



# Briefing Paper

## Property rights and housing legislation

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### Abstract

This paper sets out a range of instances over the past decade (2009 – 2019) when the constitutional protection of private property rights has been invoked in opposition to legislation proposing reforms in the housing sector. It also, for context, briefly sets out the nature of the constitutional protection of private property, and the role of the Attorney General in advising the Government on the constitutionality of legislation.



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## Introduction

This paper analyses the influence of private property rights on the fate of legislation relating to housing proposed in the Oireachtas in the period 2009 – 2019. The vast majority of these Bills are from 2016 onwards, reflecting the onset of the current housing crisis at that time. This analysis is based on targeted searches of the Oireachtas debates and Bills webpages, as well as from academic output on the question. While every care has been taken to ensure a comprehensive overview, having regard to the sheer volume of parliamentary debate over the past ten years, it cannot be guaranteed that every instance of private property rights being invoked in opposition to housing reforms is accounted for in this paper.

Additionally, it is entirely possible, and indeed plausible, that many other legislative proposals never made it to the floor of either House on the basis of legal advice received as to its constitutionality. The extent of this is particularly hard to gauge in respect of Government legislation having regard to the great deal of secrecy that surrounds the provision of Attorney General advice.<sup>1</sup>

The paper first provides an outline of the nature of the protections of private property in the Constitution, before considering how these protections have been invoked in political and parliamentary debate. The paper finally provides an outline of the role of the Attorney General, and certain criticisms that have been levelled at how the functions of that office have been executed in recent times.

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<sup>1</sup> See discussion at p. 13 of this paper.

## The Constitution and Property Rights

The Constitution protects property rights in two separate articles, Article 40.3 and Article 43. Article 40.3 provides for a general protection of the personal rights of the citizen against “unjust attack”, and this extends to the protection of private property. This is further bolstered by Article 43, which provides specifically for the protection of the institution of private property, stating that “[t]he State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.” The interaction of these separate articles has been the subject of much debate and some confusion, but they are generally now considered to be mutually reinforcing and complementary.<sup>2</sup>

### Constitutional articles affecting property rights:

#### ARTICLE 40

3 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

#### ARTICLE 43

1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

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

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

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

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<sup>2</sup> A view previously held by the courts was that Article 43 merely protected the institution of private property generally, and that a litigant should rely on Article 40.3 if challenging a breach of their own personal right to private property (see *Central Dublin Development Association v Attorney General* (1975) 109 ILTR 69). The modern view is that these articles inform one another, and do not establish entirely separate protections (See, e.g., *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.)

The Constitution therefore establishes very firmly the right to private property in the legal foundations of the State.<sup>3</sup> However, the right is far from absolute and the Constitution provides for numerous qualifications to the right. The text of Article 43 provides that the right “ought, in civil society, to be regulated by the principles of social justice” and should be reconciled with “the exigencies of the common good.” Similarly, in the language of Article 40.3, the measure complained of must constitute an “unjust attack” on the right.

An example of legislation that was found to constitute an “unjust attack” on property rights was the *Rent Restrictions Act 1960*. The Act imposed strict rent controls on particular categories of dwellings. The Act was a consolidation of legislation going back to before the First World War, and as a result the scope of its application was somewhat arbitrary.<sup>4</sup> In *Blake v Attorney General*,<sup>5</sup> the Supreme Court took the view that the Act unjustly imposed the cost of achieving a social good for one section of society (low-income tenants) on another section of society (landlords within the scope of the Act). This was done without compensation, and without an opportunity for appeal or review, or regard to the financial situation of the individual landlord. The Court therefore held the Act to be unfair and arbitrary, and an unjust attack on the property rights of the landlords affected.

The courts, in recent times, consider “unjust attack” in terms of a proportionality analysis. The proportionality test was first set out in *Heaney v Ireland*,<sup>6</sup> and was adopted in the property rights context by the Supreme Court in *Re Part V of the Planning and Development Bill 1999*.<sup>7</sup> The test is that where a legislative provision interferes with a constitutional right in furtherance of some collective good, the provision must:

- (a) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) Impair the right as little as possible;
- (c) Be such that [its] effects on rights are proportional to the objective.

