UNCONSTITUTIONAL EVICTIONS

Abstract: Earlier this year, the Irish Government pressed ahead with plans to allow a temporary legislative ban on 'no-fault' evictions to expire. In this article, I argue that Article 40.5 of the Constitution, which protects the inviolability of the dwelling, would be implicated in any case in which the courts must decide whether the law requires them to enforce evictions against tenants. This is the position even in cases involving private landlords, and where the tenants continue to occupy the landlord's property in defiance of a valid notice of termination. To make this argument, I analyse the case law surrounding Art 40.5 and offer an account of the normative underpinnings of that provision. In early cases, it was thought that Art 40.5 was concerned with forcible entry into one's home by the State. While this is certainly a relevant aspect of Art 40.5, I argue that subsequent cases make clear that this provision is underpinned by a richer conception of the moral value of the home. Drawing on recent work in moral philosophy, I argue that the 'dwelling' referred to in the Constitution has an important social aspect. We have standing to demand that our home, or dwelling, is not interfered with because control over a private space of one's own is essential for forming intimate human relationships and pursuing valuable ends. When we see that this is the conception of the dwelling with which Art 40.5 is concerned, it becomes clear that tenants have standing to demand a heightened level of justification from the State before their eviction is enforced.

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Introduction

Earlier this year, the Irish Government pressed ahead with plans to allow a temporary legislative ban on 'no-fault' evictions to expire. Notices of termination of tenancy could still be issued during this time, but evictions had to be deferred until after the 'winter emergency period'.[1] Now that the legislation has been allowed to lapse, many of those backdated evictions will proceed, as will evictions based on any new notices of termination.[2] Some tenants, faced with few other options, may now pursue legal challenges to their evictions.

Where a landlord secures a valid notice of termination of a tenancy, a tenant who remains in a property is 'overholding'. An overholding tenant must continue to pay rent, but the landlord's acceptance of this rent does not imply recognition of an ongoing tenancy. The landlord can make a complaint to the Residential Tenancies Board (RTB). Tenants can in turn appeal decisions that go against them internally to the Tenancy Tribunal. Section 123(3) of the Residential Tenancies Act 2004 also allows the parties to appeal to the High Court on a point of law. Landlords can also seek an injunction from the District Court requiring tenants to vacate the property. Tenants can seek judicial review of a decision either of the

[*] I am extremely grateful to Donal Coffey, Hilary Hogan and Finn Keyes for valuable feedback and discussion.

[1] The most recent legislative basis for the ban was the Residential Tenancies (Deferment of Termination Dates of Certain Tenancies) Act 2022. Section 1 of this statute provided that the 'winter emergency period' would extend from October 2022 to 31 March 2023.

[2] Gabija Gataveckaite 'Over 4,300 notices to quit issued to tenants from October to December last year' *Irish Independent* (3 April 2023) <https://www.independent.ie/irish-news/over-4300-notices-to-quit-issued-to-tenants-from-october-to-december-last-year/42416185.html> accessed 1 May 2023; Mark Hilliard, 'Tenant notices of termination increase to more than 5,700 in second quarter after eviction ban ends' *Irish Times* (10 August 2023) < https://www.irishtimes.com/ireland/housing-planning/2023/08/10/most-landlords-issuing-notices-to-quit-cite-selling-as-the-reason-rtb/> accessed 22 November 2023.

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RTB or the District Court, although the costs involved mean that such cases are relatively rare.

In this article, I suggest that Article 40.5 of the Constitution, which protects the inviolability of the dwelling, would be implicated in any case in which the courts must decide whether the law requires them to enforce evictions against tenants. This is the case, I argue, even in cases involving private landlords, and where the tenants continue to occupy the landlord's property in defiance of a valid notice of termination. This does not imply that the courts should never enforce these evictions. My argument is much weaker than that. It is that the constitutional protection of the dwelling is *engaged* in cases involving the eviction of private tenants, and therefore a particular level of justification is demanded before such evictions are enforced.

The argument proceeds as follows. First, I sketch the case law on Article 40.5, from its roots in the criminal process context, through cases in which it was invoked to challenge the demolition of dwellings constructed without planning permission, to its recent successful invocation by a Traveller family challenging an order to leave property which they were occupying illegally. Following this case law analysis, I set out what I view as the best understanding of the moral underpinnings of Article 40.5.[3] My methodology here is interpretive; I aim to give a theory of Article 40.5 that both fits the practice of adjudication around that provision and is independently morally attractive.[4] I argue that the jurisprudence around Article 40.5 demonstrates that the inviolability of the dwelling is underpinned by much more than a concern with 'forcible entry' to one's home by the State. Drawing on recent literature in moral philosophy, I argue that Article 40.5 is underpinned by a concern with the dwelling both as a place of shelter and as a place where important social relationships are constituted. I then draw out the consequences of this moral reading of Article 40.5 and argue that evictions should only follow from the higher level of justification appropriate for cases in which constitutional rights are implicated. I close this section with some reflections on what sorts of considerations might feature in this justificatory analysis.

The Inviolability of the Dwelling

Article 40.5 of the Constitution provides: 'The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.'[5] In this section, I trace the development

[3] I speak throughout of the 'moral' or 'normative' (I use the terms interchangeably) 'underpinnings' of Article 40.5. A key assumption in my argument is that in order to determine whether a particular constitutional provision is implicated in a particular context, we need to understand the moral principles underpinnings that provision, and then ask whether those same principles apply in the new context. For more on this approach, see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1996); Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017); Dimitrios Kyritsis, 'Constitutional Law as Legitimacy-Enhancer' in Dimitrios Kyritsis and Stuart Lakin (eds) *The Methodology of Constitutional Theory* (Hart 2022).

[4] Ronald Dworkin, *Law's Empire* (HUP 1986). For more, see Nicos Stavropoulos, 'Legal Interpretivism' (2021) *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/law-interpretivist/> accessed 2 November 2023; Conor Crummey, 'One-System Integrity and the Legal Domain of Morality' (2022) 28(4) *Legal Theory* 269.

[5] It has been noted that this provision has roots in a broader European constitutional tradition, most notably Article 115 of the 1919 Constitution of the Weimar Republic, but also the 1848 French Constitution, and contemporary constitutions of Belgium, Denmark and Italy. Gerard Hogan and others, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) 2019. See also Hardiman J in *People (DPP) v Cunningham* [2012] IECCA 64.

of the judicial interpretation of this provision. A key question arising from the jurisprudence is what kind of protection Article 40.5 offers, if any, in cases involving purely private relations between landlords and tenants (as opposed, for example, to cases in which a tenant is renting from a local authority). The text of the provision, after all, is concerned with *forcible entry*. Some might argue that it is a mistake to think that such text could apply to the eviction of tenants by a private landlord. What I aim to show in this paper is that when we reflect on the reasons *why* forcible entry is considered a moral wrong, we see that the same moral concern underpins other kinds of cases, including eviction cases. It follows, I argue, that Article 40.5 applies in these cases too. To make out this argument, I will first consider the range of cases in which Article 40.5 has been adjudicated.

The Criminal Procedure Context

For a long period, Article 40.5 claims were confined to the context of criminal procedure; cases in which it was claimed that evidence should be excluded from trial because it was obtained in violation of Article 40.5. In a series of cases, the courts held that Article 40.5 demands a level of substantive justification from the State before its agents are permitted to enter the private homes of individuals.[6] Importantly, the courts rejected the notion that 'save in accordance with law' simply meant that the State must be able to point to any old law on the books. Rather, it meant that if the State is to enter the dwelling of an individual, it must do so 'without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution'.[7] The courts also held that that this protection extended to the occupier of a property, and not just its legal owner.[8]

In *Damache v DPP*, it was established that the courts would strictly construe statutory powers of entry, owing to the impact such powers have on the inviolability of the dwelling.[9] Here, the Supreme Court considered the constitutionality of section 29 of the Offences Against the State Act 1939, which allowed for search warrants to be issued by a Garda officer of a particular rank to an officer of lower rank. Usually, such warrants could be issued only by a judge or Peace Commissioner. The Court found that owing to the interference with the applicant's Article 40.5 rights, the Court must apply a proportionality test to determine the constitutionality of section 29; a test which the provision subsequently failed.

