Committee on Housing and Homelessness

Tuesday, 10th May 2016

Presentation by Edmund Honohan, S.C., the Master of the High Court.

Chairman and members of the Committee, may I first of all thank you for this opportunity to contribute in this way to the workings of the Committee. I will try to keep to the strict time limits indicated to me by the Clerk, but would ask you to be tolerant. The topic of Housing and the possibility of using compulsory acquisition powers as one of a suite of initiatives merit careful consideration.

1. The issue which this Committee is considering is how to respond to the current shortage of public housing. But, viewed with a lawyer's eye, the first question must be who, given the Separation of Powers, is *constitutionally* empowered to decide:-

(a) whether there is a shortage;
(b) whether the shortage is a matter for political action "*for the Common Good*";
(c) if so, what the political/legislative intervention should be; and
(d) whether the policy option chosen is compatible with Constitutional provisions.

2. There is a surprisingly widespread misconception about the parameters of the Supreme Court's function. Article 37 refers to "*limited functions and powers of a judicial nature*" which can be exercised by a designated person who is not a judge. It might be useful to begin employing the concept of "limited legislative functions" when describing the courts' role in Constitution-proofing legislation. The notion that the courts are free to veto or shape new law to conform to the personal inclinations of the bench has gained currency in the mind of the public because of the Oireachtas' tendency to enact laws which devolve to the courts various decision-making powers to be exercised "*at the court's discretion*", or where the "*reasonable*" exercise of a statutory function may be judicially "*reviewed*" on its merits (under the principles of judicial review of administrative action). Also, the courts' occasional liberal invocation of so-called "unenumerated" personal rights (with the carte blanche of Article 40.3) appears to indicate a broad but legitimate interventionist role.

3. But the Supreme Court, in considering Constitutional challenges to legislation, is always at pains to defer to the primary legislative intention of the Oireachtas and will always start by presuming that the measure is constitutionally sound (sometimes utilising the double construction test to distil the constitutionally sound from an otherwise ambiguous provision).

4. The provisions of the Constitution are the terms of a contract, not as between the constitutional institutions, but between the people of Ireland and the State. The Supreme Court will monitor and regulate that contract, but cannot re-write it.

5. The constitutional "contract" prohibits legislative interference with the various personal rights referred to as "fundamental" but, in turn, the prohibition is subject to listed exceptions. Example: Article 43 – the right to private ownership of external goods "*ought to be regulated by the principles of social justice … to reconcile (its) exercise with the exigencies of the common good*". ("Exigency" has been read as "requirement". Neither word is to be found in the Irish text, where "common good" and "public good" are both stated as "*leas an phobail*".) Often, so, it falls to the Supreme Court to judge whether the stated facts support the assessment of the Oireachtas that there has occurred a circumstance for which the people authorised derogation from the rigour of the prohibition on interference, or whether that

assessment by the Oireachtas is irrational. The looser the legislative terminology employed, the more the scope for long-winded litigation.

6. After some early exploratory decisions, many later overruled, the Supreme Court's jurisprudence has settled on a methodology which owes much to the judgments of the European Court of Human Rights in regard to "public interest" expropriation of private property, both with and without compensation.

> *"... the notion of 'public interest' is extensive. In particular, the decision to enact laws expropriating property or affording publicly funded compensation for expropriated property will commonly involve considerations of political, economic and social issues. The Court has declared that, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, it will respect the legislature's judgments as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation."* (*Broniowski v. Poland* (App. No. 31443/96), Judgment of the Grand Chamber of the 22nd June, 2004; (2005) 40 E.H.R.R. 495, para. 149.)

7. Accordingly, it is for the Oireachtas to decide whether or not there is such shortage of affordable rental or state subsidised dwellings as to constitute a public interest concern. That is a question of fact (the numbers involved/anticipated; the failure of the market place) and degree (is it so dysfunctional as to be a challenge to society and society's values?) On this latter point, the Supreme Court, in the Article 26 reference about the Part V social and affordable provisions, has confirmed that:-

> *"... the objectives sought to be achieved by Part V of the Bill are clear: to enable people of relatively moderate means or suffering from some form of social or economic handicap to buy their own homes in an economic climate where housing costs and average incomes make that difficult ... It can scarcely be disputed that it was within the competence of the Oireachtas to decide that the achievement of these objectives would be socially just and required by the common good."* (*Re Article 26 and the Planning and Development Bill, 1999* [2000] 2 I.R. 321, at p. 348 and 349).