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<sup>3</sup> It has been argued that the trenchant assertion of the primacy of property rights in the Constitution has its roots in the experience of the dispossessed Irish in the Land War, and in the Catholic emphasis on resisting communism in the 1930s, when the Constitution was drafted. See McDonagh, ‘Philosophical-Theological Reflections on the Constitution’ in Litton (ed.), *The Constitution of Ireland 1937-1987* (1988) p. 192.

<sup>4</sup> The Act applied to dwellings erected before May 1941, within a particular rateable valuation, and required that rents be fixed, to some extent, by reference to the rent applicable in May 1941. The Act affected about 40,000 properties. It has been said that the rates the Act directed be applied rendered the dwellings a “wholly uneconomic asset for their owners”. Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> ed. Bloomsbury, 2018) p. 2377.

<sup>5</sup> [1982] IR 117.

<sup>6</sup> [1994] 3 IR 593.

<sup>7</sup> [2000] 2 IR 321. In this case, the Supreme Court upheld planning legislation that required building developers to cede up to 20% of their land to local authorities for use as social and affordable housing.

## Discussion of constitutional property rights in debate on Bills concerning the provision of housing in the period 2009 - 2019

This section sets out the instances in which property rights under the Constitution have been invoked in debate on legislation relating to housing in the Oireachtas. Such invocations are usually made by the Government, opposing a Private Members' Bill, and are usually made in the course of Second Stage debate.

### No Consent, No Sale Bill 2019

[This Bill](#) was introduced in Dáil Éireann by Pearse Doherty TD in January 2019. It aims to prevent the sale of a mortgage onward by a bank or credit institution without the consent of the borrower, or in simple terms “no consent, no sale”. The Government was vociferous in its objection to the Bill at Second Stage, noting the potential harm to the financial sector in the country. The Government also raised constitutional objections to the Bill. Minister of State at the Department of Rural and Community Development, Seán Canney TD, stated:<sup>8</sup>

“Deputy Doherty's Bill will ban the sale of any mortgage loan unless explicit written consent is given by the consumer. The level of interference proposed by the Bill in the mortgage market is, we believe, both disproportionate and potentially unconstitutional.”

The Bill is at order for Committee Stage in Dáil Éireann. The Minister for Finance, Paschal Donohoe TD stated in Second Stage debate that a money message would be required for the Bill.

### Residential Tenancies (Prevention of Family Homelessness) Bill 2018

[The above Bill](#) was introduced by Eoin O'Broin TD in the Dáil in October 2018. The Bill proposed to prevent landlords from evicting tenants on the basis that they intended to sell the property, where the landlord or developer had purchased the property on a buy-to-let scheme, thereby availing of tax-breaks. While the Minister did not specifically refer to the Constitution in responding to the Bill in the Dáil, Deputy O'Broin made clear that he had been informed that the Government intended to oppose the Bill on the basis that the Attorney General had advised it was unconstitutional:<sup>9</sup>

“As I said, the Tánaiste made it clear this morning that the Minister, Deputy Murphy, would not be supporting the Bill. He said it would not work, would drive landlords out of the market, would discourage new investment and would fall foul of the Constitution...On the issue of the Bill's constitutionality, if the Minister has legal advice from the Attorney General he should publish it. This has happened previously, although not often enough.”

Deputy O'Broin went on to quote from the Supreme Court judgment in *Re Article 26 and Part V of the Planning and Development Act 1999*, in support of his assertion that the Bill was in fact constitutional. The Supreme Court in that case upheld the constitutionality of requiring developers

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<sup>8</sup> [No Consent, No Sale Bill 2019: Second Stage \[Private Members\]](#) (29 January 2019).

<sup>9</sup> [Residential Tenancies \(Prevention of Family Homelessness\) Bill 2018: Second Stage \[Private Members\]](#) (28 March 2019).

to cede 20% of the land they proposed to develop to local authorities for social housing. The Bill was defeated by vote at Second Stage.

