

## CHAPTER 17

# Conclusion

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As this book is being completed the Irish State has entered an agreement with the IMF and ECB for a loan facility of €85bn, some €10bn of which will go towards recapitalizing Irish banks, who had lent recklessly over the past decade to housing and housing related corporations and developments. This is in addition to the many billions already provided to Irish banks from State funds. In many other circumstances, this would have generated a root and branch analysis of failure and nature of the housing system which required so much State subsidy to operate, but not in Ireland. **17-01**

Meanwhile Irish housing law and policy in Ireland operates within the overriding and now globalised market system, and the Irish State underpins the “market” (if that is any longer the appropriate term) through its laws, institutions, subsidies, and social housing measures. Housing law is located in statute, constitutional, and common law. An increasing part is being developed through secondary legislation, use of soft law methods, and administrative measures. However, EU law, administrative law, competition law, equality law, consumer and human rights law is growing in importance in relation to the enforcement and regulation obligations of the State, as the housing system becomes more integrated within the workings of international financial institutions and corporations. **17-02**

The challenge of sustainable housing development in Ireland and the consequences of the housing development boom of the past ten years are enormous. However, many important future law and policy decisions around sustainable development have been thwarted. Many reasoned and inclusive decisions and law on such issues as urban sprawl, water quality, transport costs and commuting times, preservation of open spaces for recreation in towns and cities, and quality of life matters, have been pre-empted.<sup>1</sup> Equally, the legacy of reckless lending for Irish housing will overshadow all other issues in relation to housing policy for at least a decade. **17-03**

Contemporary challenges in Irish housing, such as stricter criteria for borrowers of housing loans, negative equity, the legacy and development of remedies for reckless lending, the stratification of society created by the unregulated housing market, meeting the housing needs of people with disabilities, the absence of policy of housing for older people, a proposed housing tax (ignoring the mortgages attached), the regulation of waste from the country’s 400,000 septic tanks, and bringing into use the many empty **17-04**

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<sup>1</sup> See McDonald & Nix, *Chaos at the Crossroads* (Dublin, Gandon, 2005).

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houses, will call for novel approaches and responses. Regulation of the housing system as a whole, however, even from a consumer perspective, has not yet become part of the public or political discourse.<sup>2</sup> There are tentative steps to introduce a European wide system of regulation on lending institutions in the wake of the failures of the European Central Bank, and this will have significant impacts on mortgage lending in Ireland.<sup>3</sup> There is also the question of political representation for the 116,000 private landlords, the 400,000 private sector tenants and a quarter of a million social housing tenants. The effective political representation of the interests of the 789,000 private residential mortgage account holders (with a value of almost €118bn.) of whom some 40,000 (5.1% of total) were in arrears for more than 90 days at the end of September 2010 has yet to emerge. A particularly vulnerable group are those who purchased their homes between 2005 and 2008 and who are in a situation of negative equity.

### Law, Rights and Policy—Legislature, Judiciary and Executive

**17-05** The reader will notice that throughout this book a significant disconnect appears between housing policy and practice, housing legislation and the decisions of courts. These three approaches to housing reflect three perspectives, or perhaps three epistemic communities, areas of knowledge, systems, or disciplines. While operating simultaneously there is often little effective communication between these spheres. The three elements of the apparatus of the State, legislature, the judiciary and the executive, offer dissonant treatment to the housing system, acting in ways which are often highly contradictory, although reflecting their established institutional approaches.

**17-06** At another level, the masculinity of land and property law, with its overriding priority relating to the balancing of competing claims on property,

<sup>2</sup> There is a noticeable absence of consumer organisation in housing in Ireland, either representing tenants, homebuyers or mortgage payers, and government policy in the past decade has contributed to this. According to a report by a sub-committee of the Consumer Consultative Panel of the Financial Regulator there has been no serious effort to promote the Consumer Protection Code and no real efforts to protect consumers by the Financial Regulator. See *The Irish Times*, 23 September 2010.

<sup>3</sup> Banking regulation and oversight will be strengthened by the new European Securities and Markets Authority (ESMA) and European Systemic Risk Board (ESRB). The latter will monitor and assess risks to the stability of the financial system as a whole at the level of macro-prudential supervision, providing early warnings of systemic risks that may be building up and, where necessary, recommendations for action to deal with these risks. A European System of Financial Supervisors (ESFS) for the supervision of individual financial institutions at the level of micro-prudential supervision will consist of a network of national financial supervisors working in tandem with new European Supervisory Authorities. There will be a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA). For full details of EU Commission financial regulation see website: [http://ec.europa.eu/internal\\_market/finances/committees/index\\_en.htm](http://ec.europa.eu/internal_market/finances/committees/index_en.htm).

displaces many other more sophisticated and contemporary approaches in housing legislation and case law.<sup>4</sup> This perspective applies to much legal treatment of housing, but also to economic, statistical and other “objective” measurements.<sup>5</sup> Of course, feminist approaches regularly deconstruct many of these perspectives, exposing the specificity of the “values” upon which objective and legal liberalist housing legislation is based. Lynch *et al* suggest that while society is regularly examined from economic, political and socio-cultural approaches, a fourth perspective, that of love, caring, support and solidarity is also required for a proper examination of societal issues and the development of appropriate housing and other laws.<sup>6</sup>

Fox has shown that although housing and “home” concepts occur regularly throughout legislation, and are dealt with in courts on a regular basis, how these are recognised depends on the nature of the interests at stake.<sup>7</sup> Lawmakers and courts regularly address concepts such as security of tenure, matrimonial home, tenant for life, life interest, persons in actual occupation, purchase money resulting trust, housing loans<sup>8</sup> and property adjustment orders. Yet, protection of property rights, the freedom and enforcement of contracts, and the treatment of housing as enforceable security for loans, remain the dominant influences.

