the process. See Larragy, J, “Irish Social Partnership: What is the significance of the Community-Voluntary Pillar?”, available at: sociology.nuim.ie/documents/larragy_000.pdf. It has been pointed out on many occasions that there is no representation of consumers interests in these discussions and that the organizations are not selected in any open and accountable way. Some groups such as farmers are represented by many organisations whereas tenants or house purchasers have no representation.

³⁴² Government of Ireland, *Towards 2016 – Ten-Year Framework Social Partnership Agreement* (2006–2015) (Dublin, The Stationery Office, 2006), p 5.

³⁴³ *ibid* at section 13.

The longer timeframe of a ten-year framework agreement allows for pathways to be developed to transform the Irish housing environment: to improve not only responsiveness of services but also quality of services. In this context, the core objective of housing policy is to enable every household to have available an affordable dwelling of good quality, suited to its needs, in a good environment and, as far as possible, at the tenure of its choice.

The Government and the Social Partners endorse the important principles set out in the Housing Policy Framework – Building Sustainable Communities which provides a vision of the kind of high quality, integrated sustainable communities that are worth building. This also aims to take into account other factors in the areas of balanced regional and rural development, planning, physical and social infrastructure and environmental sustainability and the development of social capital. The parties agree to work together toward the delivery of this vision over this ten-year framework agreement. A more detailed policy statement will issue during 2006, reflecting these principles and taking account of this Agreement.

The *Towards 2016* agreement also adopts earlier NESC proposals that:

The approach seeks to ensure that all housing is seen as being on an equal footing whether provided fully by the State or supported in some way. All parties have a role in developing this ethos, which makes no distinction between types of housing or tenure. A critical factor in determining housing interventions is the requirement for a clear perspective as to the scale and nature of need, including local variations. In framing responses, account should be taken of individual and family circumstances and each person's position in the lifecycle. The approach should also seek to encourage choice, personal autonomy and a sense of community involvement for all those across the life-cycle. To advance these goals, a new means of assessment will be developed to provide a better basis for policy development and service delivery to ensure that all people can live with maximum independence within their community.³⁴⁴

Key areas for development under the first phase of this ten-year framework agreement include new means of assessing need and enhancing delivery of social and affordable housing. The Government are committed to expanding the social and affordable housing options over the coming years and have indicated that increased investment will meet the needs of some 50,000 households over the three years to 2008, through the existing range of social and affordable housing options. Further households will benefit from the Rental Accommodation Scheme (RAS).³⁴⁵

It is not clear how the proposed similarity of treatment between types of housing tenure would impact on housing systems. It may amount to no more than similar exterior appearances on newly developed social rented housing alongside low cost subsidised homeownership schemes. In many ways it could appear as a superficial approach to housing policy which denies the structural and social factors which distinguish housing tenure and wealth in Ireland.

³⁴⁴ *ibid* at p 26.

³⁴⁵ *ibid* at p 27.

3–212 The agreement also endorses the new approach to redefining assessments of social housing need as “eligibility for social housing support”, which in the ensuing legislation of the Housing (Miscellaneous Provisions) Act 2009 can amount to no more than accommodation in a long-term privately rented accommodation unit. The redefining of social housing provision was accepted in the agreement, in the context of the requirement (proposed by NESC) of 73,000 social housing units by 2012.

The parties acknowledge the view taken in the NESC report on housing that an additional 73,000 social housing units should be provided in the period 2004 to 2012. The parties consider this target as being of continuing relevance to the expected response under this ten-year framework agreement. Implementation of such an objective will be assessed in the light of work on the assessment of need, the emerging picture in relation to need, the evolution of the various housing programmes and the outputs achieved under these, and the resources available...

- The commencement/acquisition of an additional 4,000 new housing units over the period 2007 to 2009 for such households [through a combination of local authority (2,000), voluntary and co-operative housing (1,000), and RAS long-term contractual arrangements for new supply (1,000)]. This will bring the total number of new commencements/acquisitions in the period to 27,000 units;
- In addition, further households will benefit from full implementation of the Rental Accommodation Scheme, involving contractual arrangements with landlords, for existing properties transferring from rent supplement;
- Implementation of the Local Authority Traveller accommodation programmes.³⁴⁶

The social partnership agreement also endorsed the Government’s subsidised home ownership programme and supported a variety of methods for achieving this.

In addition to the current affordable housing measures which will deliver some 17,000 units over the period 2007 to 2009 through a more streamlined approach currently under development, the Affordable Homes Partnership [now replaced by a new Agency] is undertaking initiatives to increase the supply of affordable housing in the Greater Dublin Area. A key instrument is their role in bringing forward additional land for housing development. It is understood that the Partnership is at an advanced stage in selecting suitable sites from its first call for proposals, which subject to planning, could deliver a substantial affordable housing yield. Other innovative means of increasing the supply of affordable housing will also be explored during the first phase of this agreement. Throughout the period of agreement there will an emphasis on innovation and joint policy approaches with the social partners to accelerate delivery, including affordable rental and shared equity options...³⁴⁷

³⁴⁶ *ibid.*

³⁴⁷ *ibid.*

The Housing Forum

The social partnership agreement *Towards 2016*, led to the confirmation of the significant role of the Housing Forum: **3–213**

The Housing Forum will play an important role in inputting to policy development and evaluating outcomes over the period of the ten-year framework agreement. This will include housing issues in both the urban and rural environments. Progress will be reviewed following the first phase (during 2008) of the ten-year framework agreement. This will inform the delivery under the next series of multi-annual housing action plans, taking account of market developments and capacity. In many areas, the outcomes for individuals will be critically dependent on the inter-linkages of services as described under the key lifecycle phases set out in Chapter 3.³⁴⁸

This important institution of social partnership would comprise representatives of the social partners and the government and would have a vital monitoring role.

Working through the Housing Forum, the Government and the Social Partners will focus on five main areas to achieve the objectives of creating sustainable communities:

- Continuing improvements in the quality of houses and neighbourhoods, including improvement of consumer information in relation to housing;
- Providing tailored housing services to those who cannot afford to meet their own housing needs, and in this way responding to the broad spectrum of housing need;
- Developing inter-agency cooperation where there is a care dimension;
- Maintaining the impetus for the delivery of housing at affordable prices to the market, including through State supported schemes, and other appropriate innovations, such as measures to support first time buyers;
- Progressing the social housing reform agenda set out in the Housing Policy Framework.³⁴⁹

This body, whose membership has been prescribed by the social partnership system, now plays an unclear and largely unaccountable role in the development of housing policy. Its membership is made up of the representatives of the social partners, but there are no accountability processes for the Forum in relation to ordinary citizens or users of housing services and policies created which affect them. No minutes of its decisions or its representations of consultations or reasoned conclusions in developing housing policy are publicly available.³⁵⁰

³⁴⁸ *ibid* at p 28. It has not been possible to trace any significant input from the Housing Forum or indeed any awareness of the housing system collapse which was taking place as it met.