8. There is no shortage of material and commentary on the practical measures adopted by public authorities over the last one hundred and fifty years to improve the living conditions of the population. It is this history that allows the Oireachtas to interpret "the exigencies of the common good" as including the real consequences of any failure (caused by marketplace dysfunction or previous government omission) to provide an adequate number of subsidized public or affordable private housing for its populace.

9. The Statistical and Social Inquiry Society of Ireland, founded in 1847, published papers on "*the houseless poor*" (1877); on "*remedies for overcrowding*" (1911); and, as late as 1937, "*slum clearance in Dublin*". The Iveagh Trust was established in 1890. Against this backdrop, it is easy to understand why the survivors of 1916 set down in the 1919 Dail's Democratic Programme their "reaffirmation" that *"all rights to private property must be subordinated to the public right and welfare ... and that it should be the duty of Government ... to secure that no child shall suffer hunger or cold from lack of food or clothing or shelter."*

10. Between them, the County Councils and the urban housing developments built almost 200,000 dwellings between 1880 and 1960. By 1961, in urban areas one third of the dwellings were owner occupied, one third rented from private landlords and one third erected by local authorities. In 1957 the Capital Investment Advisory Committee criticised the fact that so much of the capital budget was for house construction, and the local authorities' rental portfolios were, over the years, invariably loss making on a significant scale (see White Paper on Housing 1964).

11. Drudy and Punch, in their authoritative 2005 study "*Out of Reach: inequalities in the Irish housing system*" (Tasc at New Island), track the changes in public housing policy from the hands-on construction of the thirties, forties and fifties to the "tax expenditure" private construction incentives of the seventies and eighties and to the market ideology driven policy of the nineties onwards "privatising public housing", and the authors warn of the danger of PPP re-commodification of public land previously in use for housing for "low income families" adding their view that *"sadly, the recent events in Dublin would suggest we are about to revive a policy direction now that generated some of the worst housing slums in Europe in the 19th and early 20th century"* (p. 178).

12. Is subsidised public housing needed for the common good? (The question may indeed be shortly answered by asking another: will the marketplace deliver affordable housing?) There are of course societies where housing is not recognised as a public concern, and where shortage of affordable shelter is not considered to be a matter for government. It is by reference to the longstanding acknowledgement of the obligation of society to uphold the dignity of man (whether rooted in Christian tradition or the post WWII tenets of civilisation now enshrined in the ECHR) that an Irish government must interpret the scope of its constitutional mandate to secure the common good.

13. The ECHR refers to *"the right of a State to control the use of property in accordance with the general interest"*. (The Court found that there was no violation when an unused planning permission was annulled (without compensation) by a later rezoning, noting that there was an element of risk in any commercial venture. (*Pine Valley Developments Ltd. v. Ireland* (1992) 14 E.H.R.R. 319)

14. The common good has featured in Catholic Social Teaching since the time of Thomas Aquinas and was understood as such at the time of the enactment of the Constitution in 1937. The 1891 encyclical Rerum Novarum highlighted the "people before profit" approach: *"The end of civil society is centred in the common good in which one and all, in due proportion, have a right to participate"*. And a hundred years later, Pope John Paul's 1987 encyclical Sollicitudo Rei Socialis speaks of "solidarity" as a moral and social response to the "interdependence" of peoples, continuing, (at p. 38): *"This then is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all responsible for all."* (Note: There is no reference to "moral hazard" either in the New Testament or in the Constitution. Of course there will be free loaders, but that is no excuse for the failure to act in charity. See Article 45.1).

15. On the basis of this brief historical survey, it should be obvious that the Oireachtas has, for good or ill, at all times treated housing policy as an area for legislative action, in so doing confirming it's view (whether expressly or not) that such action is for the common good. It was noted at para. 3.4 of the ninth report of the all-party Oireachtas committee on the

Constitution (2004) that *"clearly, the duty of legislators to provide for those who cannot provide for themselves is a hallmark of a developed society"*.

16. In sum, there really is no basis for suggesting that the common good does *not* include the provision of public housing. The Article 43.2.2 exception is clearly in play. Accordingly, it may be read as an enabling provision allowing regulation of property rights to "reconcile their exercise" with public housing requirements. In its written submission to the all party committee the Law Society, in regard to Article 43 rights, commented that *"the decisions of the Superior Courts have in fact been strongly supportive of sensible and equitable policy making in areas involving property rights and ... compulsory acquisition ...* (and) *appear in fact to pave the way for future legislative innovation to tackle the problems."*

17. In passing, it should perhaps be noted that in neither the Constitution nor in legislation is there any positive provision in the nature of a right to housing. Compared with, say, the right to an education or the right of the family to protection "*in its constitution and authority*", we have only the public housing enabling exception above referred to coupled with a statement of a directive principle (not cognisable by any Court) by which the State *"pledges itself to safeguard with especial care the economic interests of the weaker sections of the community"*.