### Anti-Evictions Bill 2018

[The above Bill](#) proposes to ban the sale of property as a ground for eviction, and ban renovation as a ground for eviction. It also proposes that, in the case of a landlord wishing to evict to move a family member into the property, the landlord would have to compensate the tenant. The Minister of State at the Department of Housing, Planning and Local Government, Damien English TD, responding to the Bill, said:<sup>10</sup>

“The flip side of this is that landlords have constitutionally protected property rights that can be delimited only in a proportionate manner to achieve a legally justifiable social common good. In recent years we have improved security of tenure for tenants while maintaining the property rights of landlords as much as possible. I spoke before about trying to get that balance. We are trying to balance the rights of tenants with the property rights of landlords in all legislation. It is not easy to achieve. We would say the Deputies' Bill is a little extreme and goes too far but we do want to achieve the same things, though perhaps in different ways.”

The Bill is at Committee Stage in Dáil Éireann and is awaiting a money message from the Government.

### Housing Emergency Measures in the Public Interest Bill 2018

[The above Bill](#) was introduced in Dáil Éireann by Seamus Healy TD in November 2018. The Bill proposed to declare a housing emergency, and to provide for a number of urgent measures. It provided that no tenant could be evicted from a buy-to-let dwelling during the period of this national housing emergency and that there should be no further increase in rents on dwellings. The Bill also provided that existing private rents be reduced to “reasonable” levels, having regard to the differential rent that would be payable by a tenant to a local authority for a similar dwelling.

Minister Eoghan Murphy TD raised objections to the Bill on constitutional grounds, noting:<sup>11</sup>

“Another issue is that relating to constitutional protections. Would the declaration of an emergency allow us to ignore certain aspects of the Constitution? No, it would not. This does not mean that we cannot, in the context of the Constitution and the existing interpretations of it, rebalance rights away from the individual and towards the collective because we recognise that there is an emergency, but we cannot trample on those individual rights altogether.”

Deputy Murphy went on to describe the Bill as outright unconstitutional. The Bill was defeated at Second Stage in the Dáil.

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<sup>10</sup> [Anti-Evictions Bill 2018: Second Stage \[Private Members\]](#) (12 December 2018).

<sup>11</sup> [Housing Emergency Measures in the Public Interest Bill 2018: Second Stage \[Private Members\]](#) (13<sup>th</sup> November 2018)

## Planning and Development (Amendment) Act 2018

[The above Act](#) introduced a “vacant site levy” that local authorities can levy on vacant sites in their administrative area. In subsequent debate, the Minister for Housing, Planning and Local Government, Eoghan Murphy TD noted that there had been concerns about the constitutionality of the measure, but ultimately the Government came to the view that the public good merited the restriction on property rights entailed. He said:<sup>12</sup>

“It is not true to say that property rights trump other rights in the Constitution. There is a balance of rights and that is why we were able to bring in the vacant site levy and increase it to 10% over a two-year period. That is why we have been able to bring in rent controls. That is why we have compulsory purchase order powers. We recognise that the public good trumps individual rights in certain instances but we can only take them so far.”

Alan Kelly TD, during his time as Minister for Environment, Community & Local Government, stated that he was advised that it would be unconstitutional to introduce vacant site levies, and other measures to tackle housing. He did not say whether this was the advice of the Attorney General or other legal advice.<sup>13</sup>

The Bill was passed by the Oireachtas and became law on 19 July 2018.

## Residential Tenancies (Greater Security of Tenure and Rent Certainty) Bill 2018

[The above Bill](#) was introduced by the Labour Party in May 2018. The Bill proposes to extend rent pressure zones to the entire country, and to remove an intention to sell the property as grounds to terminate a tenancy. Eoghan Murphy TD, Minister for Housing, Planning and Local Government criticised the Bill, citing legal advice to the effect that the legislation was unconstitutional. He said:<sup>14</sup>

“[t]he extension of rent pressure zones to the whole country would be unconstitutional. That was made clear when we were introducing the criteria for rent pressure zone designation... I have been notified that removing the intention to sell within three months as a ground for terminating a tenancy would also be unconstitutional.”