³⁴⁹ Government of Ireland, *Towards 2016 – Ten Year Framework Social Partnership Agreement* (2006–2015) (Dublin, The Stationery Office, 2006), p 26.

³⁵⁰ I am grateful to Frank O'Donoghue of the Department of the Environment, Heritage and Local Government for providing copies of minutes and other information on the Housing Forum.

Delivering Homes—Sustaining Communities (2007)

- 3–214** The Department of Environment Report *Sustaining Homes, Building Communities—Statement of Housing Policy (2007)*³⁵¹ endorsed the earlier NESC Report on housing in 2004. Reiterating the challenges set out in the NESC Report this government report set out three key policy guidelines or goals. These are firstly, building sustainable communities, secondly, responding to housing needs and thirdly, delivering housing services efficiently and effectively.³⁵² This approach accepts the dominance of the market in housing provision and seeks only to influence its operation at a superficial level. The government report largely concentrates on social housing and even accepts that it must provide an effective range of suitable supports for households with affordability problems, as well as assisting the market to deliver a high level of supply consistent with demand.³⁵³
- 3–215** The Report of 2007 stated that it outlines an overarching vision to guide the development of the Irish housing sector over the next 10 years, by delivering more and better quality housing responses and by doing this in a more strategic way, focused on the building of sustainable communities. It set out a range of actions geared at building sustainable communities, responding to housing needs in a way that improves choice and encourages individual responsibility within communities. There is a clear emphasis on a services approach—one which tailors supports to households taking account of their position in the life cycle, effectively delivering housing programmes, to get better outcomes for the households supported, and better value for money for the tax-payer.
- 3–216** The actions arising from this policy include a policy agenda, with a range of guidance documents to support the building of sustainable communities, a legislative programme to support social housing reform, the delivery of housing programmes and measures relating to the use of land, new schemes to support social housing tenants seeking homeownership and meet the needs of older people and people with a disability to adapt private homes for their needs. Other actions include the effective use of the €18 billion investment in housing programmes provided for in the National Development Plan 2007–2013, meeting the needs of some 140,000 new households over the period of the National Development Plan, and focussing on improving the quality of social housing stock,

³⁵¹ Department of Environment, *Delivering Homes, Sustaining Communities: Statement on Housing Policy* (Dublin, The Stationery Office, 2007). Available at: <http://www.environ.ie/en/Publications/DevelopmentandHousing/Housing/FileDownload,2091,en.pdf>.

³⁵² *ibid* at p 23.

³⁵³ This approach is all the more remarkable as it was produced at a time when all over the world governments were accepting that the market in housing had led to gross overlending and consequent failures in banking systems. This report on housing policy makes no attempt to deal with regulation of finance markets, land markets or consumer rights.

with extensive programmes of housing and neighbourhood renewal.³⁵⁴ The Report of 2007 states that:

Forecast growth in the Irish economy and population indicate that strong demand for housing will continue. Output is expected to reduce gradually over the longer term. Nonetheless, the number of homes in Ireland may rise from 1.8 million at present to over 2.5 million by 2020. This poses significant challenges in terms of planning, delivery and community development.³⁵⁵

It is significant that legislation forms only one of many actions or elements of the plan, and that it is not even the primary element.

The *Delivering Homes – Sustaining Communities* Report of 2007 draws heavily on the NESC Report of 2004 which considered that future challenges for housing in Ireland would fall into three broad areas: These were achieving high quality sustainable developments in urban and rural areas, provision of an effective range of suitable supports for households with affordability problems, and assisting the market in continuing to deliver a high level of supply consistent with demand. The Report of 2007 also draws on the social partnership agreement and the NESC “vision of society”:

3–217

13. The development of this statement has taken account of the broader vision for the development of Ireland outlined in *Towards 2016*. This has as its foundations ‘a dynamic, internationalised participatory society and economy with a strong commitment to social justice, where economic development is environmentally sustainable and internationally competitive’. It involves a commitment to social and economic development in a way that leads to a better quality of life for all.³⁵⁶

The Report also states that the Government actively encourages the fulfilment of new households’ aspirations to home-ownership. It is important to offer choices in a more mobile and dynamic economy:

The modernisation of the private rented sector is one component of developing tenure choice. The Government acknowledge also the important role of the State in providing choices for those who cannot meet their own needs in the housing market. The same principles of quality and sustainability must be reflected in policies to deliver affordable housing, or social housing supports. The passage of Part V of the Planning and Development Acts 2000 to 2006, marked an important step in encouraging planning for housing in a way that

³⁵⁴ The National Development Plan 2007–2013 entitled *Transforming Ireland – A Better Quality of Life for All*, sets out the roadmap to Ireland’s future. The €184 billion Plan is presented by the Government as representing another major milestone in building a prosperous Ireland for all the people, characterised by sustainable economic growth, greater social inclusion and balanced regional development. See website: http://www.ndp.ie/docs/NDP_Homepage/1131.htm. Of course, this has now been significantly reduced in the context of the fiscal and economic crisis.

³⁵⁵ *Delivering Homes, Sustaining Communities—Statement on Housing Policy* (2007), p 8.

³⁵⁶ *ibid* at p 9.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

avoids undue social segregation. It is a fundamental thesis underpinning this statement, that in planning for affordable and social housing, local authorities should seek to actively provide for integrated communities, delivering accommodation choices for a wide range of households. In this context, policies should encourage a sense of personal autonomy and responsibility that underpins good community participation.³⁵⁷

The housing policy Report adopts the “pathways approach” to housing.

A key element is viewing the individual’s need from the perspective of their current position in their life cycle and tailoring supports to address the need at this point in time. This reflects a central underpinning of the *Towards 2016* agreement and the commitments on housing reflected therein. This approach requires a holistic perspective on people’s needs as they move through key life cycle phases - childhood, working age, older people. A particular focus is placed on people with a disability (who, will benefit from mainstreamed measures through all stages of the life cycle). This approach allows supports to be geared to the particular needs of people in different phases of their life.

3–218 In relation to addressing how these supports will be provided, the Report proposes a “client” approach, albeit with commitments required from the recipients of housing supports. This Irish public sector clientelist perspective stands in marked to consumer, citizenship and human rights developments.³⁵⁸ It demonstrates how little the language of rights has pervaded housing policy in Ireland.