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Since legal analysis has not yet drawn on cross disciplinary research into the meanings and values of home, the idea of home bearing specific and identifiable meanings beyond the physical structure or capital value of a house appears, to the legal perspective, an unverifiable and illusive proposition.<sup>9</sup>

Law can play two roles within the housing arena. Firstly, it can reflect the market reality of housing as a commodity and support the contemporary housing system, such as it is, dominated by the market. Irish housing law has acted primarily, and in some areas exclusively, to underpin and bolster this housing market system. Secondly, law can be a source of autonomous values that can temper the market and structure it in different ways. It can

<sup>4</sup> See Fox, L, *Conceptualising Home* (Oxford, Hart, 2007), p 99. There is also the significant and unresearched impact of male and “macho” networks across many aspects of Irish society, and within the subsystems of the housing system.

<sup>5</sup> It is significant that NESC has developed a new standard of evaluating policies under the “well-being” approach. The nature and extent of each individual’s well-being involves a unique combination of six domains. See NESC, *Well-being Matters: A Social Report for Ireland* (Dublin, NESC, 2009).

<sup>6</sup> Lynch, K, Baker, J & Lyons, M (eds.) *Affective Equality, Love, Care and Injustice* (Basingtoke, Palgrave Macmillan, 2009).

<sup>7</sup> See Hunter, R, McGlynn, C & Rackley, E, *Feminist Judgements – From Theory to Practice*, (Oxford, Hart, 2010). Hunter points to a lack of empirical evidence that female judges exhibit gender differences in judging based on “an ethic of care” – Hunter, R, “Can Feminist Judges make Difference?” (2008) 15 *International Journal of the Legal Profession*, 7.

<sup>8</sup> See Consumer Credit Act 1995 (as amended) and Part 10, Land and Conveyancing Reform Act 2009.

<sup>9</sup> See Fox, L, *Conceptualising Home* (Oxford, Hart, 2007), p 75.

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draw on the reservoir of international jurisprudence, rights, and principles to inform and creatively expand the conceptual framework of housing law, rights and policy. It can promulgate the rights-based approaches of international legal instruments and the best historical, constitutional and other values in relation to housing rights.

### Legislation

**17-08** The overriding imperatives of supporting and maintaining a market system for the production, exchange, mortgaging and renting of housing offer the most powerful drivers of legislation. However, there is also a corpus of social housing legislation largely based on an Irish nationalist or Roman Catholic communitarian concern for the poor, although in recent times this has become imbued with the creation of systems for controlling tenants and encouraging their salvation into “first class citizens” through subsidised owner-occupation. The *Oireachtas* or Legislature supports and reinforces the role of the market and neo-liberal approaches to housing policy, with little apparent regard for the many policy reports developed through the ubiquitous consultation or government-sponsored research systems. Some of these have proposed that housing law and policy be developed as a means of redistribution, social inclusion and support for poor people. However, there is, as yet, no constitutional, legislative or policy focus on housing as a means of enhancing opportunities for personal and social development of people, including children. There is little legally inspired emphasis on shaping housing law or policy for children’s or people’s development,<sup>10</sup> social integration, or other people-centred values.<sup>11</sup> There is no legal requirement which would result in everyone having the opportunity of living in a good home at a reasonable cost and in a stimulating, secure and ecologically sustainable environment.

**17-09** Feudal and *petit bourgeois* neo-liberal legal concepts and legal precedents permeate housing legislation and, indeed, case law in Ireland. The law has inherited particular feudal and liberal legal models and conceptual frameworks, which acted for centuries to protect property owners, perpetuate patriarchy and control human and family behavior accordingly, slightly modified by some recent legislation and enlightened judgments. But while the ancestors of housing law may have been property and land law, the steady growth of the State regulation and intervention into the housing system has broadened the legislative ambit of housing law. However, there remain many conflicting legislative objectives.

<sup>10</sup> See Brooke, *Housing Problems and Irish Children – the impact of housing on children’s well-being* (Dublin, Children’s Research Centre TCD, 2004).

<sup>11</sup> There are many references in housing related legislation to the requirement on local authorities to counteract and prevent “undue social segregation” but this is not the same as an obligation to promote an integrated society.

This continuing dichotomy within Irish housing legislation is clearly illustrated in the recent updating and codification of market perspectives within the Housing (Miscellaneous Provisions) Act 2009. The Act promotes even greater levels of subsidised homeownership among poor people at a time of systemic collapse of housing market norms and systems. The legislation was enacted while social partnership was adopting the NESC “vision of society” (described above in Chapter 3), with its sustainable housing communities proposals.<sup>12</sup> Meanwhile, legislative regulation of housing finance was almost negligible, leading to a major and unsustainable boom in house prices.<sup>13</sup> In any case, concepts such as “sustainable communities” were given no legislative basis in this statute of 2009, emphasising the disconnected nature and powerlessness of these “participatory” and social partnership-sponsored reports. The NESC “vision of society” which now underlies much of Irish State policy development had no impact on the Land and Conveyancing Law Reform Act 2009, which abolished feudal tenure in so far as it survived, and updated the law relating to land ownership and mortgages on homes. Indeed, this legislation, as part of the *eConveyancing* project may well have a greater impact on the Irish housing system than any other measures. Yet, it was largely ignored in housing policy reports.<sup>14</sup>

## Rights

In modern societies housing rights jurisprudence is growing in its content, relevance and sophistication, reflecting new principles of personal and social development, as well as the influences of public international human rights law. State action is transcending traditional civil and political rights guarantees on life, liberty and property towards giving effect to contemporary expectations, through legal and other intervention in housing systems.<sup>15</sup> However, there are significant limitations to the international human rights approach in enforcing rights within contemporary housing systems. Housing rights now need to be integrated, not just into political

<sup>12</sup> National Economic and Social Council, *Housing in Ireland: Performance and Policy* (Dublin, NESC, 2004).

<sup>13</sup> It is now becoming clear that limited and selective participation and consultation undertaken by NESC in the preparation of its reports on housing resulted in a narrow focus on social housing and other issues, at the expense of either a comprehensive review of the housing system, including the housing finance sub-system, or any independent or holistic analysis. See *The Irish Times*, 31 July 2010.

<sup>14</sup> See Law Reform Commission, *Consultation Paper on the Reform and Modernisation of Land and Conveyancing Law* (LRC CP 34-2004); *Report on the Reform and Modernisation of Land and Conveyancing Law* (LRC 74-2005); LRC/BearingPoint *Modelling of the Irish Conveyancing System* for the Law Reform Commission (LRC 79-2006).