The Bill is at Committee Stage in Dáil Éireann and is awaiting a money message from the Government.

## Urban Regeneration and Housing (Amendment) Bill 2018

[The above Bill](#) was introduced by Mick Wallace TD in July 2018 with a view to tackling the issue of “land hoarding”. The Bill proposed to expand the definition of a “vacant site”, to increase the vacant site levy, and to provide for a power of local authorities to acquire vacant land with reduced

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<sup>12</sup> [Ceisteanna - Questions \(Resumed\) - Ceisteanna ar Sonraíodh Uain Dóibh - Priority Questions \(9 April 2019\)](#).

<sup>13</sup> The Irish Times, [‘Kelly says Constitution blocked attempts to tackle housing crisis’](#) (31<sup>st</sup> March 2016)

<sup>14</sup> [Residential Tenancies \(Greater Security of Tenure and Rent Certainty\) Bill 2018: Second Stage \[Private Members\]](#)(30 May 2018).



compensation. Responding to the Bill, Minister of State Damien English TD said “there are some elements of this... Bill on which I must indicate serious reservations ...primarily relating to legal and constitutional issues.” He went on to outline the objections to the Bill that he had formed on the basis of legal advice:<sup>15</sup>

“In light of these principles and the previous legal advice received, there are significant concerns about the constitutionality of specific provisions of the Deputy's Bill, which propose to dramatically increase the levy from 3% to 25% of the market value of a site, remove the important and fair appeals provisions in particular circumstances, and facilitate the purchase of vacant sites deemed suitable for housing purposes from site owners for not more than 60% or 40% of their market value in specified circumstances. Taking account of previous advice, these provisions are likely to be considered to be excessive, unreasonable and in conflict with the constitutional provisions relating to individual private property rights.”

The Bill is at Committee Stage in Dáil Éireann and is awaiting a money message from the Government.

### **Residential Tenancies (Student rents, rights and protections) Bill 2018**

[The above Bill](#) proposes to include student renters within the definition of tenants under the Residential Tenancies Acts, and to extend rent pressure zones to them. It was introduced by Sinn Féin in May 2018. The Government did not oppose the Bill but indicated that further scrutiny was required having regard to potential legal and constitutional concerns. Minister of State, Mary Mitchell O'Connor TD said in Second Stage debate:<sup>16</sup>

“This is a difficult balancing act of ensuring the vital protection of our students and increasing the availability of affordable student accommodation, while ensuring the constitutionally protected rights of property owners.”

The Bill is at Committee Stage in Dáil Éireann and is awaiting a money message from the Government.

### **Landlord and Tenant (Ground Rents) (Amendment) Bill 2017**

[The above Bill](#) was introduced in the Seanad in November 2017 by Robbie Gallagher TD. The Bill proposes to legislate for a Supreme Court decision affecting the ability of holders of long-term leases to acquire the freehold title in their property, under the *Landlord and Tenant (Ground Rents) (No. 2) Act 1978*. The Bill was ultimately supported by the Government but only following extensive consultation with the Department of Justice and the Office of the Attorney General, and on the condition that various technical amendments be made to ensure the compatibility of the Bill with

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<sup>15</sup> [Urban Regeneration and Housing \(Amendment\) Bill 2018: Second Stage \[Private Members\] \(Continued\)](#), (July 3 2018).

