IRISH CONSTITUTIONAL PROPERTY RIGHTS AND NORMATIVE THEORIES OF PROPERTY

Abstract: Irish courts have failed to engage with the wording of the constitutional property rights clauses, a failure justified on the basis that the wording of these clauses is ambiguous. Through the application of normative theories of property, this article seeks to show that the clauses contain an unambiguously communitarian meaning. It is argued that courts have at times defaulted to a liberal understanding of property as exemplified by cases like Blake-Madigan. However, this 'liberalism creep' has largely now abated and recent judgments in areas such as planning law show the emerging predominance of communitarianism in constitutional property rights adjudication.

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Introduction

Irish courts have failed to engage with the wording of the constitutional property rights clauses, a failure that has been justified on the basis that these clauses are ambiguous in nature.[1] Courts and commentators have often talked past one another, some suggesting that the property clauses contain communitarian values and others suggesting they contain liberal values, at times without employing a thorough analysis of the area.[2] Evidence of the failure to engage with the property clauses and ultimately to clarify them may be seen in the ongoing uncertainty over whether certain political proposals to address the Housing Crisis would fall foul of the constitutional property rights provisions.[3] The failure to adequately interpret the constitutional provisions has created an ambiguity that has arguably given rise to proposals for a referendum to insert new wording into the Constitution to clarify the Oireachtas' powers in the area of housing.[4]

This article asks how Irish constitutional law understands the values through which property rights must be interpreted. It will apply two normative theories of property, communitarian and liberal, as an aid to determining this question.

Utilising the insights of the property theory set out in the first section of the article, the second section will conclude that the constitutional property wording is imbued with communitarian values. The origin of the Constitution and the significance of the Land Question will be critical to the analysis. It is argued that Irish courts, in a similar way to courts in other common law jurisdictions, have at times defaulted to a liberal understanding of property as occurred in cases such as *Blake-Madigan*. However, this 'liberalism creep' has largely now abated and recent judgments in areas such as planning law are given as examples of the emerging predominance of communitarian considerations in constitutional property rights adjudication.

* *I am grateful to Dr Gabriel Brennan and Dr Brian Barry for reading earlier drafts and providing me with helpful comments.*

[1] Gerard Hogan, 'The Constitution, Property Rights and Proportionality' (1997) 32 Irish Jurist 373, 375.

[2] For example, Mr Justice O'Donnell, writing extrajudicially, has suggested the Constitution contains liberal values with respect to property rights. See O'Donnell, 'Property Rights in the Irish Constitution: Rights for Rich People, or a Pillar of a Free Society', in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round 2008) 413. In contrast, Mr Justice Brian Walsh, writing extrajudicially, has argued for the idea that the Constitution contains communitarian values on property rights. See Walsh, 'The Judicial Power, Justice and the Constitution of Ireland' in Deirdre Curtin and David O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law: Essays for the Honourable Mr Justice TF O'Higgins* (Butterworth 1992) 147.

[3] See Rachael Walsh, 'No legal reason Government can't limit sale of new homes' *The Irish Times* (Dublin, 7 May 2021).

[4] 'Why a Referendum' (*Home for Good*) <https://www.homeforgood.ie/referendum> accessed 28 May 2023.

Normative Theories of Property

Overview

This section will outline the two most relevant normative theories of property for Irish constitutional property rights: communitarian theory and liberal theory. These theories will then be used as an interpretative aid in the following section when analysing the Irish constitutional position.

It is useful to introduce this discussion with a brief overview of constitutional interpretation. Daly argues that the 'interpretivist approach' has dominated in Irish constitutional law, that is where constitutional provisions are interpreted so as to express an underlying philosophy.[5] Mr Justice Brian Walsh writing extrajudicially, argues 'each of our judges must work from a philosophical conviction which does not differ from the philosophy underlying and informing the Constitution'.[6] Citing Sunstein,[7] Whyte argues that all judges necessarily come to constitutional adjudication with a set of 'preinterpretative values'.[8] This follows from the fact that a given passage in a constitution will often not have one clear and definitive meaning and a judge must select which meaning is the most plausible.

The text of the Irish Constitution refers to property rights twice; the first reference being in Article 40.3.2° where, under the heading of 'Personal Rights', it is stated that the State shall protect, as best it may, the property rights of every citizen from unjust attack. The second reference is Article 43 which asserts that there is a natural right to the private ownership of external goods and that the State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property. Article 43 goes on to state that the exercise of property rights ought to be regulated by the principles of social justice which means that the State may delimit property rights with a view to reconciling their exercise with the exigencies of the common good.