Those providing such supports (local authorities and voluntary and cooperative housing bodies) must take a service-based approach that is client centred. For more vulnerable households this will generally require an interagency response. A range of reforms to improve the quality of service and the effectiveness of provision is required to fulfil this ambition. This approach must engage individuals in receipt of housing supports in a new way. This will involve the development of new partnership approaches with other relevant support agencies to ensure that individuals’ long-term needs are addressed in a holistic and effective way. It is not sufficient, for example, for housing supports to be provided in the absence of commitments by the individual or relevant agencies in relation to other interventions such as employment, further education etc. The development of a more holistic approach will require detailed work aimed at making social inclusion responses a reality for the individuals in receipt of the various kinds of housing support. This will seek to combine an approach based on personal activation with the delivery of high quality services to individuals.³⁵⁹

While there is much merit in having a holistic response from all State agencies to people’s needs, one would have expected that this was already

³⁵⁷ *ibid* at pp 9–10.

³⁵⁸ These various perspectives as a basis for public service provision are set out in Cousins. M. “The Quality of Public Services: Clarifying Conceptual Issues”, *Administration*. Vol. 44, No. 4, (Winter 1997-97) pp 83-93.

³⁵⁹ *Delivering Homes, Sustaining Communities - Statement on Housing Policy* (2007), p 10.

part of State policy. It is significant that though conditional benefits may be the norm, the notion of legal contracts for services between landlords and tenants in the public sector seems to be conditional on a person's status in terms of their commitment to some non-defined norm. Yet, the Report proposes that tenancy agreements will continue to prescribe the landlord tenant relationship within social housing in Ireland:

Tenancy agreements will continue to set out the relationship between the tenant and the local authority and will detail the rights and responsibilities of tenants as regards their rented local authority dwelling. In so far as is practicable, standard tenancy agreements will be pursued across all social housing tenures, including local authority housing, voluntary and co-operative housing and the rental accommodation scheme (RAS).³⁶⁰

Again, the Report refers to tenancy agreements in terms of the primacy of the physical locality:

Managing the housing stock well requires best practice to be adopted in terms of tenancy agreements. This must reflect an appropriate balance of tenant rights and responsibilities, good estate management and tenant participation and consultation.³⁶¹

There is no attempt to quantify, evaluate or relate how these rights might develop in the context of the international and legislative obligations of the State in this area. There are some references to ensuring that “tenancy agreements reflect an appropriate balance of rights and responsibilities”, ensuring equitable rents and allocation policies and providing a system of redress for tenants.³⁶² Passing references are made to the rights of property owners (p 33) and private rented tenants (p 36), but remarkably there is no reference to housing rights as a concept, the impact of the European Convention on Human Rights Act 2003, or legally binding consumer and equality legislation.

3–219

The Report acknowledges that although Irish housing stock is quite modern and energy efficient, and levels of satisfaction with the quality of Irish housing are generally very high, there are problems in relation to affordability of housing for low-income groups, the design of both housing and neighbourhoods, facilitating innovation and ensuring consumer satisfaction.³⁶³ The State response to this involves a range of actions focused on addressing housing need, choice and responsibility:

Work with other Departments and the industry to increase consumer information and protection in the private housing market. This includes, the development by

³⁶⁰ *ibid* at p 41.

³⁶¹ *ibid* at p 67.

³⁶² *ibid* at p 16 and p 67.

³⁶³ *ibid* at p 17.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

the Department of Justice, Equality and Law Reform of legislation to implement the recommendations of the Auctioneering and Estate Agency Review Group, including the establishment of the new Regulatory Authority.³⁶⁴

- 3–220** The Report specifically addresses consumer information and protection in the context of home ownership as the most popular tenure. It suggests ensuring appropriate regulatory frameworks are in place and encouraging innovation in terms of construction and product, yielding positive value for money and environmental sustainability outcomes.³⁶⁵

An efficient well-functioning housing market requires that potential clients be well-informed regarding dwelling quality, expected lifetime performance of the dwelling as a whole and its key components, expected running costs, maintenance requirements and related issues. All of these influence the overall sustainability of new housing. *Towards 2016* reflects a particular commitment to improve consumer information in relation to housing. One aspect of this will be addressed with the introduction of energy rating requirements from January 2007...³⁶⁶

- 3–221** The Report proposes that purchasers of new housing should also have access to detailed information on the key elements of the dwelling that potentially affect its overall performance, efficiency and running costs. These include specific details in relation to the location of wiring, pipes, ducts, meters, valves, stopcocks, and maintenance/replacement cycles of key elements and services. The DoEHLG will work with the industry to ensure that appropriate information is made available.³⁶⁷

The Report refers to reports and new legislation on management companies and also states that the new Property Service Regulatory Authority, which will regulate the auctioneering/estate agency business and related matters, will also have a consumer information function.³⁶⁸ It also refers to the existence of a Working Group set up to delineate the extent of the local authority responsibilities for facilities in high-density estates.

In relation to stage payment the Reports states that the Department of Environment “has pursued agreement with the construction industry for the voluntary phasing out of the practice of stage payments in house purchase contracts in housing estates”.³⁶⁹ Despite the High Court decision³⁷⁰ case in this area in relation to unfair contract terms in consumer contracts, the Reports points out that:

³⁶⁴ *ibid* at p 13.

³⁶⁵ *ibid* at p 31.

³⁶⁶ *ibid* at p 31.

³⁶⁷ *ibid* at p 31.

³⁶⁸ *ibid* at p 32.

³⁶⁹ *ibid* at p 34.