<sup>16</sup> [Residential Tenancies \(Student rents, rights and protections\) Bill 2018: Second Stage \[Private Members\]](#) (May 29 2018).

the Constitution. The Minister for Business, Enterprise and Innovation, Heather Humphreys TD, described the process in the Dáil chamber:<sup>17</sup>

“As indicated during Seanad discussions, it has been necessary to subject the Bill to detailed legal analysis and scrutiny to ensure, as far as possible, that its provisions are consistent with the property rights safeguards enshrined in the Constitution ... For that purpose, following the Seanad’s approval of the Bill, I was pleased to work with the Minister for Justice and Equality to establish a small expert group comprising senior officials from his Department and the Office of the Attorney General together with a number of outside experts in the area of land law, including Professor John Wylie, who is a leading expert on Irish land law... The group’s task was to examine the provisions of the Bill and determine what amendments would be necessary to address the issues raised by the Supreme Court ruling in the Shirley case, while remaining within constitutional limits. The group has reported and has made a number of detailed technical recommendations which, following extensive discussions with the Attorney General’s office and the Office of the Parliamentary Counsel, the Minister for Justice and Equality intends to table as Committee Stage amendments to the Bill in due course. These amendments will seek to ensure, as far as possible, that the Bill’s provisions will not be subject to successful constitutional challenge.”

The Bill is currently at Committee Stage in Dáil Éireann, having passed all stages in the Seanad. It is awaiting a decision as to whether a money message is required.

### **Mortgage Arrears Resolution (Family Home) Bill 2017**

[The above Bill](#) was introduced by Fianna Fáil in the Dáil in July 2017. The Bill proposed to create an independent mortgage arrears tribunal with powers to make binding orders against banks and lending institutions requiring them to restructure a mortgage in particular ways. The Minister for Justice and Equality, Charlie Flanagan TD argued that the Bill was unconstitutional, having regard to the exclusive prerogative of the courts to administer justice under Art. 34 and the property rights protections in Art. 40.3 and Art. 43. In relation to property rights, and the power of the proposed independent tribunal to make binding orders affecting mortgage restructuring, he said:<sup>18</sup>

“Such orders would intervene with the banks legal right to be repaid under a mortgage contract validly entered in with private parties. These are protected vested property rights under Article 40 of the Constitution. The constitutionality of proposals to impose mortgage resolution solutions has been extensively discussed by Government Departments and the Attorney General’s office, not only in recent times but in recent years, as all Members are aware. Any legislative interference with private property rights in this area seeking to achieve an objective of the common good still has to demonstrate clearly that it is a carefully balanced and strictly proportionate intervention which has taken full account of the respective rights and obligations of both parties. The very cursory provision in this Bill falls far short of that standard.”

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<sup>17</sup> [Landlord and Tenant \(Ground Rents\) \(Amendment\) Bill 2017 \[Seanad\]: Second Stage \[Private Members\]](#) (21 May 2019).

<sup>18</sup> [Mortgage Arrears Resolution \(Family Home\) Bill 2017: Second Stage \[Private Members\]](#) (12 July 2017)

The invocation of the Constitution by the Minister was the subject of intense criticism in the Chamber, with Deputy Paul Murphy arguing that it was political manoeuvring. He said “[i]t is something the Government hides behind whenever it suits, saying it cannot do it because it is unconstitutional. When it does not suit, it will be utterly forgotten.”<sup>19</sup> Deputy Seamus Healy suggested the invocation of constitutional concerns was “disingenuous”.<sup>20</sup>

The Bill is at Committee Stage in Dáil Éireann and is awaiting a money message from the Government.

### **Residential Tenancies (Housing Emergency Measures in the Public Interest) (Amendment) Bill 2016**

[The above Bill](#) was introduced in Dáil Éireann in May 2017 by Richard Boyd Barrett TD. It proposed to give the Minister power to declare a housing emergency, and to empower him to direct that rents be lowered in a particular area. The Government refused to support the Bill, citing constitutional concerns.<sup>21</sup> A Fianna Fáil TD, Deputy Pat Casey, also argued that the Bill was unconstitutional, saying “[w]hether we like it or not, forcing a reduction in rents, as this Bill attempts to do, would infringe on property rights which would be unconstitutional.”<sup>22</sup>

The Bill was defeated by vote at Second Stage.