In discussing the values which permeate the Constitution, legal commentators have posited a dichotomy between communitarian and liberal content. Van der Walt has discussed this dichotomy specifically with reference to Article 43 of the Constitution, comparing it to the constitutions of South Africa and Germany in terms of its communitarian impetus.[9]

This liberal-communitarian dichotomy is crucial to understanding how constitutional property rights have been interpreted. This is because, as Pistor has pointed out, constitutions presume property rights but do not define them nor do they specify who has the right to define them.[10] Thus it is left to judges to determine how property rights are interpreted and what values, be they liberal, communitarian or otherwise, are brought to bear in that interpretative process. Relatedly, Allen discusses the possibility that the idea of value-free judicial interpretation in the context of constitutional property rights has in practice been a way for liberal values-influenced judiciaries to incorporate liberal presuppositions into their adjudication.[11]

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[5] Eoin Daly, 'Public Philosophy and Constitutional Interpretation after Natural Law: Republican Horizons' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012) 91.
[6] Brian Walsh (n 2) 147.
[7] CR Sunstein, *The Partial Constitution* (Harvard UP 1993) 93.
[8] Gerard Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration 2002) 26.
[9] AJ Van Der Walt, 'The Protection of Private Property under the Irish Constitution: A Comparative and Theoretical Perspective' in Oran Doyle and Eoin Carolan (eds) *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 398.
[10] Katerina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton UP 2019) 68.
[11] Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge UP 2000) 106.

Irish judges have historically understood the political implications surrounding the interpretation of the property clauses of the Constitution and have, at times, done their utmost to avoid interpreting the meaning and values contained therein. In *Pigs Marketing Board v Donnelly*, when discussing 'social justice' as the term appears in Article 43, Hanna J stated that it was a:

> nebulous phrase, involving no question of law for the Courts, but questions of ethics, morals, economics, and sociology, which are, in my opinion, beyond the determination of a Court of law, but which may be, in their various aspects, within the consideration of the Oireachtas, as representing the people, when framing the law.[12]

That case is now considered bad law in that the High Court in its judgment failed to carry out its duty to interpret the Constitution.[13] However, commentators who have been satisfied to write off *Pigs Marketing* as bad law have themselves sought to avoid interpreting Article 43 and its terminology. Hogan has called the language of Articles 40.3.2° and 43 'so inherently subjective and open-textured that its interpretation is replete with difficulties'.[14] In the same article, he sympathised with the courts' approach in avoiding interpreting the language 'in favour of a workable judicial methodology' centring on the use of the proportionality test.[15] O'Neill has similarly written that the phrases of Article 43 'are so broad and subjective as to be of little real guidance'.[16] Thus there has been a reluctance among both the courts and legal commentators to fully engage with the language of the Constitution's property provisions and the values contained therein. Many have preferred to side-step the issue altogether and to replace the language of the Constitution with alternatives such as the proportionality test. The following sections of the article will set out the aspects of the communitarian and liberal theories of property relevant in an Irish context before returning to the actual wording of the Constitution, its influences and how it has been interpreted in order to understand where the Irish Constitution falls along the communitarian versus liberal values axis.

The Communitarian Position

The communitarian theory of property emphasises the obligations of property rights holders toward their communities and the potential uses of property law to bring about human flourishing.[17] Communitarians envisage that the social obligations of property rights holders may, through democratic decision-making, be fulfilled through property law.[18] While the term 'communitarian' is a recognised one in the context of Irish property rights discussion, 'progressive property theory' is the approximate United States equivalent.[19] Walsh's recent monograph has attempted to apply some of the insights of progressive property theorists to an Irish context.[20] Progressive property theorists promote a theory of property rights and

[12] [1939] IR 413, 418.
[13] See, *inter alia*, Rachael Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 Dublin University Law Journal 1, 13; Donal Barrington, 'Private Property under the Irish Constitution' (1973) 8 Irish Jurist 1, 6.
[14] Hogan (n 1)375.
[15] ibid 377.
[16] Ailbhe O'Neill, 'Property Rights and the Power of Eminent Domain' in Oran Doyle and Eoin Carolan (eds) *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 439.
[17] JW Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 *Cornell L Rev* 1009, 1010.
[18] Eduardo Peñalver, 'Land Virtues' 94 *Cornell L Rev* 821, 869-71.
[19] For the use of the term 'communitarian' in Ireland, see, for example, Rachael Walsh, 'Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise' (2011) 33 Dublin University Law Journal 86.
[20] Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge UP 2021) 45-6.

values which are particularly useful in interpreting the Irish Constitution because they draw from many of the same intellectual sources from which the Constitution itself has drawn.