<sup>15</sup> *The Vienna Declaration* (1993) states that both civil and political rights and socio-economic rights, such as housing rights are “universal, indivisible, interdependent and interrelated”. See The Secretary-General, *Report of the Secretary General on the Vienna Declaration Programme of Action*, UN. Doc. A/CONF 157/24 (Part I) (13 October 1993).

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policies and legislation, with their traditional emphasis on social housing solutions, but into the *macro*, *meso* and *micro* frameworks of the housing system, involving all its elements.<sup>16</sup>

- 17–12** Today, housing rights are offered as providing a real alternative model for directing State law and policy, as a basis for legislation, and sometimes as a substitute to political development or politics itself. While public international law human rights provide a moral compass for the development of law and policy, EU and ECHR law increasingly provides inspiration and material for a range of national measures, legislation and NGO participation. Although the now binding EU Charter of Fundamental Rights and ECHR Act 2003 have yet to seriously impact on housing legislation in Ireland, many of the international UN instruments are sufficiently vague to be easily incorporated into the language of contemporary policy documents. Indeed, it is now becoming the norm to incorporate these measures to buttress and justify existing legislation and policies, a situation which relegates rights to areas of benchmarking for quality management service provision.<sup>17</sup> However, the concepts of minimum core obligations on the State, and progressive realisation of rights, offer valuable legislative principles and standards, even in the era of new public management and governance approaches. These can create both an enforceable State guarantee in relation to a minimum level of housing to be enjoyed by all, as well as enforceable rising normative standards in line with increasing resources.

A significant challenge for housing rights development is to refine the specific content of the minimum core housing obligation for the State so that no individual or group must endure poor housing. Equally, housing rights advocates have yet to tailor contemporary housing rights standards to the nuances and dynamics of housing market systems. An even greater challenge arises in positioning specific, measurable and achievable housing and human rights standards within the existing and emerging regulatory and consumer protection and enforcement systems of Irish and EU law.

### The Courts

- 17–13** The courts interpret housing-related legislation in the context of a corpus of common law property, land, mortgage, planning and other precedents and legislation drawn from 18th and 19th century peasant proprietorship and *petite bourgeois* principles, disturbed only by a national Constitution and recent

<sup>16</sup> See Kenna, P, “Can international housing rights based on public international law really impact on contemporary housing systems?” in Fox, L & Sweeney, J (eds.) *The Idea of Home in Law—Displacement and Dispossession* (Ashgate, Farnham, Surrey, 2011); Kenna, P, “Can housing rights be applied to modern housing systems?” *International Journal of Law of the Built Environment* (2010) Vol. 2, Issue 2, 103–117.

<sup>17</sup> See, for example, the Irish Human Rights Commission, *Human Rights Guide for Civil and Public Servants* (Dublin, IHRC, 2010).

enactments reflecting rights for women, families and others.<sup>18</sup> Again, the maintenance and protection of the contract based neo-liberal market system of property is paramount within the *grundnorm* of Irish constitutional law.

Of course, the modern housing system includes and is composed of many powerful corporations and institutions, in such areas as mortgage lending, building and development, public bodies, insurance, product and materials supply, professional associations, service supply, auctioneering, estate agency and property management etc. These corporations and institutions operate at national, and in many cases at a global level. For individual homeowners, house-purchasers, or consumers, there is an enormous imbalance in their position vis-à-vis these large corporate and institutional bodies within the Irish model of the liberal pluralist State. There is almost no opportunity for an individual or natural person to secure redress in the courts in the event of a violation of any of the few rights which exist in the system, whether in relation to violations by social housing providers (State and voluntary sector), State bodies, providers of goods and services, or in relation to enforcement of regulations, standards or consumer rights. Seeking redress through the courts, which is often the only possibility for a claim/hearing of any kind, involves major issues of costs, delay and uncertainty. Indeed, the risk of enormous costs being borne by individual litigants renders any legal rights which exist as almost symbolic, and in this scenario the law is widely viewed as protecting the rich and powerful.<sup>19</sup> Consumer or class actions are not possible in Irish law, and orders of protection against costs in public interest cases are, as yet, unknown in this jurisdiction. The rise of quasi-legal and administrative systems for dispute resolution and enforcement of standards and obligations in housing related areas reflects these concerns, and these are becoming the norm in almost all new proposals for rights protection. Yet, there is still no effective redress and remedy system in many areas of the housing system in Ireland.<sup>20</sup>

Of course, the traditional concept of law and legal regulation as a means of effective regulation and ordering of society has been challenged by

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<sup>18</sup> Former Chief Justice Ronan Keane describes the 19th century and first half of the 20th century as the great formative phase of common law — see Keane, R, “Judges as Lawmakers; The Irish Experience”, in *Judicial Studies Institute Journal* (2004) 4(2).

<sup>19</sup> See National Consumer Agency/Grant Thornton/Mason, Hayes and Curran, *The Home Construction Industry and the Consumer in Ireland, Vol. 3. Review of Legal Issues* (Dublin, NCA, 2008).

<sup>20</sup> While there are major gaps in the protection for homebuyers in tort and contract law, there are some significant areas where the law is developing, such as the impact of High Court housing precedents relating to the ECHR Act 2003, the insightful reports of the Law Reform Commission, and the housing consumer protection approaches of the Law Society Conveyancing Committee. On the other hand, agencies such as the National Consumer Agency have almost completely failed to create any effective enforcement of consumer rights within housing systems, and have sponsored no known cases to enforce the Unfair Contract Terms in Consumer Contracts Regulations. However, the Agency has produced some valuable reports.