### **Social and Affordable Housing Bill 2016**

[The above Bill](#) was introduced in the Dáil by the Labour Party in December 2016. The Bill proposed certain powers for local authorities to compulsorily acquire land for housing purposes at reduced rates, and for rent controls. The Government opposed the Bill, citing constitutional concerns. Responding to the Bill in chamber, the then Minister for Housing, Simon Coveney TD said:<sup>23</sup>

“While in certain circumstances the Constitution allows the State to delimit the property rights of individuals in the interest of the common good, such restrictions on land owners’ property rights must be reasonable and proportionate to the ends the legislation seeks to achieve. In particular, measures such as the vacant site levy must be introduced in line with the principles of fair procedures and administration.”

The Minister took the view, citing legal advice from the Office of the Attorney General, that the issues raised in the Bill would be better addressed by Government legislation that could be designed to be more constitutionally robust.<sup>24</sup> The Bill was defeated by vote at Second Stage.

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> [Residential Tenancies \(Housing Emergency Measures in the Public Interest\) \(Amendment\) Bill 2016: Second Stage \[Private Members\]](#) (18 May 2017).

<sup>22</sup> Ibid.

<sup>23</sup> [Social and Affordable Housing Bill 2016: Second Stage \[Private Members\]](#) (8 December 2016)

<sup>24</sup> Ibid.

## Central Bank (Variable Rate Mortgages) Bill 2016

[The above Bill](#) proposes to cap variable mortgage interest rates in particular circumstances. It was introduced by Fianna Fáil in May 2016. The Bill was opposed by the Government on constitutional grounds. The then Minister for Finance, Michael Noonan TD, stated that:

“There are major constitutional issues which fall to be considered in relation to interference in vested property rights, the retrospective application of the proposals and the absence of an appeal mechanism.”

It was reported that Fianna Fáil sought a commitment to this legislation as part of the confidence and supply agreement.<sup>25</sup> This reporting noted that the Government’s decision to oppose the Bill was based on the advice of the Attorney General that the Bill might be unconstitutional.

## Thirty-fifth Amendment of the Constitution (Right to a Home) Bill 2016

In Second Stage debate on [the above Bill](#), Pat Casey TD observed that “[t]he Irish Constitution also contains certain explicit property rights, but there is no clear statutory right to adequate housing which can be legally enforced by the courts. Any amendments to the Constitution or any approach to legislating for a right to housing will have to balance the rights of landowners.” The then Minister of State for Housing, Damien English TD, responded to the Bill, stating that while he was not opposed in principle to the Bill, the measure merited further scrutiny, and he further noted the existence of various statutory rights to housing on the statute book.<sup>26</sup>

The Bill was defeated at Second Stage in Dáil Éireann.

## Family Home Mortgage Settlement Arrangement Bill 2014

[The above Bill](#) was introduced in the Dáil in December 2014 by Michael McGrath TD. The Bill proposed to provide for powers of the Insolvency Service of Ireland in relation to the restructuring of mortgages on family homes. The Bill was opposed by the Government, citing constitutional concerns. Frances Fitzgerald TD said:<sup>27</sup>

“the Bill ignores the fundamental importance of striking a carefully measured balance between the interests of people who are in arrears of mortgage repayments on their family homes and the property rights of secured creditors.”

In his speech proposing the Bill, Deputy McGrath sought to pre-empt these objections on the part of the Minister and the Government, citing his own legal advice to the contrary:<sup>28</sup>

“It would be useful to ascertain whether the Taoiseach sought the legal advice of the Attorney General, who is the Government’s legal adviser in these matters and guardian of

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<sup>25</sup> Irish Independent, [‘FF seeks mortgage rate cap as part of stability agreement’](#) (December 14, 2018).

<sup>26</sup> [Thirty-fifth Amendment of the Constitution \(Right to a Home\) Bill 2016: Second Stage \[Private Members\] \(Continued\)](#).

<sup>27</sup> [Family Home Mortgage Settlement Arrangement Bill 2014: Second Stage \[Private Members\]](#) (3 March 2015)

<sup>28</sup> Ibid.

the Constitution. I expect that the Minister will confirm whether this is the case. I can only assume that the basis on which the Taoiseach is claiming the Bill to be unconstitutional is Article 43's provisions on protecting property rights. Based on the legal advice we have received, I do not believe this to be the case, as there are already legal provisions that limit property rights, including the established mortgage arrears resolution process.”