It would be tempting to conclude from this line of cases that what Article 40.5 provides is protection against the State entering one's home. This is undoubtedly a key aspect of Article 40.5, the wording of which does after all make specific reference to forcible entry. The Court in *Damache* made reference to the common law's traditional protection of the home, citing Blackstone's comment: '[E]very man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence'.[10] This concern with State entry follows a venerable common law tradition, in which respect for the dwelling as a space free of State interference is viewed as a key component of the rule of law.[11] Part of what I argue in this paper, however, is that when we reflect on the reasons why we think the dwelling

[6] *Ryan v O'Callaghan* (HC, 22 July 1987).
[7] ibid, per Barr J, citing the judgment of Henchy J in *King v Attorney General* [1981] IR 233.
[8] *People (DPP) v Lawless* (CCA, 28 November 1985); *People (DPP) v Lynch* [2010] 1 IR 543.
[9] *Damache v DPP* [2012] 2 IR 266.
[10] ibid [41], citing William Blackstone, *Commentaries on the Laws of English* (1768). The Court also made reference to *Semayne's Case* (1604) 77 ER 194, in which Coke stated: '[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose'.
[11] *Entick v Carrington* [1765] EWHC KB J98.

should be a place free of State interference, we see that the morally relevant consideration is not the *State* entering one's home, but the value in a home more generally.

I pursue this argument in more detail in the next section, but it is worth noting that even in these cases involving State entry, the primary concern is with the *inviolability* of the dwelling, not with the fact that it is the State doing the violating. Consider the following passage from Hardiman J:

> This constitutional guarantee [in Article 40.5] presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and reinforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2°), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against *all comers*, save in the exceptional circumstances presupposed by the saver to this guarantee.[12]

This is a helpful initial elaboration of the reasons for a dwelling's inviolability. The connection with other constitutional rights is undoubtedly significant. I will argue in the next section that there is also an intrinsic value to the protection of the dwelling beyond this connection with other rights, and a particular harm that is inflicted when the inviolability of the dwelling is compromised. Note for now that Hardiman J states that Article 40.5 protects the dwelling against *all* comers, not just the State. This will be a significant point when considering what sort of protection Article 40.5 affords in the context of purely private relations.

Privacy and Security Beyond the Criminal Context

The application of Article 40.5 has expanded into several areas beyond the criminal process context. In one strand of cases, the courts have emphasised the significance of the dwelling as a place of privacy and security. In *Sullivan v Boylan*, Hogan J states:

> Few things are more important in life than the security of one's own dwelling and the right to come and go from that abode without interference. It is a right which perhaps most of us take for granted. It is only when that security has been threatened by intruders – such as in the aftermath of a burglary – that we realise how important that sense of safety, security and a general sense of repose from the cares of the world actually is.[13]

In this case, a private debt collector repeatedly parked his van, marked 'Licensed Debt Collector', outside Ms Sullivan's home. This pattern of bullying and humiliation, coupled with repeated demands for repayment, was found to breach Ms Sullivan's right to the

[12] *DPP v O'Brien* [2012] IECCA 68 (emphasis added).
[13] *Sullivan v Boylan (No 2)* [2013] 1 IR 510 [1]. Doyle and Feldman criticise Hogan J for taking this horizontal applicability of Article 40.5 for granted. I hope that the account offered here will serve as a fleshed out defence of this horizontal applicability. Oran Doyle and Estelle Feldman, 'Constitutional Law' (2013) 27(1) Annual Review of Irish Law 110, 166.

inviolability of her dwelling.[14] What is most relevant about this case for present purposes is that, as the authors of *Kelly* note, Hogan J 'assumed that Article 40.5 had horizontal effect between private parties, appearing to treat that conclusion as flowing self-evidently from the text of Article 40.5'.[15] Hogan J found the defendant liable in damages for the breach of a constitutional right, notwithstanding the fact that the defendant's conduct did not seem to satisfy the breach of an existing tort.[16]

Schrems v Data Protection Commissioner also provides a helpful example of the heightened justificatory demands that are placed on State conduct when Article 40.5 is impacted.[17] This was a judicial review of a decision of the Data Protection Commissioner to reject Mr Schrems's complaint about the data handling policies of Facebook Ireland. Hogan J referred the issue to the European Court of Justice but made several statements on the application of Article 40.5 to the case that are helpful here. He noted that the inviolability of the dwelling was engaged when State authorities access private communication created within the dwelling. Such an interference with Article 40.5 might satisfy a proportionality test, owing to the 'vital and dispensable' State interests served by such surveillance.[18] However, he noted that wide-scale accessing of personal data by State authorities would be unlikely to satisfy the demands of proportionality.[19]

Taken together, these cases tell us much about the application of Article 40.5. Both demonstrate that Article 40.5 rights can be interfered with in ways beyond forcible entry. *Sullivan* demonstrates that Article 40.5 does have horizontal application. *Schrems* demonstrates that it can demand that State action satisfy a heightened justificatory demand (in this case a proportionality test) where it interferes with Article 40.5 rights. What is arguably still ambiguous is whether these conclusions can be combined. Does Article 40.5 require the courts to apply a proportionality test or something like it when enforcing the demands of private individuals, where those demands impact the Article 40.5 rights of others?

Before turning to this question in earnest, there is another question to be considered. Might we distinguish cases like *Sullivan* and *Schrems* on the basis that the individuals involved in those cases were peacefully enjoying their property, while overholding tenants are acting prima facie unlawfully? Again, a full answer to this question will require an analysis of the moral underpinnings of Article 40.5, but we can gather some initial clues from cases involving unlawful occupation of the dwelling.

[14] This conduct was also found to be unlawful under ss 10 and 11 of the Non-Fatal Offences Against the Person Act 1997, and a breach of Ms Sullivan's rights protecting her person under Article 40.3.2° of the Constitution.
[15] Hogan and others (n 5) para 7.5.43.
[16] It is possible that the award of damages for breach of a 'constitutional tort' such as this could be a remedy available to some tenants in cases of eviction. I do not explore this point fully here, as I wish to focus on the prior question of Article 40.5's applicability in the context of evictions, but a fuller consideration of this remedy in this particular context would be well worthwhile. I am grateful to Donal Coffey and Finn Keyes for discussion on this point.
[17] *Schrems v Data Protection Commissioner* [2014] IEHC 310.
[18] ibid [49].
[19] ibid [52]. The privacy dimension of Article 40.5 was also emphasised in *CA v Minister for Justice* [2015] IEHC 432, in which Mac Eochaidh J held that unannounced room inspections and the prohibition on guests in family rooms for those living in direct provision was contrary to Article 40.5.

Unlawful Occupation and Article 40.5

Planning Permission and Demolition

The first line of cases concerns not unlawful occupation of dwellings, but rather their unlawful construction. While the courts have stepped away from an initially robust application of Article 40.5 in this context, I argue in the next section that these cases are still useful in helping us to draw out the underpinnings of Article 40.5.

In the first of these cases, the court considered an application by Wicklow County Council for a demolition order on a property that had been built without planning permission in an area of outstanding natural beauty.[20] Hogan J held that Article 40.5 extended to civil law issues such as these, and noted that the Constitution afforded stronger protection to the dwelling than Article 8 of the European Convention on Human Rights (ECHR).[21] In order to justify the demolition of the dwelling, the Council would need to show that that 'continued occupation[…] would be so manifestly at odds with important public policy objectives that demolition was the only fair response'.[22] When the case came back before the Court, it was held that the Council had failed to make out this justification.[23]

Hogan J's judgment in *Fortune* received an unusually stinging rebuke from another judge the next time a similar issue came before the High Court. Kearns P, in another case concerning an application for demolition of a premises constructed without planning permission, said that the notion that there was 'some freestanding application' of Article 40.5 in these circumstances was 'beyond this court's comprehension, particularly having regard to the huge public and community interest in protecting the environment and the integrity and efficacy of planning law enforcement'.[24] He said also that 'the *Damache* case had absolutely nothing to do with planning laws or the enforcement of same'.[25]

Below, I argue that Kearns P asserts too much in these statements. While it is true that Hogan J may have demanded too much by way of justification, he was correct to hold that Article 40.5 is engaged in cases such as these, and that its mode of operation is increasing the level of justification that individuals have standing to demand from the State. For now, however, it should be noted that this retreat from Hogan J's initial position was confirmed in a subsequent case before the Supreme Court. In *Murray v Meath County Council*, the Court found