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systems theorists.<sup>21</sup> The inadequacy of formal legal rules in the complex world of contemporary society, with its multiplicity of actors and powerful corporations has been associated with the rise of new forms of governance.<sup>22</sup> In relation to public law and its impact on regulating the public and private sector, there are major gaps in effectiveness through relying on traditional command and control law based approaches.<sup>23</sup>

**17-15** The vast majority of housing related cases are property based, although family law, planning, succession and other areas of law are regularly considered in the courts. In relation to social housing law, a type of feudal treatment is often reserved for social housing tenants and other marginalised groups in some of the lower courts, where their status or social position appears more important than any notions of citizenship rights.<sup>24</sup> Of course, in relation to regulating the actions of the Legislature and Executive, the courts have a potentially powerful role through judicial review, although this has been more symbolic than instrumental, with significant deference to the Executive demonstrated over the years.<sup>25</sup> The failure by some senior judges to incorporate contemporary internationally accepted normative approaches to public policy issues into judicial reasoning, limited levels of judicial activism, and a failure of advocates to effectively use the courts as part of progressive social movements for change, have resulted in limited housing case law development in Ireland. However, there are a number of significant recent decisions where family, human rights and consumer law are tempering the harshness of property law, and where a contemporary role for the development of equity seems possible.

### The Executive

**17-16** The Executive, or the implementation arm of the State, carries out a wide range of actions relating to the housing system, expending large levels of resources and dealing with market externalities and support

<sup>21</sup> For a discussion on the role of law *viv-a-vis* other systems see Luhmann, N, *Law as a Social System* (Oxford, OUP, 2004); Teubner, G, *Autopoietic Law: A New Approach To Law And Society* (Berlin, Walter de Gruyter, 1987).

<sup>22</sup> See Morgan, B, *The Intersection of Rights and Regulation: New Directions in Socio-legal Scholarship* (Ashgate Publishers, London, 2007).

<sup>23</sup> See Scott, C, "Accountability in the Regulatory State", *Journal of Law and Society*, Vol. 27, No. 1, March 2000, 38-60.

<sup>24</sup> The formally equal liberal concept of citizenship is widely propounded in Ireland, as part of the notion of Irish Republican "petit bourgeois" citizenship. However, substantive citizenship is more readily assessed according to housing tenure, with first class citizens owning their own homes, second class citizens as renters and third class citizens forced to live on poor social housing estates (some of which result in a denial of access to credit, third level education or freedom from intimidation). Ireland is unique in its absence of any representative tenant associations in social or private rented housing, with the result that there is no input into legislative development from this group of citizens into the modern deliberative democracy, or the liberal pluralist State, even in relation to the passing of legislation directly affecting them.

<sup>25</sup> *The State (Keegan and Lysaght) v The Stardust Victims Compensation Tribunal* [1987] ILRM 202; *O' Keffe v An Bord Pleanala* [1993] 1 IR 39, [1992] ILRM 236.



mechanisms.<sup>26</sup> The State has enormous impact through funding, regulation and direction of local authorities in shaping the housing system, as well as facilitating networks, public procurement, guaranteeing rights and developing policy and law. Of course, in Ireland, where political institutions, are largely based on the inherited “Westminster model” there is a fusion of the Legislature and Executive through the appointment of the relevant Minister in charge of the Executive department from the elected members of Parliament.<sup>27</sup>

Many examinations of the State in Ireland often fail to recognize the shift from the traditional Weberian model or ideal-type civil service, based on the rational/legal bureaucratic organisation, to the contemporary (and varied) new public management model, across all public bodies and agencies in OECD countries. This largely ideological approach which originated in the 1980s, involves running government like a business and adopting market style approaches to the delivery and management of the public sector. The Irish variant involves a strategic management approach, based on strategies, actions plans, a commitment to openness and accountability, quality customer service, simplified regulation, revised human resource management with incentives etc. and better financial management.<sup>28</sup> The importance of this

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<sup>26</sup> George Soros and others have pointed out that the role of the modern State, at the behest of the World Bank, international corporations and the OECD, involves reducing public services and taxation on profits, although consumption taxes and service charges are increased. See Soros, *The Bubble of American Supremacy* (London, Phoenix, 2004).

<sup>27</sup> The Ministers and Secretaries Act 1924 laid the basis of Irish public administration, which created the Minister as the corporation sole of his/her Department, thus rendering the actions of the Department as the extension of that personality. The Public Services Management Act 1997 has altered the position somewhat identifying the roles and responsibilities of senior civil servants and distinguished their responsibilities from that of the Minister. In Ireland, there are few resignations by Ministers when the Department is found to have acted illegally or improperly, unlike the situation in the UK. The Executive/Legislature split can be contrasted with other Republics, such as France and the US, where the Executive is clearly separate from the Legislature, although many point to the benefits of this Irish arrangement in allowing swift decisions relating to Executive problems to be taken by the Legislature. Of course, while there are some differences between Ireland and the UK, such as the presence of a written constitution and the proportional representation electoral system, the role and operation of the State is largely the same. For an examination of the “weak-form” of judicial review in New Zealand, Canada, the UK (and Ireland) compared to the “strong-form” see Tushnet, M, *Weak Courts, Strong Rights* (Princeton University Press, New Jersey, 2008). See also Delaney H, *Judicial Review of Administrative Action: A Comparative Analysis* (2nd ed.) (Dublin, Round Hall, 2009).

<sup>28</sup> See Collins, N, “NPM: a new orthodoxy” in Collins, N, Cradden, T & Butler, P, *Modernising Irish Government, The Politics of Administrative Reform* (Dublin, Gill & Macmillan, 2007). s 5 of the Public Service Management Act 1997 affirms that a “strategy statement” shall (a) comprise the key objectives, outputs and related strategies (including use of resources) of the Department of State or Scheduled Office concerned, (b) be prepared in a form and manner in accordance with any directions issued from time to time by the Government, and (c) be submitted to and approved by the relevant Minister of the Government with or without amendment. (2) The Minister of the Government shall, not later than 60 days after the strategy statement has been approved, cause a copy thereof to be laid before each House of the Oireachtas.