³⁷⁰ *In the matter of an application pursuant to regulation 8(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995: Record No. 229SP/2001, dated 5 December 2001.*

While any possible legislative measure in this area would fall to be considered in the context of the law relating to property sale and conveyancing and associated contracts, it is envisaged that the voluntary approach being developed will prove effective and that it will not be necessary to have recourse to legislative action.³⁷¹

The Report also considered quality, innovation and sustainability as part of consumer issues. It states that “[Q]uality may not be easily defined but it can be described and includes a totality of features and characteristics that satisfy a variety of needs”.³⁷² The Government will support and encourage the adoption of new technology and innovative approaches to design and construction of dwellings aimed at improving productivity and enhancing quality and performance of new dwellings. It is considered particularly important that the widespread adoption of any new developments of this nature is based on adequate certification having regard to the nature of the measure and the purpose for which it is used. Key factors are practicality of application, durability, and maintenance and repair characteristics. The benchmark for performance should be equivalent traditional methods. The role of the Private Residential Tenancies Board (PRTB) in relation to private rented housing and measures including tackling sub-standard accommodation are outlined in the Report. 3–222

The key action in relation to consumer issues in the general housing sector were set out: 3–223

- Promotion of sufficient supply of housing of the right type in the right locations, by ensuring that housing strategies are regularly updated and integrated with other infrastructure requirements as part of county/city and national development plans.
- Underpinning of housing strategies with housing action plans to deliver affordable housing and housing supports.
- Development and appropriate regulation of the private rented sector, making it more attractive both to those seeking housing and to accommodation providers.
- Development of new comprehensive planning guidance on interrelated housing and planning issues including:
 - revised minimum floor area standards/facilities for apartments, particularly from the point of view of ensuring higher proportions of family and child friendly development;
 - a review and update of the existing residential density guidelines, to take account of housing trends and policy development since the guidelines were first issued in 1999; and
 - a new best practice manual in relation to the planning and design of residential neighbourhoods and housing layouts, the scale and pace of development, including encouraging the use of sustainable transport modes, maximising energy efficiency

³⁷¹ *Delivering Homes, Sustaining Communities - Statement on Housing Policy* (2007), p 34. See also Kenna, P, “State housing policy makes no move to regulate industry”, *The Irish Times*, 3 March 2007.

³⁷² *Delivering Homes, Sustaining Communities—Statement on Housing Policy* (2007), p 34.

PERSPECTIVES ON THE IRISH HOUSING SYSTEM

and adaptation to climate change and planning for amenities such as playgrounds and child-care facilities.

- Work with relevant agencies to promote an effective general regulatory environment or standards of practice, as appropriate, in relation to housing.
- Development of legislation to ensure lands zoned and serviced for housing purposes are used in a timely fashion.
- Encouragement of appropriately certified innovative approaches in housing construction to improve productivity and output in the residential market and enhance quality and performance.
- Progressively improve the environmental sustainability of new housing through building regulations and voluntary codes.³⁷³

3–224 There are, of course, significant questions about the narrowness and the basis of the assumptions behind this Report. There is no examination or analysis of the growth of mortgage credit and its impact on sustainable house prices. This is fundamental to the whole housing system. It has been demonstrated in the subsequent dramatic reactions of the State, in the nationalisation of financial institutions, the restructuring of public expenditure and the use of revenue income to sustain lending institutions, rather than developing community facilities leading to sustainable communities. The NESC Report suffers from the same fundamental weakness—a failure to examine the housing system as a whole rather than examining elements of government spending and minor intervention measures in the market. The position of housing consumers is largely disregarded, and there is no attempt to generate any kind of involvement in the policy making process by tenants, purchasers, mortgagors or others.

3–225 In the context of government departments proclaiming a new found interest in sustainable communities, King points out that there is a suspicion that the renaming of policies and practices is essentially a displacement activity aimed at giving the impression of newness and fresh thinking, when, in fact, current policy is actually a continuation of previous policies.³⁷⁴ He claims that we get a sense of these tactics by looking at the very idea of “sustainable communities”. At the root of the problem is an inability to actually define what a “sustainable community” is.³⁷⁵ King points out that much of the language associated with this term is aspirational, unquantifiable and question-begging. In the absence of any practical definitions, King suggests that we must assume that the definition of “sustainable community” amounts to that which is deserving of government subsidy. Indeed, governments seem to think that that giving its policies and institutions what might be called soft and inclusive terms somehow alters the tenor of the policy.³⁷⁶

³⁷³ *ibid* at p 36.

³⁷⁴ See King, P, *Choice and the End of Social Housing* (London IEA 2006).

³⁷⁵ *ibid* at p 98.

³⁷⁶ *ibid* at p 99.

The NESC Report in 2009, Ireland's Five-Part Crisis: An Integrated National Response³⁷⁷

This Report was prepared by NESC and presented to the social partners in the wake of the global economic slowdown and the collapse of the Irish property market in 2009. Identifying the property bubble as a major cause of Ireland economic crisis it states: 3–226

Property Bubble: Since approximately 2004, Ireland developed one of the worst property bubbles the world has seen in recent years. Up to 2004, fundamental supply and demand factors went a considerable way towards explaining why houses continued to sell despite their high prices; thereafter, expectations of future house price increases themselves began to drive current house prices. Banks played a huge role in this by borrowing money cheaply on international markets on a short-term basis and lending it on a long-term basis to builders, developers and house-purchasers. Many people with major responsibilities in Irish banking institutions and the Irish regulatory system did not acknowledge or act when warning indicators flashed red.³⁷⁸

This NESC Report states that the reason for Ireland's particularly severe downturn is that a substantial housing market correction and sharp deceleration of export growth have occurred together. It points out that residential construction peaked at almost 90,000 units in 2006 and a correction, in both house prices and supply, began towards the end of that year.

The decline has accelerated—as few as 22,500 houses may be completed in 2009—and spread to commercial and retail construction, particularly after the international credit crunch in September 2008 exposed the huge involvement of the country's banks in borrowing short-term funds on international money markets to fund property investments and purchases.³⁷⁹

The Report points out that in Ireland, until Autumn 2008, there were grounds for hoping that a substantial housing-market correction, which began towards the end of 2006, along with strategies to renew the economy's competitiveness by focusing on knowledge and innovation, would enable the country to enter a new phase of more moderate but soundly-based growth, without major dislocation. It claims, however, that the global financial crisis precipitated the credit crunch which spilled over into the real economy, and that Ireland was experiencing the vulnerability of its economic openness (without which, of course, the rapid expansion and higher living standards since 1993 would not have happened). A collapse in construction and fall-off in exports have triggered a decline in employment and consumer spending. 3–227

³⁷⁷ NESC, *Ireland's Five-Part Crisis: An Integrated National Response* (Dublin, NESC, Report No. 118, 2009).

³⁷⁸ *ibid* at p x.

³⁷⁹ *ibid* at p 12.

The slump in tax-rich activities (housing and domestic demand in general) has caused a spectacular drop in tax revenue. With tax revenues falling sharply and public expenditure proving much more difficult to keep from growing let alone reduce, Ireland's fiscal deficit has soared and is currently the highest, and one of the most intractable, in the EU.³⁸⁰

3-228 The Report accepts that its previous analysis of the housing system did not predict such a dramatic downturn, but the NESC vision and principles are still relevant.