[20] *Wicklow County Council v Fortune* [2012] IEHC 406.
[21] ibid [36]. The position under the Convention is somewhat different. The ECtHR has held that where the rights of tenants and private landlords conflict, the correct balance can be struck through domestic legislation; see *FJM v United Kingdom* App no 76202/16 (ECtHR, 6 November 2018), re-affirming the holding in *Vrzic v Croatia* App no 43777/13 (ECtHR, 21 June 2016). Where the State fails to comply with whatever procedure is set out in domestic legislation, they will be in violation of Article 8. The Court has also held, in *Jansons v Latvia* App no. 1434/14 (ECtHR, 8 September 2022), that overholding tenants are entitled under the Convention to the protection of the police if they call upon it. I do not consider Convention law in further detail in this article, but my claims here could be read as elaborations of Hogan J's claim that Article 40.5 of the Constitution offers stronger protection than Article 8 of the ECHR in the context of tenants and private landlords. My thanks to Donal Coffey for helpful discussion on this point.
[22] ibid [42].
[23] *Wicklow County Council v Fortune (No 2)* [2013] IEHC 255.
[24] *Wicklow County Council v Kinsella* [2015] IEHC 229.
[25] ibid.

that Hogan J put too much weight on the fact that the property in *Fortune* was a dwelling.[26] McKechnie J stated also that Hogan J had paid insufficient attention to the idea of 'forcible entry' in the text of Article 40.5. They did not suggest that this was the only context in which Art 40.5 operated, but rather suggested that its focus would 'primarily' be on search and seizure issues.[27]

In later sections, I argue that the judgment in *Murray* is reconcilable with the idea that Article 40.5 demands increased justification of the State in eviction cases. Cases in which the State enforces evictions on behalf of private individuals, I argue, are indistinguishable from cases in which the State does so on its own behalf. First, though, I will consider the picture of the jurisprudence on Article 40.5.

Trespass Cases

Another line of cases concerns not dwellings constructed unlawfully, but dwellings that are either occupied unlawfully or stationed unlawfully on another's land. Several of these involve members of the Traveller community asserting Article 40.5 rights in the face of applications to have them removed. The principles that can be drawn from these cases are very relevant to the eviction context.

At first, these applications tended to be unsuccessful. In *McDonagh v Kilkenny County Council*, for example, the argument that Art 40.5 required an inquiry to be conducted before a direction to move off private land was issued against a Traveller family was rejected.[28] O'Neill J emphasised the unlawful occupation of the land in the course of rejecting the Article 40.5 argument:

> Like all human beings the applicants are entitled to the protection of Article 40.5 of the Constitution which protects the inviolability of the dwelling. However, this protection does not entitle the applicants individually or as a family group to invade somebody else's land and establish their dwelling upon it. In other words, the protection given by Article 40.5 cannot be used simply to shield against an unlawful infringement of someone else's rights.[29]

Similarly, in *Dublin City Council v Gavin* the argument that a Traveller family had nowhere else that they could lawfully go if ejected from the land in question was not accepted, with Peart J saying it would lead 'to social and environmental chaos, and an unrestrainable trampling on the property rights of others in the future'.[30]

The argument that families made to leave land that they are occupying unlawfully would be forced to trespass elsewhere is an important one in the context of evictions. The argument made by the families in *McDonagh* and *Gavin* was, in effect, that Article 40.5 gives particular

[26] *Murray v Meath County Council* [2018] 1 IR 189. The Murray family, having been refused planning permission, proceeded to build a property approximately twice the size of the one for which planning permission had been refused.
[27] ibid [117]. As the authors note, McKechnie J himself noted in an earlier case that Article 40.5 operated beyond the criminal procedure context: *Reid v Industrial Development Agency* [2015] IESC 82.
[28] *McDonagh v Kilkenny County Council* (HC, 23 October 2007).
[29] ibid 18-19.
[30] *Dublin City Council v Gavin* [2008] IEHC 444. Peart J nevertheless refused to grant the injunction in this case on the grounds that it would simply force the family to trespass elsewhere.

protections to the dwelling when individuals in effect have no other choices available to them. In rejecting this argument, the judgments in these cases could be read as authority for the proposition that Article 40.5 'only protects lawful occupation of dwellings and that trespass onto private property is illegal regardless of the plight of the trespasser'.[31] These cases, however, must now be read in light of the more recent Supreme Court judgment of *Clare County Council v McDonagh*.[32]

Here, a Traveller family successfully argued that Article 40.5 demanded a heightened level of justification before the Court could order their removal from Council land on which they were living in a mobile home. The Council, it was held, failed to meet this justification. Key to this holding was the fact that the Council had failed to secure Traveller-specific accommodation for the family. Hogan J, now on the Supreme Court, emphasised that while the Court in *Murray* may not have accepted the full substance of his earlier decision in *Fortune*, they did accept the main premise of that decision, ie that removal from one's dwelling gives rise to a heightened justificatory requirement:

> [G]iven the drastic nature of a demolition order in respect of a private dwelling, it is necessary that a proportionality analysis be first conducted by a court prior to the making of such an order. While McKechnie J disagreed with my analysis in the two *Fortune* decisions this was largely because I had given insufficient weight – perhaps it would even be more accurate to say, wholly insufficient weight – to considerations based on the integrity of the planning process and the role of the planning authorities. But he did not, I think, disagree with the conclusion that a proportionality analysis should be conducted before the making of a s. 160 order: where I had erred in *Fortune* was in respect of both the identification and the weighing of these factors.[33]

It seems, then, that Article 40.5 offers protection even where land is occupied unlawfully. Hogan J did cast doubt on the applicability of this principle if private landowners were involved: 'If in this situation the applicant for such relief was a purely private party, then the case for the granting of interlocutory relief would, at least generally speaking, be almost unanswerable.'[34] Some might argue that this definitively settles the question of whether Article 40.5 applies in cases involving private landlords. I suggest below, however, that it would be a mistake to read this judgment as authority for the claim that a heightened demand for justification is not *required* in such cases. Rather, it is the case that the property rights of private landowners feature as *part of* such a justification, eg as part of a proportionality analysis.[35]

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[31] Hogan and others (n 5) para 7.5.60.
[32] *Clare County Council v McDonagh* [2022] IESC 2.
[33] ibid [92].
[34] ibid [104].
[35] I prefer to speak in general terms about the level of justification required, rather than of proportionality specifically, to leave open the possibility of some other test being used. What matters for the purposes of my argument is simply that tenants have standing to demand a particular level of justification. While I frequently refer to proportionality throughout, this is just one articulation of such a justificatory requirement. See George Letsas, 'Proportionality as Fittingness: The Moral Dimension of Proportionality' (2018) 71(1) Current Legal Problems 53. Some might argue, for instance, that following *Tuohy v Courtney* [1994] 3 IR 1, a rationality test is appropriate in a case where competing rights are at issue. What precise justificatory requirement is appropriate is a question I leave to others. The answer to this question is likely to differ in any case depending on the particular circumstances of each case.

Importantly, *McDonagh* establishes that the seriousness of the consequences faced by those involved if forced to leave their dwelling has a bearing on the protection afforded to them by Article 40.5. Moreover, it is authority for the proposition that the State's failure to mitigate or avoid these consequences has a bearing on the protection afforded by Article 40.5. This will be of particular relevance in the context of evictions, where many tenants face eviction into homelessness as a result of the failure of the State to provide emergency accommodation.[36]

It also seems to establish that the kind of accommodation offered to those whose Article 40.5 rights are affected may partly determine the proportionality of orders sought against them. In *McDonagh*, the Council had failed to secure Traveller-specific accommodation. In the case of the present wave of evictions, the State will in many instances fail to provide *any* accommodation. Where it does, this accommodation will often be unsuitable for some, such as for families or disabled persons.[37]

A more recent High Court decision may cast some doubt on this aspect of my argument. In *Murtagh v Cooke*, an injunction was granted restraining from trespass two tenants whose existence was not known to the buyer of a property when he purchased it.[38] Phelan J followed *McDonagh* in holding that a proportionality test had to be carried out before the injunction could be granted.[39] However, the applicant was unsuccessful in arguing that the likely consequences for his health and livelihood – he had suffered from addiction issues and argued that he was unlikely to secure accommodation elsewhere – meant that an injunction would be a disproportionate interference with his Article 40.5 rights. Nevertheless, the fact that this claim featured as part of the proportionality analysis carried out is itself support for my overall argument here. Phelan J said:

> [I] accept that the Named Defendant/Appellant suffers ill-health, that he is a recovering addict who has been able to find work in recent times and that he is rebuilding his life but will have significant difficulties in sourcing suitable alternative accommodation with potentially far reaching adverse sequalae for him in terms of his health, life and work. I take full cognizance of these factors in reaching my decision in this case.[40]

The fact that such factors feature in an Article 40.5 analysis is deeply significant. The factual circumstances in *Cooke* were rather idiosyncratic. The property owner had not known that there were tenants with a lawful leasehold when they bought the property, and the tenants had attracted claims of nuisance, thus impacting the property rights of the owner in a particular way. It is arguable that the proportionality analysis would come out differently in cases where tenants do not attract such claims, such as where the property owner is aware of their presence.