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market language which leads to the reframing of citizens as consumers, customers or clients, is at odds with traditionally established views of the State as operating under democratic principles and responding to citizen rights and needs.<sup>29</sup> Essentially, if citizens are regarded by the State primarily as consumers of public services, the relationship between the State and people becomes one of passive commercial-type transactions rather than active political engagement. Complaints systems, consultation over managerialist strategies, action plans and customer quality statements replace political involvement as the shaping forces of the nature of State provision and action. Politics and public administration are separated under new public management approaches, and one of the consequences is that State activities become insulated from the political demands of society.<sup>30</sup> This dramatically changed and widely adopted pattern in the relationship between the public service and the citizens within the Irish State is largely unrecognised in contemporary constitutional and legal analyses, yet it has major implications for the development of any new legal or policy approaches.<sup>31</sup>

### The Dilemma of Law and Policy

**17–18** In that Gordian knot of public administration, politics, law and the State, one persistent obstacle stifles clear analysis and discourse. This is the question of whether housing policy creates law or housing law creates policy. Of course, judicial decisions regularly make choices on matters of public policy, whether publicly acknowledged as such, or not. The rationale behind many common law legal rules reflect an underlying set of social values,

<sup>29</sup> Cousins, M, “The Quality of Public Services: Clarifying Conceptual Issues”, *Administration*. Vol. 44, No. 4, Winter 1997–98, pp 83–93. Many writers posit that there is a major consumer cleavage in advanced capitalist societies, between a majority who provide for their consumption requirements (including housing) through the market, and a minority who are reliant on (increasingly inadequate) State provision. This distinction may be more important than social class and is said to influence political attitudes, material life-chance and cultural identities. The latter are more seriously affected by inadequate or reduced public services, thus adding an equality dimension to any diminution of social housing.

<sup>30</sup> For example, there are regular complaints from politicians that they have no role in the decision making or operational priorities of the HSE. See also Butler, P & Collins, N, “The public service and the citizen-consumer” in Collins, N, Cradden, T & Butler, P, *Modernising Irish Government, The Politics of Administrative Reform* (Dublin, Gill & Macmillan, 2007).

<sup>31</sup> Of course, the real implementation of policies and laws comes through the actions of individual public servants and the support, motivation and management of these central players is an area often ignored in the literature on law, rights and policy. Indeed, at many levels of the public service there is a perception, often justifiably supported by contemporary caricatures, of egotism, elitism and intellectual arrogance in relation to the legal system, human rights advocacy and abstract policy development. Indeed, there is often little awareness by lawyers, policy makers or human rights advocates of the hugely stressful demands placed on many public service workers operating on limited resources, who are expected to resolve complex and controversial issues, which are often largely outside their control. There are clear issues of class in this divergence of views and perspectives.

and promoting one such value requires the dismissal of another. Ultimately, these values are based on the liberal concepts that law exists to protect life, liberty and property. Of course, many areas of law, such as tort, have an implied policy basis, such as the economic analysis of negligence cases and the limitation of a duty of care (floodgate arguments).<sup>32</sup> Similarly, the courts rigidly police the line between the public and the private, restricting the growth of State action into markets and guaranteeing property/capital “freedom”. The recognition of this integral element of policy in judicial reasoning is taken as given within legal analysis and academic writings. Legal principles derived from many classical theories of law and jurisprudence offer a variety of often competing ideals. The development of these legal principles takes place, however, strictly within legal discourse, and is not normally subject to any significant variations as a result of contact with public policy developments.<sup>33</sup> In many ways these legal principles are accepted by courts as being compatible with the governance requirements of the society, and are not subject to public or Parliamentary scrutiny, due to the separation of powers doctrines and other factors. These principles may even correlate to a parallel system of policy making and implementation, untouched by the contemporary or historical plethora of policy reports and documents. Such common law principles, precedents, jurisprudence and rules are the subject of many legal textbooks, case studies and writings, and will not be recited here. At another level the courts have displayed a more socially interactive role in the curial interpretation of statutes, which are clearly the result of public policy decisions by Parliament, and here the courts are more willing to accept the notion of policy as enunciated in delegated legislation etc. Of course, all this is taking place at a time of significant change in public policy making and implementation.

For Dworkin, “policy” must be considered as an element of law.<sup>34</sup> Policy here means a standard that sets out a goal to be reached, such as an improvement in some economic, political or social issue. “Principle” also has to be considered, and this involves a requirement of justice or fairness or some other dimension of morality. Principles have a dimension of weight, and Dworkin accepts that a variety of abstract rights prevalent at a particular time are unlikely to be disregarded by judges. While rules can be changed by legislation, principles may not be altered this way.<sup>35</sup> Rights must be protected because society shares a deep concern for the dignity of its members. Therefore in a democracy, individual and minority rights cannot be overridden by the legislature on simple policy grounds. The denial of rights is a very serious matter, and can only be justified where the cost

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<sup>32</sup> See Quill, E, *Torts in Ireland* (3rd ed.) (Dublin, Gill & Macmillan, 2009), Chapter 1.

<sup>33</sup> There are, of course, many curial decisions which have clearly been influenced by public outcry.

<sup>34</sup> See Dworkin, *Laws Empire* (London, Fontana, 1986).

<sup>35</sup> See Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977).

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would be exorbitant or some competing right would be affected. It is worth paying a significant cost in social policy or efficiency to uphold rights:

So, if rights make any sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it.<sup>36</sup>

For Dworkin, rights, whether derived from legal rules or general legal principles protect individuals from political decisions, even if those decisions would improve collective goals.

It is suggested that there are two significant elements to this issue of law and policy: policy as a governance construct leading to State action, including legislation; and policy creation as a means of giving effect to law, at the level of guidelines, circulars etc. These perspectives reflect the often conflicting interpretations of policy, as a governance construct or as a mere emanation of statute.

### Policy as a Governance Construct

**17–20** Public policy can be generally defined as the courses of action (or inaction) taken by a State on a particular issue, and this is often described as the governance approach.<sup>37</sup> It can encompass the many courses of action including constitutional provisions, laws, judicial decisions, regulations, State funding priorities and other supports from the largesse of the State

<sup>36</sup> *ibid*, p 199.