3.2.7 Housing, land management and sustainable neighbourhoods

While the Council's understanding of the housing market did not anticipate the likelihood or full consequences of the collapse in construction that has occurred, it has a vision for sustainable development, land management and housing that is relevant to the current crisis. It identified five principles of sustainable housing and integrated development: sustainable urban densities; consolidated urban areas; compact urban satellites; rapid communication networks; and sustainable rural settlement. These help not only to understand what went wrong and what contributed to the creation of a property bubble, but can also serve to guide the response to this part of the crisis and help insure against its repetition.³⁸¹

The Report points out that NESC had, in its housing study of 2004, advocated an element of active land management to meet the goals of housing policy, but this had been ignored by the Government.

The NESC Vision and Well-Being

3-229 In 2009, NESC published a range of reports on well-being and people with disabilities, older people, children, people of working age, and the relationship with State policies developed under the NESC approach or "vision" developed in its earlier reports such as the *Developmental Welfare State*.³⁸² This Report considers that well-being must be measured in wider terms than GDP or GNP. In its definition of well-being, the NESC Report states:

³⁸⁰ *ibid* at p x.

³⁸¹ *ibid* at p 33.

³⁸² See Report No. 119, *Well-Being Matters: A Social Report for Ireland*, (Dublin, NESC, 2009). Significantly, in a section entitled, "What is a NESC Report?" there is a succinct description included which states "A report from the National Economic and Social Council contains the shared analysis of the 30 Council members on a theme considered to be of strategic national importance. Council membership comprises senior civil servants, representatives from employers, trade unions, farming, community and voluntary, and environmental organisations, plus independent members with relevant expertise. A NESC report, therefore, has the characteristic of being shaped and discussed by people who, collectively, have a wide understanding of Ireland's economy and society and of the need and potential for specific policy changes to have an impact".

A person's well-being relates to their physical, social and mental state. It requires that basic needs are met, that people have a sense of purpose, that they feel able to achieve important goals, to participate in society and to live the lives they value and have reason to value.

People's well-being is enhanced by conditions that include financial and personal security, meaningful and rewarding work, supportive personal relationships, strong and inclusive communities, good health, a healthy and attractive environment, and values of democracy and social justice.

Public policy's role is to bring about these conditions by placing the individual at the centre of policy development and delivery, by assessing the risks facing him/her, and ensuring the supports are available to address those risks at key stages in his/her life.³⁸³

The NESC definition of well-being is based on individual well-being being applied to six domains of existence, such as economic resources, work and participation, relationships and care, community and environment, health and democracy and values.

The NESC Report of 2009 cites the levels of well-being in the policy context of children, people of working age, older people and people with disabilities, examining among other things the situation in relation to housing in the context of community and environment. It provides valuable data, for example, that 449 children were homeless in 2006, some 58% of first time buyers in 2007 were under 30 years old and that the 2008 assessment of homelessness recorded 1,394 households.³⁸⁴

The Approach of Irish Law

Housing law and policy is a product of the unique history of every country.³⁸⁵ 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. The corpus of property law relating to the centuries of landed estates is still applied to property in housing. The period when land was the primary or primitive form of accumulation of capital and wealth has created a myriad of rules, precedents and principles which persist today, despite attempts to modernise land law, and with it, to some extent, housing law. It is indeed, the changed circumstances of property as capital and property as a home which requires a new conceptual framework

3–230

³⁸³ See Report No. 119, *Well-Being Matters: A Social Report for Ireland* (Dublin, NESC, 2009), p 4.

³⁸⁴ This figure, of course, only refers to those homeless people who are seeking local authority housing. Previous assessments also counted those homeless people who required supported or shelter type accommodation which local authorities are unable to provide.

³⁸⁵ Housing in this book relates to all types of living accommodation from detached houses to apartments and caravans.

for the development of law. As the legal, social and policy treatment of housing moves from the feudal notions of property (and indeed patriarchal family structures) to the more people and family-centred places of personal and social development and locus of leisure, work and relationships, so too housing law must relate to new circumstances.

3-231 A clear example of this shift in approach from a feudal and institutional legal approach to a more simplified, codified system of creation, transfer and dispute resolution for housing can be seen in the dramatic changes relating to private rented housing. Here the new statutory system under the Residential Tenancies Act 2004 creates a range of implied terms in every lease, whether oral or in writing, and a special dispute resolution machinery outside the courts, with no provision for legal costs, has been established. Whether arising from the excessive costs, delays, or poor services associated with legal arrangements concerning people's homes, there will inevitably be demands for a simplified and inexpensive process for acquiring, mortgaging and selling homes. In many ways it would appear logical to separate the property law elements of commercial property and land from the law relating to homes. Significantly the feudal, common law and multi-layered statutes of landlord and tenant now apply only to commercial tenancies, and a tiny proportion of residential tenancies, and most terms of leases are prescribed by the Residential Tenancies Act 2004. Is it any longer justifiable to apply centuries-old common law principles developed in another era to the ordinary transactions of buying, selling and mortgaging a home, with all the potential for expensive legal disputes and unbearable trauma and uncertainty for homeowners in dispute?

3-232 Traditional legal perspectives view housing law as part of conveyancing, family law or planning. This involves land, contract and conveyancing law, recent family law statutes and cases, local authority development plans and relevant cases. A lesser significance is accorded to residential landlord and tenant issues, and even lower status is afforded to social housing tenancies. Indeed, this latter area forms the subject matter of housing law in the UK, as taught in law schools, a sub-species of the law of residential landlord and tenant law, but which is relevant in the context of millions of such tenancies there. Stewart has described the creation of a "new" UK subject called housing law whose "elderly parents had been a property lawyer and a local government officer who never had much meeting of minds".³⁸⁶

3-233 The growth of the subject of housing law in the UK is largely due to the extensive level of legal rights, legislation, and case law in these areas developed as part of the post-war Welfare State—a situation common to most industrialised European countries with socialist and social-

³⁸⁶ See Stewart, *Rethinking Housing Law* (London, Sweet & Maxwell, 1996), p 1.

democratic political parties.³⁸⁷ While there is much valuable jurisprudence and innovative legislation to draw from the UK system, the limited role of social housing in the Irish context operates to obviate any comparable development of housing law. In Ireland, any examination of housing law and policy needs to address the whole housing system.