Progressive property theorists accept the insights of Aquinas and Thomism,[21] the influence of which on the Irish Constitution has been long recognised and will be discussed further below. Peñalver, for example, argues for the reconfiguration of property law rules in order to promote human flourishing, a theory grounded in the thought of Aristotle and Aquinas.[22] In common with *Lyall's* interpretation of property rights as ultimately consisting of relations between people,[23] Aquinas similarly viewed property rights, in contrast to liberal theorists, as concerning matters of justice between people, not just human relationships to things.[24] His justification for property being allocated to private individuals rather than the community as a whole was that holding property in common would lead to a neglect and misuse of resources akin to a tragedy of the commons. However, this allocation was subject to the proviso that the use of resources was ultimately common; that all possessions are in some sense morally available to those in need. Aquinas sets out three categories of resources or property: (a) a category corresponding to absolute necessity, resources required for one's own survival and one's dependants' survival, (b) a category corresponding to relative necessity, including maintaining one's responsibilities to one's household, for example by educating one's children and maintaining one's business, and (c) a category called the *superflua*, resources remaining following provision of resources for absolute and relative necessity.[25] Justice, not charity, requires an individual to distribute one's *superflua* to those lacking in their provisions as to absolute and relative necessity. Aquinas believed that rulers had a responsibility to provide a fair distribution of resources to their subjects.[26] Finnis concludes that Thomist property theory entails that states should legislate to ensure *superflua* are distributed accordingly.[27] The 'general justice' which Aquinas believed governed property relations, broadly corresponds with the notion of social justice promulgated by the Catholic Church in papal encyclicals such as *Quadragesimo Anno*.[28] The ideas of Thomism have been extremely influential in Catholic social teaching and it is via this route that they become particularly relevant in an Irish constitutional context.

Underkuffler emphasises that property is an allocative choice by government and society.[29] Property is unlike the other liberal civil rights often coupled with it, e.g. voting rights or free speech rights, in that allocating property to one person necessarily excludes it from another.[30] It is these characteristics that leads Kingston to argue against the traditional liberal categorisation and alternatively to group property as an economic rather than a civil right.[31] Underkuffler similarly discusses how property cannot effectively exist without the State to protect it through its police power and legal institutions.[32] In an Irish context, Pettit makes

[21] See Rachael Walsh, 'Property, Human Flourishing and St Thomas Aquinas' (2018) 31 Canadian Journal of Law and Jurisprudence 197.
[22] Peñalver (n 18) 869.
[23] Niamh Howlin and Noel McGrath, *Lyall on Land Law* (4th edn, Thomson Reuters 2018) 2.
[24] John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford UP 1998) 188-9.
[25] ibid 191.
[26] Walsh (n 21) 214.
[27] Finnis, *Aquinas* (n 24) 195.
[28] John Finnis, Natural Law and Natural Rights (Oxford UP 2011) 461-2.
[29] LS Underkuffler, 'What Does the Constitutional Protection of Property Mean' (2016) 5 Brigham-Kanner Property Rights Conference Journal 109, 120-1.
[30] LS Underkuffler, 'A Special Right' (1996) 71 Notre Dame L Rev 1033, 1038.
[31] James Kingston, 'Rich People Have Rights Too? The Status of Property as a Fundamental Human Right' in Liz Heffernan (ed), Human Rights: A European Perspective (Round Hall 1994) 286.
[32] Underkuffler (n 30) 1046.

the same communitarian point.[33] Where liberals see property as a right that protects people as they interact with society, progressive theorists argue that the existence of the institution of private property itself presumes society. There must first be society to create and enforce property rights.[34]

Singer argues that liberal thinkers have failed to take account of the historical development of property.[35] He references the fact that land in the United States, following dispossession of the Native Americans, was allocated to European settlers by government grant. The justification in that instance was that European settlers would use the land more productively.[36] In an English context, a similar justification based on efficiency and productivity was employed by the State when it enclosed the commons and divided it amongst large landowners.[37] Thus, the distribution of property today has its origins in historical allocations justified by reference to the common good. In an Irish context, the Land Acts are highly salient to this point and will be discussed below.

Communitarian thinkers can rely on the fact that land law in England and Ireland originated in Anglo-Norman feudal law and therefore always contained a notion of the obligations of property owners.[38] The conception of property rights as absolute derives from Roman law, as does the distinction between dominium (property) and imperium (sovereignty).[39] Despite favouring a liberal conception, Smith has discussed how the feudal origins of the common law gives property in common law jurisdictions today a distinctive character as compared with its Roman-law based civil neighbours.[40] A hard distinction between property and sovereignty has long been recognised as having a dubious philosophical and logical basis. Cohen describes how property entails a 'sovereign power compelling service and obedience', a relationship clearer during the feudal system but obtaining still in the modern economy, for example, in the necessity to pay rent to a landlord and be governed by her rules.[41] Property is, although admittedly limited by law, a form of delegated sovereignty.