<sup>37</sup> The concept of governance developed by the World Bank and adopted by international financial institutions of a particular area of society or system has become a fashionable contemporary concept in public policy. It refers to the way in which collective impacts are produced in a social system. Some define governance as regimes of laws, administrative rules, judicial rulings, and practices that constrain, prescribe, and enable governmental activity; as self-organising, inter-organisational networks; as the use of authority in providing systemic steering and direction; the application of power and authority in a way that commits relevant political actors to managerial decisions; an authority, exchange and governance paradigm; as creating the capacity to act, bringing together the resources required to accomplish the collective ends of society. See Hill, M & Hupe, PL (2nd ed.) *Implementing Public Policy*, (Sage, London, 2009), Chapter 1. Rhodes, RAW in “The New Governance: Governing without Government”, *Political Studies* (1996) XLIV 652–667, points out that there are at least six separate uses of the term governance: as a minimal State, as corporate governance, as new public management, as “good governance”, as a socio-cybernetic system and as self-organizing networks. Rhodes also point out that focussing on governance can blur, even dissolve, the distinction between State and civil society. For a critique of the concept see Mollers, C, “European Governance: Meaning and Value of a Concept”, *Common Market Law Review* (2006) 43: 313–336. See also Peters, G & Pierre, J, “Governance, Government and the State”, in Hay, C, Lister, M & Marsh, D, *The State: Theories and Issues* (Basingstoke, Palgrave, 2006).

and the political system in relation to a particular area of society or group(s) of people.

The idea of governance was described by the World Bank as the “process by which authority is exercised in the management of a country’s economic and social resources for development, and the capacity of governments to design, formulate and implement policies and discharge functions”.<sup>38</sup> In essence, it involves taking a perspective from outside the State, to effectively observe and evaluate progress. Governance “describes the hybridity of legal interferences within a society”.<sup>39</sup> It accepts a fusion of public and private institutions, and brings an approach to public institutions primarily oriented towards efficiency and output in achieving goals. These goals, which largely relate to profit and capital enhancement, are already widely described in neo-liberal economic literature, but seldom include the realization of housing rights or other rights.

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As an integral part of the governance approach to policy all modern States support and intervene in housing markets, and government policies in many areas, such as economic policy, planning and social welfare, impact greatly on housing. Defining housing policy, therefore, is not confined to expressed housing policies alone since intervention in the housing system is multi-faceted and holistic. Clapham, *et al*, posit one contemporary definition of housing policy as:

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...any form of intervention in housing production, distribution or consumption that affects the location, character and availability of homes, or the rights associated with housing occupancy—irrespective of the ownership of property, land or the means of production.<sup>40</sup>

However, 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

<sup>38</sup> See World Bank, *Governance: The World Bank’s Experience* (Washington, World Bank, 1994), p XIV. The concept of governance was first used in World Bank in *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington, World Bank, 1989). The Bank’s Worldwide Governance Indicators (WGI) project reports aggregate and individual governance indicators for 212 countries and territories over the period 1996–2007, for six dimensions of governance: Voice and Accountability, Political Stability and Absence of Violence, Government Effectiveness, Regulatory Quality, Rule of Law and Control of Corruption. Its current definition of governance is: “Governance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them”. See <http://info.worldbank.org/governance/wgi/index.asp>.

<sup>39</sup> See Mollers, C, “European Governance: Meaning and Value of a Concept”, *Common Market Law Review*, 43: 313–336, 2006, at 316.

<sup>40</sup> Clapham, D, Kemp, P & Smith, SJ, *Housing and Social Policy* (London, Macmillan, 1990), p x.

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government interventions that motivate, enable, and constrain housing action.<sup>41</sup> 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.<sup>42</sup>

**17–23** In Ireland, the public policy approach involves the primary provision role being largely left to market forces, supported by State action in maintaining and enforcing contract and property law. This is underpinned by a system of market supports supplemented by State funded provision for specific groups. The contemporary housing policy framework is shaped by the highly influential NESC report *Housing in Ireland: Performance and Policy*, which now permeates all Government reports and proposals in this area.<sup>43</sup> The Report provided the most comprehensive review of Irish housing policy to date, albeit from a corporatist welfare approach, and subsequent State housing policy development draws from its recommendations.<sup>44</sup> The Report suggests that planning, urban design, infrastructural development, land management and public service delivery are most important in the challenges in creating sustainable neighbourhoods and integrated development of housing. It proposed increased levels of social housing and pointed out that active land management had yet to become an essential element of housing policy. However, the NESC Report did not adequately examine or address regulation of the housing system as a whole, concentrating largely on social housing and other market support mechanisms.

**17–24** Of course, the courts in their interpretation of legislation regularly deal with the potentially invigorating and expansive constitutional and social policy governance concepts of social justice and the common good, but these are held to be reflected in legislation, and the courts, often relying

<sup>41</sup> See Angel, S, *Housing Policy Matters – a Global Analysis* (New York, OUP, 2000), pp 11–15.

<sup>42</sup> See Chapter 3 above.

<sup>43</sup> The National Economic and Social Council (NESC), established in 1973, is a forum for engagement between Government and the Social Partners on strategic economic and social issues. Funded under the *aegis* of the Office of the Taoiseach, 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. The Council 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. The National Economic and Social Development Act 2006 provides a statutory basis for the operations and functions of NESC.

<sup>44</sup> See also Norris & Shiels, *Regular National Report on Housing Developments in European Countries. Synthesis Report for EU Housing Ministers* (Dublin, Department of Environment, Heritage and Local Government, 2004); Norris, M & Redmond, D (eds) *Housing Contemporary Ireland* (Dublin, IPA, 2005).

on 18th and 19th century English legal perspectives, tread a cautious path, fearful of entering this unsure ground.<sup>45</sup> However, this is not always the case and the innovative examination of the social basis of the Ground Rents legislation in the High Court case of *Shirley v O’Gorman*<sup>46</sup> by Peart J offered a glimpse of how housing and other legislation could be approached by the courts, from an overt governance perspective.