In terms of Irish housing law, there is a very different historical and social environment. Social housing amounts to approximately 10% of housing stock, and is occupied by people with low incomes, whose status as tenants remains broadly similar to agricultural tenants in the late 1800s, but with the opportunity to purchase their homes. Private rented housing is a growing sector, where a special quasi-judicial machinery has been established to deal with disputes, but where legal costs are not awarded. Owner-occupied housing, which increased up until the late 1990s, is declining as a proportion of tenure, but still remains one of the highest in Europe. However, the legal distinction between these three tenures is becoming less stark, as many new forms of tenure, such as shared ownership, affordable housing, long leases under the Rental Accommodation Scheme (RAS) and other new arrangements are developed. The social inclusion policies of combating social segregation through the Planning Acts as well as the development of mixed tenure estates, and multi-occupied apartment blocks, management agencies and agreements spanning public and private tenures, and other developments, are creating many new and complex areas of housing law.

Housing in contemporary Ireland is perceived either as a home or as a property investment. 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. Housing as a property/investment involves the notion that the capital value of the building will appreciate and its asset value can be realised. Ensuring that this capital/property in housing can be securely owned, sold, rented and inherited is the basic task of property law. 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.

Indeed, it may be that housing law fills that void in Irish law where the public character of property is largely missing from legal training or property law discourse. The separation between public and private law, with property firmly placed within the latter needs to be reopened. Students of property law recognise that property is a social relationship between

³⁸⁷ See Arden & Hunter, *Homelessness and Allocations* (London, Legal Action Group, 2002); Arden & Hunter, *Manual of Housing Law* (London, Sweet & Maxwell, 2002); Hughes, Davis, Matthew & Jones, *Text and Materials on Housing Law* (OUP, 2005).

people and things. This is seen as private law, but the social context of those relations is a matter of public law. The essence of a property right is the right to exclude others, but positive obligations on property owners (as well as taxation) are growing in Irish law. Indeed, protecting property rights, including the right to receive rents, may well determine the level of future distribution of wealth, goods and resources in society for many decades to come. The significant absence of research on property wealth in Ireland illustrates the deference to property ownership among political parties at a time of recession. Property law and land registration systems are viewed by many as contributing significantly to the lack of research on wealth and property ownership in Ireland. Why not utilize this State database as a source of research on property ownership, wealth, house prices and other valuable research to assist in effective policy making by the State.

3–237 The Irish legal system is a common law system, where housing law is defined both in legislation and case law, developed on precedent and interpretation by courts of relevant constitutional legislative provisions. The courts can exercise a judicial oversight on the operation of the administrative machinery of the State in housing policy making and implementation, although this is very infrequent in Ireland. The relatively few cases involve courts gauging particular legislation or practices against constitutional provisions, occasionally reviewing the reasonableness, powers and fairness of official actions, and latterly assessing the laws and policies against the provisions of the European Conventions on Human Rights Act 2003. Indeed, the establishment of the Private Residential Tenancies Board (PRTB) which deals with all disputes in the private rented housing sector could be seen to reflect a lack of confidence in the courts and legal system to deal effectively, speedily, cheaply and congenially with housing issues.³⁸⁸

3–238 The underlying *grundnorm* of the rule of law and *Bunreacht na hÉireann* prescribes all State action and the operation of policies.³⁸⁹ The Constitution and rule of law stand as the curial basis of assessing State action and in securing redress for persons when affected by illegitimate actions. Constitutional principles as applied to housing and social housing have been invoked largely by property owners challenging State action

³⁸⁸ The *Report of the Commission on the Private Rented Residential Sector* (2000) at p 98 stated that Court procedures were complicated and very time consuming, deterred some tenants from pursuing legal action, were used by other tenants to delay eviction and thus avoid paying rent. The legal language associated with disputes relating to non-payment of rent or a tenant's refusal to give up accommodation at the termination of a tenancy, was seen as off-putting and difficult for laypersons to comprehend.

³⁸⁹ While *Bunreacht na hÉireann* does not refer specifically to the rule of law and instead Article 6(1) states that "All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good," Article 35(2) states that "All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law".

to promote or develop social housing in development plans or planning conditions, compulsory purchase orders, judicial review of local authorities or in one occasion to force striking workers to maintain lifts.³⁹⁰ The Irish Constitution has not been usually interpreted as granting any rights to people in housing need,³⁹¹ and the courts have resiled from interpreting “unenumerated rights” leading to social benefits for people in need within the provisions of the Constitution.³⁹² The Supreme Court has refused to undertake responsibility for protecting constitutional rights, even where an order from the High Court requires the Executive or a State body to honour its constitutional obligations, effectively granting immunity to the Executive branch of government from court sanctions.³⁹³ Indeed, the Constitution has been interpreted to allow a summary procedure for eviction of local authority tenants without any opportunity to be heard or even entitled to legal aid for representation.³⁹⁴

At policy level a competitive neo-corporatist approach is pervasive, and reflected in recent times in the work of NESC and its “vision of society”. At the level of statutes and the deliberations of the Oireachtas, there is a predominant neo-liberal, market-based influence, tempered with notions of Roman Catholic, Gaelic anti-colonial communitarianism. In the courts,

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³⁹⁰ See *Heeney v Dublin Corporation*, Unreported, Supreme Court, 17 August 1998, where the Court held that there was a constitutional rights to lift access to a flat in a high rise block in Ballymun. This case was taken in the context of a strike by lift maintenance staff.

³⁹¹ See *O’Reilly v Limerick Corporation* [1989] ILRM 181. Six years after that decisions Costello J, handed down an *ex tempore* judgement in the case of *O’Brien v Wicklow UDC*, Unreported, High Court, 10 June 1994, where he held that Travellers had a constitutional right to bodily integrity which was infringed by the conditions under which they were living.

³⁹² See Keane CJ, in *TD v Minister for Education and others* [2001] 4 IR 259 at p 282 where he stated “I would have the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as ‘socio-economic rights’ to be unenumerated rights guaranteed by Article 40. In my view, however, the resolution of that question must await a case in which it is fully argued”.

³⁹³ In *TD v Minister for Education and others* [2001] 4IR 259 at 372. Hardiman J, expressed the apparently established view that in relation to the circumstances in which the court may make a mandatory order compelling the executive to fulfill a legal obligation. “First, such a thing may occur only in absolutely exceptional circumstances ‘where an organ or agency of the State has disregarded its constitutional obligations in an exemplary fashion. In my view the phrase “clear” disregard can only be understood to mean a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties accompanied by bad faith or recklessness’. Secondly, even in such extreme circumstances, the mandatory order might direct the fulfillment of a manifest constitutional obligation but ‘without specifying the means or policy to be used in fulfilling the obligation’. Such an order, in my view, could only be made as an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself. I do not believe that any circumstances which would justify the granting of such an order have occurred since the enactment of the Constitution 64 years ago. I am quite certain that none are disclosed by the evidence in the present case”.