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[36] There is, moreover, an important difference between the context of *McDonagh/Gavin* and the context of evictions, which is that the individuals in the former get to keep their dwelling, though they have to move it elsewhere. I will return to this point in subsequent sections.

[37] The toll of moving to emergency accommodation generally cannot be overstated. See the report of the Ombudsman for the Children's Office, *No Place Like Home: Children's Views and Experiences of Living in Family Hubs* (2019), available at: <https://www.oco.ie/app/uploads/2019/04/No-Place-Like-Home.pdf> accessed 21 April 2023.

[38] *Murtagh v Cooke* [2022] IEHC 436.

[39] ibid [75].

[40] ibid [78].

Cases involving failure to meet financial requirements to remain in one's home

There is one final context which will have obvious relevance to the eviction context. In *Irish Life and Permanent v Duff*, Hogan J held that Article 40.5 could be relied upon by a person facing repossession of their home as a result of a failure to meet mortgage repayments.[41] Here, Article 40.5 was also applied horizontally in the context of purely private relations. It was held there must be a judicial procedure in place to determine whether a mortgagee is entitled to recover possession from a defaulting mortgager. This was a purely procedural requirement; the Court indicated that it would not itself demand substantive justification before recovery of possession was ordered.

Applying this to the context of evictions, the question is whether procedural guarantees, such as those that are provided by the RTB and the courts themselves, satisfy the demands of Article 40.5. I argue below that the context of evictions is closer to the criminal law context, in which substantive justification is demanded.

Conclusions: Summary of key principles

This section has served to survey the courts' Article 40.5 jurisprudence. In the next section I give an account of the normative underpinnings of these decisions, that we might have a better idea of how Article 40.5 might apply in the context of evictions. First, it may be worth summarising some of the main principles found in the cases. The most significant of these for the present analysis are as follows:

I. In the criminal procedure context, Article 40.5 gives rise to a demand for substantive justification before the State takes an action that interferes with the inviolability of the dwelling.
II. Article 40.5 operates outside the criminal procedure context, in cases involving planning disputes, harassment, digital privacy, and trespass.
III. Article 40.5 has horizontal effect. That is, it affords protection even where the interference with the dwelling comes from a private individual, rather than the State.[42]
IV. Article 40.5 gives rise to procedural guarantees in cases involving repossession where one fails to meet the financial obligations necessary to continue in one's dwelling.
V. The seriousness of the consequences faced by those whose enjoyment of their dwelling is interfered with features in an analysis of the justification for the interference.

This is all just a starting point. It is unclear at present whether these same points apply in the eviction context. If Article 40.5 does apply in that context, it is unclear what *kind* of justification will be required. Will it be as strong as that required in the criminal law context? Or will the existence of some legal procedure do the job? In order to assess these sorts of questions, we need to ask whether the approach taken by the courts tracks some relevant moral principles. If it does, these principles will determine the application of Article 40.5 in novel contexts. Put more simply, if we want to establish whether the dwelling is protected in a particular context, we need to know more about why the dwelling is valuable to begin with, and why interference with it is a moral wrong.

[41] *Irish Life and Permanent v Duff* [2013] IEHC 43.
[42] In most of the cases that demonstrate this, the Court does not engage in detailed reasoning explaining *why* Article 40.5 has horizontal effect. My argument in the remainder of this paper should be read partly as an attempt to supply such reasoning.

The Moral Underpinnings of the Dwelling

The home plays an important role in our personal and social lives. It is where we plan our lives and form many of our most intimate relationships. It is also the site of a complex nexus of rights and responsibilities. We owe obligations of different kinds to those who share our homes with us, to neighbours on our street, to our landlords, to the bank etc. We also have rights; to be left alone if we want to be and to have our authority over our home respected. In this section, I consider some of the key values underpinning the concept of the home. This will give us a clearer idea of why we would want to protect the 'inviolability' of a dwelling, and therefore a clearer idea of precisely what it is that Article 40.5 entitles us to.

Freedom, Shelter, and Basic Needs

Jeremy Waldron characterises the problem of homelessness as a problem of freedom.[43] The great wrong committed against those without homes, Waldron thinks, is the denial of the space in which to perform their 'basic needs': eating, sleeping, urinating, defecating etc. That we generally restrict people from doing this in public while simultaneously failing to ease the conditions which leave many with no space to do so in private is, he argues, one of the 'most callous and tyrannical exercises of power in modern times by a (comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings'.[44]

Waldron is right that such a concern with fulfilling basic human needs is surely one central aspect of having a place of our own. We might also note the impact on our autonomy when such basic needs are not guaranteed. Raz uses the example of a person being chased around an island by a monstrous creature to illustrate one way in which we can lack autonomy.[45] When we lack an adequate range and diversity of options, when every decision is geared towards avoiding an urgent calamity, we cannot truly be said to be autonomous beings, in control of our lives.

Evidently, however, there are aspects of homelessness and types of displacement from one's home that are not captured by the concern with shelter. Individuals who couch-surf with friends or family can arguably be considered homeless.[46] So too can those housed in emergency accommodation. Many homeless people can shower and use the lavatory at gyms or even in work.[47]

Concern with the dwelling as a place of shelter must surely feature in an account of the normative underpinnings of Article 40.5. It makes sense to think that one reason why one's

[43] Jeremy Waldron, 'Homelessness and the Problem of Freedom' (1991) 39 UCLA Law Review 295. See also 'Homelessness and Community' (2000) 50(4) University of Toronto Law Journal 371; 'Community and Property – For Those Who Have Neither' (2009) 10(1*)* Theoretical Inquiries in Law 161.
[44] Waldron, 'Homeless and the Problem of Freedom' ibid 301-2.
[45] Joseph Raz, 'Autonomy and Pluralism' in *The Morality of Freedom* (OUP 1988).
[46] As Jenkins and Brownlee note, whether one considers these states of affairs 'homelessness' depends on one's circumstances. A single person in their early twenties might consider couch-surfing quite normal, while this is unlikely in the case of others, such as a family of four. David Jenkins and Kimberley Brownlee, 'What A Home Does' (2022) 41 Law and Philosophy 441, 447.
[47] According to the charity Mendicity, in 2022 around one quarter of homeless clients who approached them for help were employed. Noel Baker, 'One quarter of charity's clients are working but homeless' *Irish Examiner* (10 September 2022) <https://www.irishexaminer.com/news/arid-40958183.html > accessed 21 April 2023.

dwelling is inviolable is because it is a place of s*helter*; a place within which we attend to the basic needs that Waldron speaks of. Equally clear, however, is the fact that this concern with shelter is not all that underpins Article 40.5. In *McDonagh*, for instance, the family's removal from Council land would not have impacted their shelter at all. Their dwelling would have moved with them. Yet the inviolability of their dwelling had been breached by the attempts to move them on.