### Policy as an Emanation of Statute

In Irish law, policy is regarded as a creation of statute giving effect to statute through enabling legislation sometimes involving many detailed and complex administrative arrangements. In Ireland, the current situation renders the Minister, as the interpreter of statutes to be the ultimate determinator of policy. Indeed, the “principles and policies” test set out in *Cityview Press v AnCo*<sup>47</sup> held that the constitutional and curial definition of policies in Ireland is confined to matters which are within the remit of existing legislation.<sup>48</sup> The Minister, when giving effect to broader policies contained in statutes may make regulations, policies, guidelines, etc., but these can only give effect to the law already made by the Oireachtas.<sup>49</sup> While based on the constitutional principles of limiting the discretion of Executive agencies of the State to make arbitrary decisions and create new laws by stealth, it illustrates the status of policy in Irish constitutional and case law. In other words, only where legislation allows a Minister to give effect to a clearly delegated authority to make regulations or policies can new policies of any significance be introduced. This fundamental legal principle, which is widely ignored in the extensive policy reports of recent years, renders the sovereignty of the *Oireachtas* and the relevant Minister as the ultimate controller of policy making, regardless of what is contained in the myriad of policy reports produced by the State and other agencies. Thus, the legal status of the many lengthy and well researched reports in Ireland, written after extensive broader consultation (including with government departments

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<sup>45</sup> There is no tradition in Ireland of the use of Parliamentary history to discover legislative purpose in legislative interpretation. See *Crilly v Ferguson* [2001] 3 IR 215. See also Donlon, SP & Kennedy, R, “A Flood of Light?: Comments on the Interpretation Act 2005”, *Judicial Studies Institute Journal* (2006) 6: 1, 92.

<sup>46</sup> [2006] IEHC 27. This case was on appeal to the Supreme Court at time of writing. It is also very significant that the constitutional principles of social justice and the common good have been almost totally absent in the discussions, laws and policies around the revamped financial and property development regulatory system in Ireland. For instance, the NAMA legislation does not refer at all to these constitutional principles, yet it binds the legislature for many decades in relation to taxation and spending decisions.

<sup>47</sup> [1980] IR 381.

<sup>48</sup> See Hogan, G and Morgan, D, *Administrative Law in Ireland* (Dublin, Round Hall, 1998).

<sup>49</sup> Article 15.2.1. states: “[t]he sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State”.

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and local authorities) and costs, remains almost negligible, and they suffer from the phenomenon known as implementation deficit (described below). These highly enlightened and well written reports abide in the shadow of the corpus of housing and property related legislation and case law, some of which is centuries old and imbued with the values of other ages.

- 17-26 Yet, the consideration of policy must be regarded as more than a minimalist approach of giving effect to statutes. Public policy must be seen to embrace the totality of laws, cases, regulation (or its absence), decisions of the allocation of the largesse of the State at national and local level, to individuals and corporations as well as published policy documents of the State. This wider concept of policy as governance, can act to prompt legal change and legislation, and inform contemporary judicial reasoning.

### The Implementation Deficit

- 17-27 The Executive, through the civil service, government departments and State-sponsored agencies, such as NESC, (often in collaboration with some non-governmental agencies and private consultants) publish highly innovative, inclusive and progressive housing policy reports. There is, indeed, a range of highly complex, and internationally regarded policy reports on housing and many other areas of public policy, but these experience an “implementation deficit”. This is taken to mean that while the enlightened reports, policies and objectives have been created which can offer valuable solutions to widely acknowledged problems in Ireland in key policy areas, such is the institutional inertia and resistance, power of stakeholders, or other reasons, that these are never implemented. Comparing what is achieved and what was expected can lead to the observation of an “implementation gap”.<sup>50</sup>
- 17-28 This view of an implementation deficit or “gap” is often applied in critiques of housing policy. Of course, some of this approach is derived from crudely comparing State executive actions with private sector or private industry corporate implementation approaches. The latter are based on the organisation of production, whereby objectives and targets are set at high level, and through a command and control management system, are implemented on the ground. The implementation of public policy, however, takes place within a different context.<sup>51</sup> The development of the State, where collective actions are legitimised by notions of shared racial, geographic, cultural or other characteristics involves two different and critical factors

<sup>50</sup> See Dunsire, A, *The Execution Process, Vol. 1: Implementation in a Bureaucracy* (Oxford, Martin Robertson, 1978).

<sup>51</sup> For a contemporary discussion on the role of law in implementation of public policy see Hill, M, & Hupe, PL (2nd ed.) *Implementing Public Policy* (Sage, London, 2009).



from the private sector—the rule of law and the practice of democracy.<sup>52</sup> The rule of law requirements establish that the State must act within the law, be bound by public law, and that discretionary State power is subject to review by independent courts.<sup>53</sup>

It is suggested that the concept of an “implementation deficit” arises from a lack of understanding of the two aspects of policy in Ireland, policy as a governance construct and policy as an emanation of statutory implementation. The latter applies to the legal definition and place of policy

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<sup>52</sup> Of course, this distinction also applies to the myriad of NGOs undertaking contracted out State roles or producing policy reports, and thus it is critical to establish which agencies are State agencies and which are not. While there is much confusion in Irish academic studies in this area, clarity is now becoming critical in the context of the obligations of “organs of the State” under the European Convention on Human Rights Act 2003, but also in the context of creeping privatisation and public law and democratic accountability for bodies such as *Coillte*, the largest landowner in the State. There are a large number of bodies which claim to inhabit that space between the State and private society, and only those which are part of the State are subject to the two distinguishing characteristics of public law control and democratic accountability obligations. For an examination of modern theories of the State see Hay, C, Lister, M & Marsh, D, *The State: theories and issues* (Basingstoke, Palgrave, 2006).

<sup>53</sup> Hill and Hupe point out that this fascination with the use of bureaucratic discretion is very much a debate carried on between lawyers. In fact, it appears to be widely unknown among many public policy writers, administrators and politicians. The constitutional concept of separation of powers first proposed by Baron de Montesquieu in *Spirit of the Laws* (1748) was based on post Cromwellian republican England, where the monarchy had been deposed and a power balance between the legislature, executive and courts was being advanced. Of course, this model gave way to a fused legislature-executive approach, but nevertheless it has major symbolic legitimacy in arguments about controlling the legislature and executive. For Dicey it expressed British ruling establishment fear of collective power exercised through the State, such as that arising from ruling class fear of collective and State Jacobean power. In Ireland, there is only a brief reference to the separation of powers in Art 6(1) of the Constitution which states: 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. The three judge High Court pointed out in *Dellway Investment Ltd & Ors v National Asset Management Agency & Ors*. [2010] IEHC 375 and [2010] IEHC 364 that “It is important to emphasise how the Constitution divides the powers of the State. The executive power of the State is conferred on the government (Article 28.2). The legislative power is conferred on the Oireachtas (Article 15.2). The judicial power is conferred on the courts (Article 34.1)”. The High Court also held at para 10.28 that “the creation of NAMA, as permitted by the Act in the manner interpreted by the Court, is a reasonable and proportionate policy response to the problems which the Act seeks to address”. The court then proceeded to give serious weight to European Commission Decision on State Aid as a justification for the NAMA legislation, and at Para 9.31. the court stated: “When one looks at the commitments given by the Irish authorities at para. 74 of the Decision, it is clear that the legislation and the NAMA scheme was looked at in minute detail by the Commission. If it was the intention of the Commission that the definition of eligible bank assets had to be altered so as to include the necessity of borrower impairment, one could reasonably expect a commitment to that effect to be sought and given by the State. No such undertaking was sought in respect of the operation of s. 69 of the Act”. Remarkably, there was no examination of Irish constitutional social justice issues in the decision.