Another Deputy, Dara Calleary TD, lamented the use of the Constitution in opposing Bills of this nature. He said:<sup>29</sup>

“It is extraordinary that the document of the people, the Constitution, Bunreacht na hÉireann, is being used against family home owners and small property owners when in the view of the Attorney General, upward only rents are protected by the Constitution that is supposed to stand up for people. There are property rights for pension funds but not for small family homeowners or small-business people.”

The Bill was defeated by vote at Second Stage in Dáil Éireann.

### **Upward Only Rent (Clauses and Reviews) Bill 2013**

The Minister of State, Michael Ring, TD on behalf of Alan Shatter, TD, Minister for Justice, Equality and Defence, stated during Second Stage debate on [the above Bill](#) that the Government had decided in 2011 not to proceed with its own legislation abolishing upward only rent reviews on the basis of Attorney General advice received, and was opposing this legislation on the same basis. Discussing the potential unconstitutionality, Deputy Ring said:<sup>30</sup>

“In particular, it was clear that in order to strengthen the ability of any retrospective legislation to survive a Constitutional challenge, provision would have to be made for a scheme of compensation to landlords... Given the current economic circumstances, the Government was strongly of the view that the payment of compensation to a particular sector of society could simply not be justified. In any event, it should also be noted that the existence of a compensation scheme would not, in itself, have guaranteed that the proposed legislation would be proof against a Constitutional challenge.”

Senator Fergal Quinn, proposing the legislation, strongly contested the Government's view that the legislation was unconstitutional:<sup>31</sup>

“The Bill before the House is entirely compatible with the Constitution. I will now address its constitutionality under various headings. The first of this relates to the fact that the State's duty to protect property rights is not absolute. The wording of Article 40.3.2o of the Constitution makes this clear... According to Gerard Hogan, SC, the State's leading constitutional lawyer and now a judge of the High Court, "it follows that the State is entitled to balance the protection of property rights against other considerations".”

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<sup>29</sup> Ibid.

<sup>30</sup> [Upward Only Rent \(Clauses and Reviews\) Bill 2013: Second Stage](#) (2 October 2013).

<sup>31</sup> Ibid.

## National Asset Management Agency Act 2009

While the NAMA Act did not deal with the issue of housing in the State, it is relevant to current debates in relation to housing and property rights insofar as it seriously interfered with property rights in the context of a national emergency. The National Asset Management Agency (NAMA), was set up by the Irish government in late 2009 to acquire certain loans from the banks. The Act empowered NAMA to compulsorily acquire various loans and assets on the books of the banks in order to better secure the stability of the banking sector. The Act was passed in the context of a severe financial crisis in the State.

The constitutionality of various provisions empowering NAMA to acquire assets were challenged in subsequent litigation. The courts held that, while NAMA must abide by requirements of fair procedures in acquiring assets,<sup>32</sup> such powers were not *per se* an unconstitutional breach of property rights, having regard to the serious financial situation in the State. In *National Asset Loan Management Agency v Breslin*,<sup>33</sup> the Court of Appeal (Whelan J) held that the restrictions on property rights were proportionate. In reaching this conclusion, she noted:<sup>34</sup>

“the exigencies that brought forth the NAMA Act included a serious threat to the State’s economy, the risks surrounding stability of institutions in the State generally and the need for the maintenance and stabilisation of the financial system in the State.”

The NAMA cases illustrate that the courts are prepared to allow reasonably significant interference with private property rights where there is a compelling public interest in so doing.

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<sup>32</sup> *Dellway Investments v National Asset Management Agency* [2011] IESC 14. In *Dellway*, the Supreme Court held that the potential adverse impact of the acquisition of assets by NAMA on the property rights on the holders of such assets required that NAMA afford them fair procedures. Such fair procedures include a right to be heard in advance of acquisition. However, the Court held that, provided such procedures are followed, the Act does not amount to an “unjust attack” on property rights.