³⁹⁴ *State (O’Rourke) v Kelly* [1983] IR 58.

housing law, with all its elements of property law, family law and social housing law, is largely treated on an almost feudal 18th century basis of upholding property and market rights, maintaining “order” but respecting newer statutory enactments as reflections of contemporary public policy, by many recently appointed neo-liberal and neo-conservative judges. Indeed, it is important to highlight the variance between the understanding of what amounts to public policy, by the courts, which view is as statutes created by governments balancing the many competing and strident interests in society, and the Legislature and Executive which sponsor a plethora of policy reports and agreements within the contemporary Irish neo-corporatist form of governance. These latter emanations of State bodies occupy no place in the deliberations of the courts, which look no further than statutes to enhance the development of common law.

This disconnect is reflected in many areas of life, leading to claims of judicial ignorance of modern times. In the arena of housing law, some recent court decisions resonate more with 18th century models of dealing with the housing of the poor than contemporary notions of equal citizenship and social inclusion.

3–240 This dissonant situation is exemplified by recent developments in housing law. At the level of housing policy, a competitive neo-corporatist vision of society, promoted by NESC, has led to major policy documents outlining State housing policy at a macro and micro level. Based on a tripartite agreement between the representatives of employers (or capital) trade unions (labour) and the State, these emphasise the principles of social inclusion, participatory society and economy and strong commitment to social justice.³⁹⁵ Towards 2016 sets out a housing policy framework entitled *Building Sustainable Communities*, alongside some 27 other policy frameworks. It reiterates that the core objective of housing policy is to enable every household to have available an affordable dwelling of good quality, suited to its needs, in a good environment and, as far as possible, at the tenure of its choice. This tripartite Agreement endorsed by the State, outlines the principles of housing policy agreed by the parties, and some of these have important implications for statutory interpretation, where the courts seek to discern contemporary public policy objectives within housing statutes.

The approach seeks to ensure that all housing is seen as being on an equal footing whether provided fully by the State or supported in some way. All parties have a role in developing this ethos, which makes no distinction between types of housing or tenure. A critical factor in determining housing interventions is the requirement for a clear perspective as to the scale and nature of need, including local variations. In framing responses, account should be taken of individual and family circumstances and each person’s position in the lifecycle. The approach should also seek to encourage choice,

³⁹⁵ *Towards 2016, Ten-Year Framework Social Partnership Agreement, 2006–2016*, p 5.

personal autonomy and a sense of community involvement for all those across the life-cycle. To advance these goals, a new means of assessment will be developed to provide a better basis for policy development and service delivery to ensure that all people can live with maximum independence within their community.³⁹⁶

The Agreement adopts the life cycle approach to policy-making within a “developmental welfare state”.³⁹⁷ The key life cycle stages are Children, People of Working Age, Older People and People with Disabilities (who, in accordance with the policy of mainstreaming, will benefit from measures at all stages of the life cycle). The Agreement states that translating the life cycle framework into such explicit policy terms is an ambitious exercise and the long-term goals pose major challenges in terms of availability of resources, building the necessary infrastructure, and institutional and service delivery at both national and local level. Yet, this is what the Irish State has committed itself to do between 2006 and 2016.

Communitarianism or Liberartarianism

In many ways Irish law as it relates to housing reflects the dichotomy between legal liberalism and communitarianism.³⁹⁸ While legal liberalism provides the conceptual basis for market based contract and property law, communitarianism is reflected in public policy legislation, such as planning, social housing, control of private rented housing etc. One writer on the rule of law explains the essential features of communitarianism as expressed in law.

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The starting point of communitarianism is the community, not the individual ... Communities have a presence or being of their own which constitutes more than just the agglomeration of individuals. Communities have an interest of their own—the survival of the community way of life—which is more than and different from the aggregated interests of individuals. The culture, language, and history of the community are the cradle within which individuals are reared. The identities of individuals are shaped and determined by their place within the community. Notions of the good are generated by the community and its shared way of life. Life meaning for individuals is provided by their role in perpetuating or contributing to the common life of the community, not from self-realisation as an autonomous self-creating individual. Indeed, individuals are neither autonomous nor self-determining, but are creatures of the communities that bear, nurture, and envelop them throughout life.³⁹⁹

³⁹⁶ *ibid* at p 26.

³⁹⁷ *The Developmental Welfare State* (NESC, Dublin, 2005).

³⁹⁸ Durkheim referred to a similar dichotomy as *Gemeinschaft* (Communitarian) and *Gessellschaft* (Liberal) societies.

³⁹⁹ Tamanaha, BZ, *On the Rule of Law* (Cambridge, Cambridge University Press, 2004), p 42–3.

In this type of society law is a reflection of shared community values and interests. The law is not neutral but conforms to and enforces the community way of life and interests.

Significantly, in contrast to the driving liberal obsession of fear of government tyranny, it is not essential in a communitarian system that there be restraints on government power. The State is not set against individuals but instead is an extension of community that should not be hobbled in the collective achievement of the common good.⁴⁰⁰

Much of this communitarianism can be seen in Article 6 of *Bunreacht na hÉireann* where the Christian basis of the common good and popular endorsement grant ultimate authority to sovereignty of “the people”:

1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.
2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.

3–242 Hogan and Whyte point out that the judiciary have invariably read Article 6 through the prism of liberal democracy. The Irish courts have failed to embrace the more communitarian philosophy within the Constitution which is more accommodating of rights. Within this philosophical tradition [liberal democracy] rights are viewed essentially as negative immunities, protecting personal autonomy from an encroaching State, rather than as positive guarantees designed to facilitate the participation of every citizen in society.⁴⁰¹

3–243 Of course, in Ireland the concept of civic Republicanism is often promoted to explain the communitarian approach of the State. While it sets down a public or common responsibility for common goods, civic republicanism recasts obligation as self-fulfilment – contribution to society is part of civic virtue and is expected from all citizens as part of active citizenship.⁴⁰² It assumes a homogeneity of persons and social purpose and as such is at odds with the increasingly pluralist society of Ireland, where 10% of the population were born outside the State. The definition of the acceptable actors within civic republicanism can exclude non-nationals, immigrants and those under 18 years. Citizens should be free to decide

⁴⁰⁰ *ibid* at p 43. There is a significant constitutional difference about the interpretation of the rule of law between Ireland and England, where that the sovereignty of Parliament in England compares to the Republic of Ireland situation where a Christian communitarian constitution has acted as the *grundnorm* for law making.

⁴⁰¹ See Hogan, GW & Whyte, GF, *Kelly JM, The Irish Constitution* (Dublin, Lexis Nexis, 2003) p 104.