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with the Irish constitutional order, as defined by the courts, which looks only to the emanations of legislation as the basis of policy. However, when policy is viewed as a governance construct the implementation deficit arises from the failure to translate policy into party political legislative proposals, which can be converted into law, and enforced and accepted by the courts as part of the legal order. This usually requires a social movement which fashions and develops the issues into legislative change, especially where the protection of rights are concerned.<sup>54</sup> Of course, the prevalence of political patronage and clientelism at all levels of the administration of the State ensures that social movements are undermined. Rights based advocacy is limited to those groups who are unable to secure their expectations of State largesse through the clientelist system (often because the resources required are large or they are part of an unpopular group), largely based on Irish catholic nationalist communitarianism.<sup>55</sup>

**17–30** It is not clear whether the Irish political system of liberal pluralism, or “deliberative democracy”, can act sufficiently independently of the clientelist and other powerful interests in the housing system to implement any new policies and laws required. As such we must treat the interaction of law, rights and policy in Ireland as a work in progress. There is a problem in the contemporary Irish constitutional and legal system, whereby the only legal evaluation of housing policy is that which arises from individuals pursuing individual claims in the courts, often through judicial reviews seeking to establish *ultra vires* or negligence actions by State agencies.

**17–31** The implementation gap applies in many areas of Irish society. Of course, the legal and policy domains occasionally overlap, such as in the making or interpretation of legislation, but their separateness outweighs their occasional interplay. Yet, the dissonance is clearly visible on the policy development side by the avoidance of any consideration of constitutional, legislative or curial roles in the formulation of housing policy reports, while the courts have marginalised any policy considerations as being solely within the remit of the *Oireachtas*.

**17–32** The weakness of the Irish State in its ability to regulate the banking and housing systems, have also highlighted significant failures in the liberal pluralist model of the State. Because of its focus on interest groups, or stakeholders, with an implicit assumption that the State is a neutral arena, there is a failure to take seriously the power of some interest groups to control the decision-making and largesse dispensation arrangements of the

<sup>54</sup> See Stammers, N, *Human Rights and Social Movements* (London and New York, Pluto Press, 2009).

<sup>55</sup> O’ Toole points out in his polemical analysis *Enough is Enough – How to Build a New Republic* (London, Faber & Faber, 2010) p 42, that the constituency office of one TD had issued more than 220,000 letters during his 14 year period as a TD, an average of more than 60 each working day. This book also highlights the almost complete usurpation of the Legislature by the Executive in the contemporary Irish State.

State. There is a clear need for greater research on the nature and role of the Irish State in the contemporary globalised economy.<sup>56</sup>

### The Legacy

The dramatic change in Irish housing in the past decade and a half has exposed many weaknesses in the political and legal order.<sup>57</sup> Yet, the past 30 years has seen a transformation, resulting in a housing stock that is the newest in Europe, but with the price of a stratified society. In the housing boom from the 1990s the market has dominated the debate, inequality has grown, while much “wealth” was created and then devalued. Two newspaper reports in 2005 illustrated the contemporary dissonance in housing law and policy. A bye-election in Kildare and Meath in Spring 2005 brought many politicians and journalists to these areas and many new phenomena were reported:

The estates have multiplied virus-like in recent years, and services are often non-existent. Yet we look on as if all of this has happened because of some law of nature that is not amenable to the hand of man. Such is not the case. Dublin’s sprawl has been allowed to happen because of greed.... Developers are happy to cram houses on sites. Can anyone blame them for making outrageous profits since few others seem to be working in the public interest. Planners and councillors have failed miserably. None of this is rocket science. Young couples have children. Children need to go to crèches and primary school, they need to play.<sup>58</sup>

In May 2005, it was announced that a review of the State tax concessions to holiday homes and other schemes was to take place. *The Sunday Business Post* described one such scheme:

Capital allowances are also available on some holiday home resorts. For example, Sovern Hotels and Resorts is selling the Riverrun Resort and Sporting Estate, which is located outside Belturbet beside the river Erne in Tipperary [*sic*]. The resort contains four-star properties with onsite amenities such as fishing facilities, marinas with boat hire, a tennis court, a petting zoo, clay target shooting area and a barbecue area.

The Scandinavian-style detached houses are being sold as a holiday cottage scheme, which allows the owner to claim capital allowances over a 10-year period under the current scheme. The properties are selling for €450,000, excluding VAT and stamp duty. Over 10 years the tax incentives reduce this cost to €266,700 for a self-employed individual, according to the company.<sup>59</sup>

<sup>56</sup> See, for example, the potential new role for the State set out in Anderson, GW, *Constitutional Rights after Globalisation* (Oxford, Hart, 2005).

<sup>57</sup> NESc, *Housing in Ireland: Performance and Policy*, p 1.

<sup>58</sup> *The Irish Times*, 5 March 2005.

<sup>59</sup> *The Sunday Business Post*, 8 May 2005.

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**17–35** Ireland has now conclusively moved from a Gaelic *Gemeinschaft* to a global *Gessellschaft* type of society, but these two examples demonstrate that the transition was not very well executed. Of course, there were a plethora of reports and enabling laws available to ensure that a very good housing system could have been created in that time. The legacy of this phase of Irish economic and social development is that the IMF and ECB will now be the dominant influences on our housing system for the next decade at least.