Even in the more traditional criminal process cases thought to represent the focal applications of Article 40.5, the concern is not primarily with shelter. When the police come through the door without a valid warrant, it is not obvious the harm done is best characterised as a restriction of the freedom to attend to our basic needs. Part of this is a particular concern tracked by the 'forcible entry' aspect of the provision. There is something especially objectionable about the State entering your dwelling without permission. But in order to be considered objectionable, this must track something morally relevant about the dwelling itself. If that is not fully captured by the importance of shelter to attend to one's basic needs, then we must look elsewhere.[48]

Valuable Activities, Social Relationships, and Freedom from Arbitrary Control

According to Christopher Essert, homelessness is defined by the absence not just of shelter within which to perform basic tasks, but of *exclusive control over* such shelter.[49] The home, for Essert, is a place where one is not 'under the power of others – to be dominated by them or dependent on them –in respect of where (they) may be'.[50] Homelessness, then, is defined by the absence of property rights that give one exclusive control over one's environment.[51]

Developing his account of what might ground such rights, Essert claims that rights to exclusive control over one's property allow for the constitution of 'valuable activities and relationships'.[52] The fact that certain activities are performed *in a home* transforms the kind of activities that they are:

> A right to determine others' presence marks the difference between a group of strangers eating at the same table at the same time and a dinner party, between sleeping rough and spending a night under the stars in the backyard, between, we are drawn to say, a house and a home.[53]

As Jenkins and Brownlee point out, however, while it is true that one's home can be a site of valuable activities and relationships, it is difficult to see a necessary connection with property rights. One can pursue many valuable activities and form relationships within spaces over which one does not have control. Equally, one can have exclusive control over spaces within which one cannot pursue such ends, such as in accommodation that is severely over-crowded.[54] While property rights may act as important tools in securing the interests that

[48] To be clear, my argument here is not against Waldron's account of homelessness. My argument is a narrower one: that this account cannot by itself explain the moral concerns underpinning Article 40.5.
[49] Christopher Essert, 'Property and Homelessness' (2016) 44(4) Philosophy and Public Affairs 266.
[50] ibid 266.
[51] ibid.
[52] ibid 286.
[53] ibid 279.
[54] Jenkins and Brownlee (n 46) 452.

Essert speaks of, in other words, their role in securing the value of a home is ultimately contingent.

Jenkins and Brownlee go on to build on Essert's notion of 'valuable activities'. According to them, many of these activities are inherently *social*. There is an important connection, on this view, between inhabitation of a home and our ability to form the intimate relationships that make the pursuit of valuable activities possible. Homes, they argue, are 'social spaces in which we are welcome, respected, and accepted, and we know we belong irrespective of our legal rights to occupancy'.[55]

Barbara Herman also views housing as having a distinctively social dimension, but she views this as connected with the status of individuals within *civic society*.[56] She invites us to see housing not as a welfare right but as a 'status entitlement', something owed to members of civic society *qua* members of civic society, because it is needed to guarantee basic independence and freedom to pursue one's aims without being subject to the arbitrary decisions of others.[57] In a paragraph worth quoting at length, she states:

> [Housing] is at once an anchor of citizenship and a condition for having a personal life. It is a place for rest, the site of family relations (in some places, for friendship as well); it is a location or orientation in the social world, a possible site of work, and a space for personal expression. So more than having a place to live, a roof over one's head. The needs this right meets are not an aspect of natural ethology, not like the hive to a bee or the den to a bear; it is an artifact of a social world in which the absence of modern sanitation and electricity is a form of social disability, not just a disadvantage.[58]

A home, on this view, is a place where we can live a relatively stable life with others in civic society. This is perhaps why we might think that a Direct Provision centre is not a home, despite providing shelter and security.

The emphasis on the social dimension of the dwelling is helpful for making sense of the ways in which homelessness and displacement cut across situations of very different kinds. It explains, for example, why couch-surfing in one's early twenties may feel perfectly normal, while a family of four staying temporarily with a close friend may feel cut adrift.[59] It is because the value of a home, and therefore the harm in being removed from one's home, has an important social dimension, meaning that both the value and the harm change depending on one's particular social context.

The account also allows us to see that persons with rights over a particular piece of property might nevertheless lack a 'home' in the full, meaningful sense. Living in overcrowded accommodation, for instance, may make it more difficult to form the sorts of intimate relationships that a home makes possible. Young people forced to remain in their parents' home, similarly, may feel that they lack a 'home' in some meaningful sense because they feel

[55] ibid 460.
[56] Barbara Herman, *The Moral Habitat* (OUP 2022).
[57] ibid 245.
[58] ibid 240.
[59] ibid 459.

inhibited from pursuing expressions of intimacy like sex, or because they feel some shame or guilt towards their parents for burdening them.

The emphasis on the social dimension of a home explains the reflexive anger one feels at that familiar story: the landlord claiming that they need to give the property to a family member, only to see the property appear on rental websites later, usually at a higher price. The landlord here in effect appeals to the same bonds of family and intimacy that the tenant currently enjoys. But they appeal also to a form of legitimate partiality; the idea that it is acceptable to favour *one's own family*, all other things being equal.[60] This sort of deception feels cutting because it appeals dishonestly to a particular kind of moral justification with which the tenant can empathise, concerned with the deep connection between a home and intimate relationships.

As with Waldron's account, there is much that is useful here when thinking about Article 40.5. We might note that the notion of the home as a space where valuable relationships are constituted sits neatly with the use of the phrase 'slán' in the Irish text of Article 40.5.[61] As Ó Cearúil notes, this phrase is used to connote 'sound, healthy, safe'.[62] A constitutional concern with the health and safety of one's home seems a concern with more than just a place to take care of one's basic needs.

When considering the wrong done to Ms Sullivan when a van marked 'Licensed Debt Collector' parked outside her house, surely part of the story must be the attempt to reduce her standing in the eyes of her friends and neighbours, to humiliate her and potentially harm her relationships with others. Similarly, the social dimension of the home makes good sense of Hardiman J's statements in *DPP v O'Brien*, that Article 40.5 'complements and reinforces' the protection of the family, of the person, of the rights of children etc. Article 40.5 protects a space within which valuable human activities can occur and relationships can be formed.

Or consider the conduct of the Gardaí in *Omar v Governor of Cloverhill Prison*:

> [T]his officer told Ms. Omar to back her bags. When Ms. Omar asked for a few more minutes to gather her belongings, the officer told her to hurry up and said that there was little time […] The officer told Ms. Omar to wait until the last minute before rousing her son from his sleep.[63]

Hogan J found this evidence 'deeply disturbing', noting that this was a particularly serious violation of Article 40.5.[64] Again, when we see the connection between the home and the intimate relationships constituted by it, it is clear why such actions by the Gardaí should be considered particularly serious constitutional violations.

Of course, Article 40.5 does not guarantee protection of the *home*, but of the dwelling. Might it be contended that the account of the moral underpinnings of the home that I give here serves as an argument for why the State is morally required to provide adequate housing, for instance, but is irrelevant to the more limited protection of the dwelling?

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[60] Thomas Nagel, *Equality and Partiality* (OUP 1991).
[61] The full Irish text reads: 'Is slán do gach saoránach a ionad cónaithe, agus ní cead dul isteach ann go foréigneach ach de réir dlí.' I am grateful to Donal Coffey for bringing this point to my attention.
[62] Micheál Ó Cearúil, *Bunreacht na hÉireann: A Study of the Irish Text* (Office of Public Works 1999) 571.
[63] [2013] IEHC 579 [31].
[64] ibid [32].

It would be a mistake, in my view, to divorce the concepts of 'dwelling' and 'home'. Jenkins and Brownlee put forward a conceptual 'ladder' of home-related concepts that can help us here. They begin with 'temporary shelter', then 'permanent shelter', 'housing' and a 'home'.[65] The top rung of the 'ladder' helps us to understand the rung below. Shelter and housing, while important in their own ways, are also important because they are steps towards a home in the thicker sense. If the dwelling is 'inviolable' then we must understand what it is that a dwelling is for and why it is valuable. It would be a mistake, then, to think that just because Article 40.5 does not require the provision of all the conditions necessary for the constitution of a 'home', that it follows that Article 40.5 is not underpinned, at least partly, by the value of a 'home'. The things that make a home valuable, that ground a positive moral right to a home, also feature in determining the negative protection of the home that we happen to have. The fact that the Constitution protects the inviolability of the dwelling without providing for an obligation to provide such dwellings, then, is neither here nor there.[66]

Jenkins and Brownlee's ladder can help us to distinguish between different sorts of eviction cases. My argument in this paper is that Article 40.5 demands a heightened level of justification before a tenant is ordered by the courts to leave their home. Whether this demand is satisfied will depend on contextual factors. For example, if no emergency accommodation is available, then the evicted tenant will not even have temporary shelter, and it would be very difficult to justify their eviction. If such shelter is available, that counts towards justification, but even that is only *temporary shelter*, and the courts must still take account of the harm done in moving a person 'down the ladder', so to speak, from their own accommodation to temporary shelter.[67]

What this also explains is why the courts have been correct to hold that Article 40.5 applies horizontally, in the regulation of private relations. If the home is a space where the relationships that make valuable human activity possible occur, then it matters little where the interference with that space comes from. We are entitled to demand that the State use its force on our behalf in defending that right against others; not just that the State refrain from violating that right itself.[68] Tenants have standing to demand justification when their home is interfered with *because it is their home*, not because of who interferes with it.[69]

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[65] Jenkins and Brownlee (n 46). For similar discussion of the relationship between concepts of shelter, house, home etc., see Lorna Fox O'Mahony, 'Creditors and the Concept of "Family Home": A Functional Analysis' (2005) 25(2) Legal Studies 201; Lorna Fox O'Mahony and Louise Overton, 'Asset-Based Welfare, Equity Release and the Meaning of the Owned Home' (2015) 30(3) Housing Studies 392.