18. The recent amendment protecting the constitutional rights of the child may well be the springboard for the contention that the State has an obligation to find practical solutions to allow the child to continue to enjoy the security of an established family home in an established neighbourhood, even if the mortgagee/landlord has secured his court order for possession. There is ample authority for the view that the more stable the childhood, the better the outcome for child and for society, and the buy back by the State of houses with distressed loans – houses where the mortgagor's right to redeem has been lost through payment default – would be a practical solution for the protection of the interests of the children of the mortgagor and one with significant savings for the exchequer both short and long term. In other words, even though the adults have no Constitutional right to housing, the children's claim to a form of constitutional forbearance, when "repossession" is threatened, may be stronger after the recent referendum. The UK courts are quite proactive in this regard: see *Edwards v. Lloyd's TSB Bank plc* [2004] EWHC 1745.

19. If the State's housing "Czar" is charged with finding more public housing now (as well as, of course, building more to come onstream in three or four years' time), the use of compulsory purchase will be an option he must consider. The Court will double check (if the legislation is challenged) to see whether the enabling legislation is "proportionate" to the objective stated in the legislation by the Oireachtas. Also, whether the legislative solution tallies with the legislative objective, and whether the solution is overkill or is targeted unfairly (see the Blake rent restrictions decision 1982). Conscious of that series of tests, the legislation should be drawn so as to answer any such concerns.

20. In the Article 43 challenge to the NAMA legislation, *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1, the divisional High Court (Kearns P., Kelly and Clarke JJ.) confirmed (at p. 118 *ff*.) that:-

> "*[283] It will always, in those circumstances, be possible to argue that any particular policy position chosen goes too far, in that it may suggested that a less intrusive policy, one which is somewhat more benign, from the perspective of those who might be affected by the relevant legislation, would nonetheless achieve the ends desired ...*

> *[284] where there is no reasonable basis for believing that an aspect of a measure is a required policy response needed to achieve the ends of the legislation, then the courts will intervene. However, the court does not second guess a reasonable policy balancing judgment on the part of the Oireachtas.*"

21. The legislation should shortlist for acquisition houses which are unoccupied and occupied houses for which the mortgagees (or their assignees, the non-regulated "vulture funds") have issued a valid demand for possession, the borrower's right of redemption having lapsed. This latter group may have tenants still in occupation. The consequence of acquisition by the State would be that the new owner, the State or a state agency, can leave all occupants in place, but now as tenants in public housing. For distressed mortgagors, this is the "mortgage to rent" solution previously advocated in the Keane report but effectively stillborn in practice. Importantly, the resolution of this group's difficulties, with the removal of the threat of eviction, should significantly reduce the numbers seeking urgent accommodation in the near future. Prevention is better than cure.

22. The court may be asked to consider whether alternatives to compulsory acquisition could be as successful in finding the additional homes that are needed, and as promptly. Perhaps there are enough houses already for sale? "*Northside Dublin People*" editor Tony McCullagh wrote in the edition 27th *ult.* that concerning houses for sale in the immediate vicinity of the five sites chosen for the modular housing project (@ €243k per house), namely Poppintree, Finglas, Belcamp, Drimnagh and Ballyfermot, he found as follows:-

> *"In the Dublin 11 area, where modular homes are planned for Finglas and Poppintree, there were 40 houses for sale, ranging in price from €115,000 to €200,000. In the Dublin 17 area, instead of building modular homes, the council could purchase six properties currently for sale for less than €200,000, with prices starting as low as €80,000. In Dublin 10, we found 14 homes on the market, with an average price of €150,000. In Dublin 12, taking in Drimnagh and Crumlin, there were 20 homes for sale under the €200,000 mark, with €180,000 being the average price. So a cursory 10-minute browse of the website revealed there were 80 homes for sale close to all five sites where it would be cheaper to buy existing properties rather than build modular homes, if the €243,000 figure is even close to being accurate."*

Mr. McCullagh's research is useful for the purposes of this submission because it shows that the number of houses for sale in this price range is woefully inadequate: we need both the existing houses, and the modular, to be in the public housing portfolio. That would be a start.