⁴⁰² See Honohan, I, *Civic Republicanism* (London, Routledge, 2002).

against participation without risking withdrawal of her citizenship.⁴⁰³ Yet, it is a powerful political influence in Ireland with a Taskforce on Active Citizenship being appointed by the Taoiseach in 2006. “Active Citizenship refers to the voluntary capacity of citizens and communities working directly together, or through elected representatives, to exercise economic, social and political power in pursuit of shared goals”.⁴⁰⁴

Etzioni, the leading writer on communitarianism, argues that social rights on an individual basis should be secondary to shared moral responsibilities. He suggests that “social justice” requires that people should not wait for their lives to be improved through rights, but should take responsibility for themselves, although the community has a role to play.

... people have the moral responsibility to help themselves as best they can ... the laying of a claim to participate actively in advancing their lives on those who are disadvantaged ... is based first of all on a concept of human dignity. There is something deeply degrading on being dependent on others. It is respectful of human dignity to encourage people to control their fate the best they can. The second line of responsibility lies with those closest to the person, including kin, friends, neighbors, and other community members...Third, ... as a rule every community ought to be expected to do the best it can to take care of its own ... Finally, ... societies (which are nothing but communities of communities) must help those communities whose ability to help their members is severely limited.⁴⁰⁵

Whyte points out that classical liberalism, with its emphasis on liberty as a set of negative immunities protecting the individual from a coercive State, and with a commitment of neutrality in relation to conceptions of good, hardly provides an encouraging environment for judicial activism targeting marginalisation.⁴⁰⁶ He views communitarianism, with its stress on the individual’s life in community, as supportive the notion of a right to social inclusion. In the highly significant book *Social Inclusion and the Legal System*, Whyte points out that Article 45.4.1. of the Constitution is directly relevant to social inclusion, although not cognisable by any court in the interpretation of law. This states that:

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The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.

⁴⁰³ See Lister, R (2nd ed.) *Citizenship: Feminist Perspectives* (Basingstoke, Palgrave, 2003), p 15.

⁴⁰⁴ See Government of Ireland, Taskforce on Active Citizenship, *The Concept of Active Citizenship* (Dublin, Secretariat of the Taskforce on Active Citizenship, 2007).

⁴⁰⁵ Etzioni, A, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda* (New York, Crown, 1995) pp 144–146.

⁴⁰⁶ Whyte, G, *Social Inclusion and the Legal System* (Dublin, IPA, 2002), p 51.

Whyte also points to the Preamble to the Constitution which clearly reflects its Christian inspiration:

... And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.

3–245 He contends that the references to dignity of the individual, the attainment of true social order and to the Christian virtues of justice and charity clearly support the argument that a commitment to social justice and social inclusion is an important pre-interpretative principle informing the Constitution.⁴⁰⁷

Whyte points out, however, that both liberalism and communitarianism philosophies are based on broad churches, with each containing different strands of beliefs. While contemporary liberals such as Nozick and Hayek have spurned substantive equality and redistributive roles for the State on the grounds of incompatibility with liberal notions of the rule of law, Whyte points out that liberalism can embrace libertarianism and social welfare liberalism, while communitarianism can include democratic socialism and traditional conservatism.⁴⁰⁸ Of course, the most significant attribute of the liberalism is that it can accommodate diversity and pluralism, whereas many communitarian approaches demand conformity and homogeneity.

3–246 The legal realist and critical legal theorists have posited the view that legal concepts are malleable and it is the implicit theories and assumptions of judges, who originate from a similar and particular social group, that determines the results of cases. The interpretation of rules and laws is open to choices and subject to the influence of the values of the judge.⁴⁰⁹ Critical scholars identified indoctrination into the legal culture as a source of predictability of the outcome of decisions where important decisions about the allocation of resources in society are allocated. The shared socio-economic background of judges in the USA (upper middle-class or elite white males) was attributed with creating this predictable outcome of conservatism.⁴¹⁰

3–247 This legal culture is shared by judges and theorists, encompasses shared understandings of proper institutional roles and the extent to which the status quo should be maintained or altered. This culture includes “common sense” understandings of what rules mean as well as conventions (the identification of rules and exceptions) and politics (the differentiation between liberal

⁴⁰⁷ *ibid* at p 46.

⁴⁰⁸ *ibid* at pp 43–57 for a detailed examination of these issues.

⁴⁰⁹ See Summers, R, *Instrumentalism and American Legal Theory* (Ithaca, NY, Cornell University Press, 1982).

⁴¹⁰ Tamanaha, BZ, *On the Rule of Law* (Cambridge, Cambridge University Press, 2004), p 89.

and conservative judges).⁴¹¹ Of course, the counter argument is that judges who err in their interpretation of the law will have decisions overturned on appeal, although this can be a costly exercise for litigants.

Conclusion

In this chapter we have seen that the production and distribution of housing within the housing market implies the commoditisation of housing, with a concurrent housing finance regime and supportive political and legal systems. The free market principles of supply and demand, and other classical economic doctrines have been adopted by the Irish government in its housing policy. Of course, in Ireland, as in all countries, there is a high level of intervention in the market, which can be justified on economic based principles such as efficiency, externalities, equity, dealing with monopolies and addressing imperfect information among consumers. The range of measures can be categorised clearly, and different countries and housing regimes adopt different approaches. The range of interventions can be used as a template to assess the housing policies of States. In the same way the variety of measures can be assessed against the rationale for political and Government intervention. There is also considerable political intervention into the housing supply and demand system for ideological, personal and party political reasons.

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Of course, there are many other perspectives on the housing system, some of which are compatible with the liberal market model, such as the pathways approach. Other perspectives, such as those based on Marxist analysis, housing viewed at home, social justice principles and human rights offer more holistic and person-centred outcomes to the narrow commodification approach. In Ireland, the role of NESC has been central to the development of contemporary housing philosophy and policy, as it has redesigned social policy around the life-cycle approach and the creation of sustainable communities. However, the NESC fails to give adequate attention to the view that housing is a right.

Different stakeholders in the housing system receive subsidy and support according to the political influence of those groups in society. In the context of different housing regimes these issues are considered in more detail in another chapter, but the rights which are favoured in the housing market system are largely those relating to private property, freedom and privacy of contract, and accumulation of capital. Housing law in Ireland is primarily seen as being associated with this market scenario, and has yet to develop in a way which can encompass the diverse perspectives which exist in relation to housing in Ireland.

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⁴¹¹ See Singer, JW, “The Player and the Cards: Nihilism and Legal Theory”, 94 *Yale Law Journal* 1 (1984).