[66] The moral analysis of the dwelling that I give here would, I believe, be relevant in the event that the Constitution was amended to provide for a specific right to housing. To interpret what that right entitles us to in more concrete terms, we will still need to engage with the moral underpinnings of the home.

[67] Drawing on the philosophy of mind, Cara Nine talks of the harm done in disrupting our sense of 'place attachment'. One's home is a feature of the 'extended mind', and displacement from it causes cognitive harm. Cara Nine, 'The Wrong of Displacement: The Home as Extended Mind' (2018) 26(2) Journal of Political Philosophy 240.

[68] For more on the State's responsibility to regulate private relationships in which one party is vulnerable to the arbitrary whims of others, see Jeff King, 'The Rule of Law' in R Bellamy and J King (eds) *The Cambridge Handbook of Constitutional Theory* (CUP, forthcoming 2024) <https://ssrn.com/abstract=4487306> accessed 22 November 2023.

[69] For the avoidance of doubt, when I refer throughout to the 'standing' to demand justification, I am not using 'standing' in the technical legal sense, but rather in the sense in which it is used in moral philosophy. See in particular Stephen Darwall, *The Second Person Standpoint: Morality, Respect, and Accountability* (HUP 2006).

Unconstitutional Evictions

We are now in a position to reconsider the application of Article 40.5 in the context of evictions. If Article 40.5 is underpinned by a concern with the home as a place of social value, how should the courts approach cases in which they are asked to enforce the evictions of overholding tenants?

Does Article 40.5 apply and what kind of justification does it demand?

First, we must ask the initial question of whether Article 40.5 applies at all in cases involving disputes between tenants and private landlords. It should be evident by now that the answer here is that it does. While the courts have been relatively clear that Article 40.5 applies horizontally, they have not always offered a fleshed-out explanation for this. Having reflected on the moral underpinnings of Article 40.5, we can now offer reasoning to support the horizontal application of Article 40.5. The inviolability of the dwelling is important because a dwelling over which one has control makes possible the constitution of particular kinds of human relationships – those that are essential to our status as civic participants. This value is compromised when that space is violated, whether by the State or by private individuals.[70] Tenants have standing to demand justification when their home is entered *because it is their home*, not because of who enters it.

Moreover, the distinction between so-called vertical and horizontal application of constitutional rights is unclear in this context. The State does play a role in violating the individual's dwelling in cases of eviction. The landlord calls on the State to use its monopoly on coercive force on his or her behalf when enforcing evictions. Whether it is a local authority or a private landlord, the tenants' experience is the same: State machinery is brought to bear on them. The same rule of law concern that is engaged when the State barges through the door on foot of an unconstitutionally obtained warrant, then, is engaged when the State barges through the door on behalf of a private individual.

Perhaps some might charge me with being selective in my interpretation of the courts' jurisprudence. In *McDonagh*, after all – the most recent Supreme Court statement on the matter – did the Court not urge incrementalism in the development of Article 40.5, as well as urge caution about whether Article 40.5 would apply to private landlords?[71] Is this reticence not a factor that needs to be considered when attempting to make moral sense of the case law on Article 40.5?

We can defuse the first point, on incrementalism – the claim that we should not develop Article 40.5 too quickly – simply by noting that the courts already do apply Article 40.5 horizontally, as the canvassing of case law in previous sections has shown. The application of Article 40.5 in the context of evictions, then, should not be considered a radical reinterpretation of the constitutional provision, but merely the application of settled principles in a novel context.[72]

[70] To take an analogy with other rights, imagine that a private security firm is employed by a wealthy donor to prevent certain citizens from voting. The important point here seems to be the that a right of deep civic importance has been violated, regardless of who violated it.
[71] I am grateful to an anonymous reviewer for pushing me to consider this point in greater detail.
[72] It is worth adding here that part of the reason why a constitutional provision might not have been developed in the context of evictions may well be that tenants have lacked the resources to bring the litigation that would

On the second point – the supposed urging of caution on the horizontal application of Article 40.5 in the private landlord-tenant context – it is worth considering the Court's reasoning in detail. Hogan J says:

> These are special and particular considerations which, it is important to stress, would not apply, for example, in the case of a private landowner seeking an injunction to restrain trespass. In that situation any Article 8 ECHR issues would not in strictness even arise by way of possible defence as the litigation would then be between purely private bodies. The courts are not themselves "organs of the State" for the purposes of s. 1(1) of the 2003 Act, save, of course, for the interpretative obligation imposed on the courts by s. 2(1) of that Act to ensure that, whenever possible, a statutory provision is construed "in a manner compatible with the State's obligations under the Convention provisions": see generally, *Kinsella v. Kenmare Resources plc* [2019] IECA 54, [2019] 2 IR 750 at 783, per Irvine J. So far as constitutional considerations are considered, the courts' first duty would normally be to ensure, in the words of Article 40.3.2°, that the property rights of the private landowner to protect his or her own property were adequately vindicated, whether by means of an order restraining trespass or otherwise.[73]

On one reading, this could be taken as a denial of the possible horizontal application of Article 40.5. On closer consideration, however, it becomes clear that this is not the case. First, it is important to note that Hogan J stresses specifically that Article 8 ECHR would not apply in cases involving a landlord seeking to restrain trespass.[74] In the same judgment, Hogan J takes pains to point out that Article 8 ECHR offers a weaker protection of the dwelling than Article 40.5 of the Constitution.[75] This passage should not, then, be read as a claim that Article 40.5 does not apply in the context of private landlords, particularly given Hogan J's horizontal application of that provision in other cases.

What Hogan J does say, in relation to the Article 40.5 issue, is that the court's 'first duty' would 'normally' be to ensure that a landlord's property rights are vindicated through an order restraining trespass. How are we to interpret this? On one reading, it means that a tenant cannot rely on Article 40.5 at all in cases involving a private landlord. In my view, however, this would be a misreading. First, even if the 'first duty' of the Court would 'normally' be to vindicate property rights in cases involving evictions (and I cast doubt on this below), this is consistent with the broader claim that I make in this article, ie that the courts in eviction cases must still consider the constitutional rights of *both* landlords and tenants. My argument is that tenants have standing to demand a certain level of justification before their Article 40.5 rights are interfered with. Saying that a landlord's property rights must be vindicated can feature as *part of* such a justification. It might be that in most cases, the landlord's property rights will provide a sufficiently strong justification for the courts.

lead to such a development. The development of constitutional property rights, by contrast, has been aided by the existence of a base of litigants with the resources to defend their constitutional rights in court. I am grateful to Somhairle Mag Uidhir for discussion on this point.

[73] [2022] IESC 2 [98].

[74] Rachael Walsh, 'Property, Proportionality, and Marginality' (*Verfassungsblog*, 4 February 2022) <https://verfassungsblog.de/property-proportionality-and-marginality/> accessed 25 August 2023.

[75] [2022] IESC 2 [46].

What is important to note is that this does not displace the demand for justification and does not demonstrate that Article 40.5 does not apply at all in eviction cases.

Secondly, however, there is reason to doubt whether it would remain the 'first duty' (however we interpret that phrase) of the Court to vindicate property rights in cases involving overholding tenants. It is important to note that in the passage above, Hogan J is discussing the displacement of a Traveller family from council land (or from private land, in the hypothetical example being considered). The family would still have possession of their dwelling in the event that they were restrained from trespassing. This is not the case for tenants facing eviction – the interference with the inviolability of their dwelling is arguably of a very different and more serious kind, and so it is not clear that the property rights of landlords would necessarily hold greater weight than the Article 40.5 rights of tenants in such cases.