23. An accelerated programme of house construction will hit a skill shortage problem (with serious costs implications) very early on. It is a long term, and wholly inadequate response to the needs of today. The promise of 2000 "affordable" houses to be financed by NAMA and built by their developer borrowers is unlikely to be realised because of the State Aid difficulties raised by Michael Flynn. Perhaps the private rental market will be able to accommodate all who need houses, but at what rent? Those who suggest that more regulation of the Landlord/Tenant relationship to further control rent and other terms are surely aware that more regulation means fewer rental properties. In fact, it is the Blake judgment of 1982 which obliges the State to buy the properties outright (and re-let them as subsidised public housing) instead of trying to regulate private tenancies in ways which are likely to be successfully challenged.

24. The crux of the matter is that there are too few houses. Rationing is the solution, until supply picks up, but not the sort of rationing which is engineered by price hikes in the private market producing windfalls for private landlords exploiting the demand and supply curves.

25. An expropriation of property may be considered "unjust" if no compensation is paid. If that is the only ground of complaint, it is answered by the payment of full compensation measured by market value assessed under the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919. Again, we find guidance in a judgement of the European Court of Human Rights:-

> *"Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances. Article 1, however, does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less than reimbursement of the full market value."* (*Holy Monasteries v. Greece* (1994) 20 E.H.R.R. 1).

26. It is purely an accident of recent history that the "vulture" funds paid firesale prices. (I have seen the Irish investment opportunities advertised as "yard sales" on American web sites.) They cannot complain if, in the fullness of time, the Official Arbitrator awards them the same low market value, because, unless they make the case that they paid well below the "real" market value, the value of property has been fairly steady over the past two or three years. Of course if they insist on arguing that they paid less than the market value and now demand a windfall profit, the vendors, the various receivers, NAMA, IBRC and so forth will have some serious explaining to do.

27. In the Supreme Court judgment in the NAMA case above cited the court noted, at pp. 193, 194 and 196, that:-

> *"[34] it is not unusual for the Oireachtas to adopt legislation which contains broad enabling measures which allow compulsory acquisition for a range of purposes as specified in the statute concerned and put in place appropriate procedures for selecting the assets to be acquired ... [36] In the circumstances the court considers that the Oireachtas was entitled, as a matter of policy, to include in the Act a very broad definition of eligible bank assets including a delegation to the relevant Minister of the power to make regulations prescribing classes of eligible bank asset ... [47] Consequently the argument of the applicants that the alleged vagueness of the criteria according to which NAMA exercises its power to acquire an asset would deprive it of an opportunity to have an effective remedy by way of judicial review cannot be considered as having been substantiated."*

28. What is surprising to me is that the potential of compulsory acquisition to build the public housing portfolio has been so long ignored. The "nationalisation" proposal is a means of rebuilding the depleted public housing portfolio, and of doing so promptly, anticipating increasing pressures in this space before unregulated lenders, who have it appears bought the banks' most underperforming loans, take possession of their securities in greater numbers and

in early course. This proposal is not tabled as a solution to deal with mortgagors in serious arrears, though it might also be an efficient means of sorting that problem.

29. There are two views of the vulture funds. One is that they are wolves in sheep's clothing. The other is that they are sheep in wolves clothing. Do we take a chance? Does it matter? They own housing which the State now needs for its public housing portfolio. The funds are American, they are German, and they are Irish. Our American investors must be amused at any hesitation in activating the compulsory purchase mechanism here. There, at the very core of the free market economy, the courts are well used to their equivalent "eminent domain" "condemnation" in the public interest. Their renowned jurist, Oliver Wendell Holmes, spoke in 1920 of the fact that *"housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present"* (*Block v. Hirsh* (256 US 135, 155)). And this from the US Supreme Court in *Louisville Joint Stock Land Bank v. Radford*,(295 US 555, 602): *"if the public interest requires … the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain"*. Even more startling is the case of *Hawaii Housing Authority v. Midkiff* (1984) 467 US 229, where the Supreme Court *"found sufficient public interest in the State of Hawaii's wholesale condemnation of landlords' ownership interests in real property in order to convey the property to tenants"*. The landlords were paid "just compensation". All in all, I would say that our American investors are well aware of the commercial and legal realities of their investments, and if they get their investment funds back, they will find other investments.

30. I imagine that a lot of this material is quite well known to the members of the committee. But where does the Oireachtas get its legal advice? Where does this committee go next with this material? Is this another aspect of democratic deficit? If the new Oireachtas wants to make evidence-based legislative decisions, it needs "evidence" about the law. I am not an authority, but I am a public servant, and I hope I have been of some assistance to you in pointing the way for further inquiry. In the final analysis, you may have to proceed with legislation, "nationalise" the distressed dwellings, and robustly face down challenges from whatever angle. At least in the interim we may be able to put the additional public housing to good use, and to do so without further delay.