<sup>33</sup> [2017] IECA 283.

<sup>34</sup> *Ibid* at [84].

## The advice of the Attorney General

A number of the Bills discussed in this paper were opposed by the Government, in whole or in part, on the basis of Attorney General's advice. It is therefore worth setting out the Attorney General's constitutional role, his influence on the political and legal process, and some concerns that have recently been raised about this influence.

The Office of Attorney General is provided for in Article 30 of the Constitution. The Article provides that the Attorney "be the adviser to the Government in matters of law and legal opinion". The Constitution also provides that all offences in the State be prosecuted in the name of the People at the suit of the Attorney General, though this power has latterly been delegated to the Director of Public Prosecutions.<sup>35</sup>

While the Attorney General works very closely with the Government, and sits at Cabinet meetings, the Constitution provides that the Attorney General should not be a member of the Government. The Attorney General has an extremely wide remit and advises not only the Cabinet but also all Government departments and state agencies. The Attorney General therefore has extensive influence on the development of legislation, advising not only on the compatibility of proposed legislation with the Constitution but also with EU and international law obligations.

It has been observed that the work of the Attorney General in providing such advice is "shrouded in secrecy".<sup>36</sup> Attorney General advice is almost never published,<sup>37</sup> though the Government often alludes to the advice in opposing Bills, as we have seen in this paper. The reluctance to publish advice makes it very difficult for opposing parties to probe and challenge the quality or accuracy of the advice.<sup>38</sup> The refusal to publish is sometimes justified on the basis of legal professional privilege, and while the advice certainly would attract privilege, privilege can be waived. It has also been justified on the basis of Cabinet confidentiality, which has been constitutionally protected since 1997.

Questions have also been raised about the independence of the Attorney General's advice and the extent to which it is free of political motivations or influence. One commentator has described the Attorney General as "a political creature" because to "distinguish the political from the legal in this context is almost impossible".<sup>39</sup> The concern here is that the close relationship between the

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<sup>35</sup> See *Prosecution of Offences Act 1974*. The Constitution directs that offences be prosecuted at the suit of the AG or "some other person authorised in accordance with law", hence the delegation of authority.

<sup>36</sup> David Kenny and Conor Casey, 'Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan' (2019) *International Journal of Constitutional Law* (forthcoming).

<sup>37</sup> A recent exception to this general position was the decision of the Government to release Attorney General advice regarding the proposed amendment to Article 40.3.3 of the Constitution put to the people in May 2018. The Attorney General advised that the proscription on abortion should not simply be repealed, but replaced with a provision explicitly empowering the Oireachtas to legislate for abortion. A précis of this advice was published. Irish Examiner, '[Govt publishes summary of Attorney General advice on Eighth Amendment referendum](#)' (January 30 2018).

<sup>38</sup> *Ibid.*

<sup>39</sup> Conleth Bradley, 'The "Political" Role of the Attorney General?' (2001) 6 *Bar Review* 486.

Attorney General and the Government can result in partisan advice that serves political expediency.<sup>40</sup>

## Conclusion

The housing crisis that has troubled the country for the past several years has resulted in a large number of Bills coming before the houses seeking to address the issue. It is a noticeable trend that the Government has frequently opposed such Bills on the basis of the private property rights protection in the Constitution, and in particular on the Attorney General's interpretation of those provisions. This paper has identified at least 12 Bills that the Government has opposed or resisted on the basis of concerns around private property rights.

The paper has sought to provide context to this trend by setting out the private property protections in the Constitution as well as the manner in which those protections have been interpreted by the courts. The paper has also sought, in light of the prominent role of the Attorney General in opposing these Bills, to outline the constitutional role of the Attorney General, as well as certain criticisms that have been levelled at the manner in which the Attorney General has carried out his functions in recent times.

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<sup>40</sup> David Kenny and Conor Casey, 'Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan' (2019) *International Journal of Constitutional Law* (forthcoming).





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