The passage from *McDonagh* quoted above then, is best read as authority for the following set of propositions. First, Article 8 ECHR does not entitle trespassers to the same protection against private landlords as it does towards local authorities. Secondly, the property rights of private landlords will generally be afforded a great deal of weight (and may in practice be insurmountable) when considering whether trespassers can rely on Article 40.5 in resisting removal from private land (where the trespassers still retain possession of their 'dwelling'). It would, however, be far too great a leap to argue that this passage is authority for the proposition that Article 40.5 does not apply at all in private landlord-tenant relationships.

If tenants do have standing to demand justification when their Article 40.5 rights are interfered with, the next question is what kind of justification should be demanded. In *Irish Life and Permanent v Duff*, Hogan J held that a person who had failed to meet their mortgage payments was entitled to a process guaranteeing 'those elements of formal notice, foreseeability and an independent determination of the objective necessity for possession of the dwelling' before an order for repossession would be granted.[76] These guarantees, he said, 'cannot be assured outside the judicial process or, at least, something akin to the judicial process'.[77]

On one view, this is a purely formal or procedural requirement. The subheading under which this case is discussed in *Kelly: The Irish Constitution* is entitled 'Procedural rights flowing from Article 40.5'.[78] It would be a mistake, however, to think that there is not a substantive dimension to this requirement. Hogan J makes clear that persons in the position of Ms Duff are entitled to a 'determination of the objective necessity' of this particular interference with their Article 40.5 rights. This is a right to justification of a particular kind, not just to a particular process.

As we saw above, in other contexts, it has been found that Article 40.5 gives rise to heightened demands of justification. In the criminal procedure context, statutes granting entry powers to the police will be strictly construed.[79] In *Schrems*, it was established that the interception of private communications in the home would have to satisfy a proportionality

[76] [2013] IEHC 43 [50].
[77] ibid.
[78] Hogan and others (n 5) para 7.5.55.
[79] [2012] 2 IR 266.

test.[80] Similarly in *Clare County Council v McDonagh* it was held that a proportionality test would be required even where a family was occupying council land unlawfully.[81]

Given that, as I have argued above, there is no meaningful difference between violations of Article 40.5 by the State and those by private individuals, it seems to me to follow that a heightened justificatory demand, such as a proportionality test, is required before eviction orders are enforced against overholding tenants. There may of course be reasons in favour of enforcing evictions. Perhaps the tenant has not paid their rent in over a year. Or perhaps the impact on a particular tenant is not as serious as it might be on others, because they have family to stay with, for instance. Or perhaps the landlord wishes to move back into the property themselves and make it their home. Crucially, however, none of these reasons remove the tenant's *standing to demand* such justification. Rather, these are factors that might count towards the satisfaction of this demand.

Hogan J was right, on this view, to hold that Article 40.5 rights were engaged even where a premises was constructed without planning permission.[82] What made that premises fall within Article 40.5 was that it was a *dwelling*, a place where Ms Fortune sought shelter and security. If she had constructed a building to use as a commercial premises, it would not have fallen within Article 40.5's scope. Where Hogan J may have erred was not in holding that Ms Fortune had standing to demand justification, but rather in calculating whether this demand had been satisfied.[83] The fact that the dwelling had been constructed without planning permission, or the environmental considerations involved in allowing the construction of a building in an area of natural beauty, all may have pointed towards the interference with Article 40.5 being justified in this case.[84]

This account fits the judgment in *Murray v Meath County Council*, in which McKechnie J held that Hogan J had demanded too much by way of justification for the interference with Article 40.5, and had given insufficient weight to the property's illegal construction.[85] The problem was not that Hogan J had applied a proportionality test in *Fortune*, but that he had in effect gone beyond such a test, demanding a higher threshold of justification.[86] McKechnie J also argued that Hogan J had paid insufficient attention to Article 40.5's concern with 'forcible entry'.[87] While he accepted that it might operate outside the criminal procedure context, he noted that 'the focus of the guarantee is primarily on the 'entry and search' power of investigating authorities'.[88] This part of the learned judge's reasoning is slightly trickier to unpack. He takes care to say that the ambit of Article 40.5 is not confined to criminal cases, but is reluctant to endorse Hogan J's conception of the right as 'a freestanding, self-executing guarantee which applies to both civil and criminal proceedings and to both State and non-State actors alike'.[89] According to McKechnie J:

[80] [2014] IEHC 310.
[81] [2022] 2 IR 122.
[82] [2012] IEHC 406
[83] I take no particular position here on whether this case was rightly decided or not. It is not relevant to my argument.
[84] This is in essence what Hogan J himself says, on reflection, in *Clare County Council v McDonagh* [2022] IESC 2 [68].
[85] [2017] IESC 25 [127]-[132].
[86] ibid [124].
[87] ibid [117].
[88] ibid.
[89] ibid, citing Hogan J in *Wicklow County Council v Fortune* [2012] IEHC 406 [35].

> It is not the fear of far reach that concerns me; rather it is, first, the creation of that potential from a base which I do not think justifies it, and, secondly, from the factual context of the instant appeal, where the provision cannot possibly prevail over the countervailing factors which are present. As a result, I think the preferable course would be that any widespread expansion from the Article's traditional sphere of influence should be case driven and individually worked out.[90]

From the reference to the 'base' from which the expansion of Article 40.5 is launched, it seems that McKechnie J was concerned with a case like Ms Fortune's, relating to the erection of a building in deliberate violation of planning laws being used to establish a constitutional innovation. Whether this is a particularly good reason or not, it indicates that there is nothing to stop us from thinking that Article 40.5 *can* form a freestanding guarantee of the kind envisaged by Hogan J.

What of McKechnie J's emphasis on forcible entry in the course of criminal investigations as the primary 'focus' of Article 40.5? It is not obvious what this should mean in practice. It could simply mean that the drafters envisaged that this was the context in which the provision would most frequently be applied. But this doesn't by itself tell us anything about whether the provision applies or doesn't apply in other contexts as well, nor does it tell us anything about the protections to which we are entitled within those contexts. I have already argued that there is no reason why the justificatory demand should be more robust in the criminal procedure context than in other contexts. It might be that the interference with one's right in a criminal context is particularly serious, as the consequences in that context are particularly bleak, and this means that the justificatory demand will be harder to satisfy. Intuitively, however, it is not obvious that violations in the criminal context are *necessarily* more serious than violations in other contexts. Breaking down the door without a warrant may be a more serious breach of the inviolability of the dwelling than enforcing the eviction of an individual who refuses to pay rent. Eviction of a family in a catchment area with no emergency accommodation, however, seems like a more serious violation of the right than, for example, entering someone's home with a warrant that has a clerical error on it. Perhaps the best understanding of McKechnie J's point, then, is that the criminal context is one in which the justificatory demand will *often* be more difficult to satisfy. This does not, however, mean that we should think there is any difference in kind between violations in this context and violations in other contexts.

A Non-Exhaustive List of Considerations

Tenants, I have argued, have standing to demand justification for breach of their Article 40.5 rights before a court orders their eviction. What sort of reasons will feature in this justificatory analysis (whether that means determining that an eviction would be proportionate or something else)? I cannot give an exhaustive list here, but I will point to some considerations that are likely to feature in a number of cases.

First, in cases involving private landlords, the constitutional property rights of those landlords must feature in the analysis. While my argument here has focussed on the rights of tenants rather than landlords, this should not be taken as an argument that the rights of the

[90] ibid.

former necessarily trump the rights of the latter. Rather, the argument is that the rights of both should feature in determining whether an eviction is justified.

Articles 40.3.2° and 43 of the Constitution expressly protect the right to own property and to have this right protected from unjust attack. Successive governments relied on these constitutional provisions to argue that they were constitutionally barred from introducing legislative measures such as prohibitions on upward-only rent reviews, controls on rental rates, or restrictions on evictions.[91] Space considerations preclude a full analysis of the constitutional property rights of landlords in the current context. It is worth pointing here, however, to Hilary Hogan and Finn Keyes's recent analysis of the courts' jurisprudence around the constitutional protection of property. To briefly summarise a wide-ranging and thorough analysis, they demonstrate that the courts have, in fact, read the constitutional protection of property in less absolute terms than the statements of successive governments, relying on the advice of Attorneys General, would have one think. They surmise:

> The Constitution protects the right to hold property but recognises that on occasion these rights can be restricted by the Oireachtas to advance the common good in accordance with the principles of social justice. As a result, considerable scope is afforded to the State to regulate property rights to achieve just outcomes.[92]

Hogan and Keyes's point is that property rights are not absolute in cases involving legislative encroachment on those rights. Similarly, I suggest, these property rights cannot be regarded as absolute in cases involving the inviolability of a tenant's dwelling. Encroachment on the inviolability of one's dwelling always demands justification. Both rights – the protection of property and the inviolability of the dwelling – must feature in the analysis of whether an eviction would be constitutional. The key point is that a landlord's property rights feature as *part of* the justification for interfering with the inviolability of a tenant's dwelling; they do not remove the need for or dilute the demands of such justification. Secondly, the reasons for the eviction must feature in the justificatory analysis. A 'no-fault' eviction of the kind temporarily banned by the Oireachtas would be more difficult to justify than an eviction in the event of non-payment of rent. While non-payment will not be determinative, a person who meets the financial and contractual responsibilities associated with their particular dwelling has firmer standing to demand that that dwelling be respected as *theirs*. However, as the courts demonstrated in *Duff*, Article 40.5 is still engaged where an individual fails to meet the financial responsibilities attached to the dwelling.

Instances of no-fault eviction might themselves be either more or less justifiable depending on the particular reasons given. If a landlord wishes to live in their property themselves, that arguably would lend weight to enforcement when compared with, for instance, their wish to sell while the market is particularly favourable. Again, I stress that my argument is not that a landlord who simply wishes to maximise profit on their investment will necessarily be unable to enforce an eviction order against the tenant.[93]

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[91] These legislative proposals and the responses to them are helpfully catalogued in Hilary Hogan and Finn Keyes, 'The Housing Crisis and the Constitution' (2021) 65 Irish Jurist 87. For a rich analysis of constitutional property rights more generally, see Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (CUP 2021).

[92] Hogan and Keyes, ibid.

[93] It may also be the case that considering the reasons for eviction would lead to certain problems that mean that a court would do better, all-things-considered, to discount the landlord's motive for sale entirely. For one

Thirdly, the consequences facing particular tenants will determine whether the interference with their rights is justifiable. I list this as a single point here, but this covers a myriad of possible circumstances. Single tenants who have family members with whom they can stay, for example, face different consequences to families that will be forced to move into emergency accommodation.[94] This is not to say that those without families cannot face equally dire consequences. There is little point trying to catalogue the various diverse and complex circumstances in which tenants facing eviction can find themselves.

One thing I do wish to make clear in relation to this particular point is this: an absence of available emergency accommodation should feature in the analysis of whether eviction would be justified. While the availability of emergency accommodation is difficult to reliably track, it has been suggested that up to half of local authorities in Ireland lack any more room in emergency accommodation.[95] The availability of such services is not in itself a particularly strong reason in favour of justification. Emergency accommodation, it should be clear from the analysis above, is not a home in any meaningful sense. Tenants without access even to emergency accommodation face, however, a real prospect of homelessness, depriving them not only of the social value of a home, but the freedom to attend to the basic needs that Waldron identified as central to the injustice of homelessness.[96] To put it in the terms of Jenkins and Brownlee's conceptual ladder, the fact that not even temporary shelter is available should count against depriving someone of their home.

Fourthly, and perhaps more controversially, the State's culpability in failing to mitigate the consequences of homelessness should feature in the justificatory analysis. In *Clare County Council v McDonagh*, the local authority's failure to provide Traveller-specific accommodation contributed to the inability to justify the interference with the McDonagh family's dwelling.[97] While this factor may have been more pressing in that case, where the Council was itself trying to enforce eviction while simultaneously failing in its statutory duty to provide accommodation, I suggest that a similar principle applies in cases of eviction. Where the State fails to make adequate emergency accommodation available, that fact should count against depriving someone of their dwelling.

The statute governing the allocation of emergency accommodation states that local authorities 'may' make arrangements for the provision of such accommodation to a person who qualifies as homeless under the Act.[98] It may be objected that this is an important difference between the present context and *McDonagh*, where the local authority was required by statute to secure Traveller-specific accommodation.

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thing, it may incentivise landlords to be dishonest about their reasons for wanting a tenant to leave. I am open to the argument that such practical considerations mean that a court should not consider the reasons for eviction at all. *Prima facie*, however, the reason for eviction features in the question of justifiability.

[94] The presence of children may also trigger Article 42A of the Constitution.

[95] Jack Horgan-Jones, 'Over half of local authorities have no capacity in emergency homeless accommodation, Sinn Féin *says' The Irish Times* (15 March 2023) < https://www.irishtimes.com/politics/2023/03/15/tanaiste-completely-out-of-touch-for-suggesting-housing-market-is-turning-corner-sinn-fein-says/> accessed 2 November 2023.

[96] The Supreme Court has recently stressed the dignitarian underpinnings of the right to seek employment in *NHV v Minister for Justice* [2017] IESC 35. I would suggest that Article 40.5, in circumstances such as these, bears no less a connection with dignity and freedom that the Constitution seeks to promote.

[97] [2022] IESC 2.

[98] Housing Act 1988, s 10.

It would be a mistake, however, to make too much of this distinction. I am not here discussing the enforcement of any duty to provide for emergency accommodation. Rather, I am discussing whether the failure to so provide features in the justification for a different action, ie eviction. For this reason, we can consider the existence of relevant State duties here in a broader sense than statutory obligations on local authorities. Whatever the position of individual local authorities, we can still say that the State itself is under a broader responsibility to make adequate housing, including emergency accommodation, available. The International Covenant on Economic, Social and Cultural Rights, for example, recognises 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.[99] Empowering local authorities is one way in which the State may seek to realise such obligations, but the underlying obligations remain. Again, my argument is not that this aspirational international obligation to provide adequate housing is directly enforceable in domestic courts. Rather, the argument is that the failure to meet such obligations to provide for adequate housing may feature in determining the scope of the constitutional protection of the dwelling that we *do* have.

The absence of emergency accommodation then, provides a double reason against justification. First, the bare fact of scarcity of shelter itself - the intolerability of homelessness – provides a reason in itself, detached from any person or institution's special responsibilities. Secondly, however, there is the fact that avoiding housing scarcity is a key responsibility of the State. Where the State fails in its most basic responsibility to ensure that adequate housing is available, I suggest, this counts against the use of State machinery to enforce evictions.[100]

The above provides only a flavour of the kind of factors that might feature in a judicial analysis of whether interference with Article 40.5 is justified. Sometimes all these considerations and many others besides will feature in a particular case; other times, entirely different considerations will. I have not sought here to provide a roadmap for resolving these cases. My argument here is simply that we cannot get away from engaging with reasons of this kind, and nor can judges tasked with interpreting the scope of Article 40.5.

Conclusion

I have argued in this paper that Article 40.5 of the Constitution is engaged in cases where the courts must decide whether to enforce the eviction of a tenant on behalf of a private landlord. This becomes clear when we analyse the cases in which that provision has been applied and the normative underpinnings of the courts' reasoning in those cases. I have argued that Article 40.5 is best understood as concerned with a philosophically thick conception of the 'home', as a place of shelter in which one can attend to one's basic needs, but also a space in which important social relationships are constituted and made possible.

[99] International Covenant on Economic, Social and Cultural Rights, Art 11.1. The UN Committee on Economic, Social and Cultural Rights has stated, incidentally, that this right should not be interpreted narrowly, but rather 'should be seen as the right to live somewhere in security, peace, and dignity.' Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No 21 (Rev 1): The Right to Adequate Housing* (2021) 3 <https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf> accessed 1 May 2023.

[100] For an excellent recent analysis of some of the causes behind the present scarcity, see Valesca Lima, Rory Hearne and Mary Murphy, 'Housing Financialisation and the Creation of Homelessness in Ireland (2022) 38(9) Housing Studies 1695.

When we see that this concern underpins Article 40.5, it is clear that this provision can be invoked by tenants facing eviction.

The main doctrinal consequence of this theoretical argument is that a heightened level of justification, most likely in the form of a proportionality test, should be required before evictions are enforced. I highlighted a number of considerations that might feature in this analysis, with each consideration given varying weights depending on the particular circumstance of each case. The property rights of landlords should feature in this analysis, but these are not the only constitutional rights in play. A landlord's property is a tenant's dwelling. Any constitutional analysis must take account of this fact.