Communitarians recognise the inherent political nature and implications of property rights. Walsh alludes to the importance of political considerations in judicial determination of constitutional property rights cases and quotes Nedelsky that property implicates the core issues of politics, distributive justice, and the allocation of power.[42] This author respectfully considers this to be an understatement. As is argued in *Lyall*, property rights fundamentally structure social relations.[43] Politics is the elephant in the room of any discussion of property.

The Liberal Position

Underkuffler characterises the American constitutional idea of property as a 'bulwark surrounding the sphere of individual liberty' and as 'an absolute and inalienable right, which provides a bedrock or protection'.[44] This is effectively the liberal view of private property,

[33] Philip Pettit, 'The Republican Constitution' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012) 42-3.
[34] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford UP 2002) 8, 31-2.
[35] JW Singer and JM Beermann, 'The Social Origins of Property' (1993) 6 Canadian Journal of Law & Jurisprudence 217.
[36] ibid 229.
[37] Pistor (n 10) 78-80.
[38] Howlin (n 23) 70.
[39] Morris Cohen, 'Property and Sovereignty' (1927-1928) 13 Cornell Law Quarterly 8, 8.
[40] Yun-chien Chang and Henry E Smith, 'An Economic Analysis of Civil versus Common Law Property' (2012) 88 Notre Dame Law Review 1.
[41] Cohen (n 39) 12.
[42] Walsh (n 20) 236.
[43] Howlin (n 23) 2-3.
[44] Underkuffler (n 30) 1044.

evolving from the Anglo-American enlightenment and associated with the classical liberal tradition. While embracing the progressive theory of property, Underkuffler does speak for the putative benefits of personal property for psychological development. O'Donnell cites Underkuffler in this respect and sets out some of the other aspects of the liberal viewpoint, which he sees as being contained in the Irish Constitution:

> at the core of the right to private property, in common with all personal rights, is the right to be 'let alone', a zone of personal freedom. [...]
>
> [Regarding Underkuffler's psychological development point] This approach is of a piece with James Madison's understanding of the importance of property: not for personal acquisitiveness, but rather as a guarantor of liberty and thus of every other right.[45]

This liberal idea of property rights characterises property as providing a robust level of private authority to individuals, thereby allowing for enhanced autonomy and the ability to plan one's future.[46] Property protects the individual from encroachments by a potentially tyrannical state and also provides security from dependency on that State.[47] Intertwined with this perspective historically are certain moral and economic claims. The moral claim according to Locke is that a person acquires property through mixing their labour with it. It follows that property is just desert for labour.[48] State interference with these rights is presumed to be unjustified unless a sufficient justification is given.

Numerous economic justifications are also associated with the liberal viewpoint, some reaching back to Aristotle. These include that private property encourages improvement of the things to which the property rights relate, a justification that extends to intellectual property rights as reward for ingenuity.[49] If an individual does not have the certainty of ownership of an object into the future, why would she improve it?[50] The classical liberal vision of property also emphasises that property serves to coordinate market interactions in a tried and tested way.[51]

In the context of the collapse of the USSR, Sunstein provided a modern reiteration of the liberal position on property rights in a piece that encouraged the emerging new nations to constitutionalise those rights.[52] The piece repeats some of the justifications referenced above, such as property providing security against dependency on the state. On the above counts, there is little disagreement with communitarians who, in the main, do not propose abolition of property rights but only their regulation and/or reconfiguration to promote the common good. Sunstein then lays out a strong liberal apologia for minimal state interference in property rights:

> [O]ne of the best ways to destroy a democratic system is to ensure that the distribution of wealth and resources is unstable and constantly vulnerable to

[45] O'Donnell (n 2) 428.
[46] Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press 2021) 1-3
[47] See Jeremy Waldron, 'Property and Ownership' *The Stanford Encyclopedia of Philosophy* (Summer edn, 2020) <https://plato.stanford.edu/archives/sum2020/entries/property/> accessed 2 January 2022.
[48] David Miller, 'Justice and Property' (1980) 22 Ratio 1, 5-7.
[49] See TW Merrill, 'The Demsetz Thesis and the Evolution of Property Rights' (2002) 31 Journal of Legal Studies 331, 332.
[50] Dagan (n 46) 5.
[51] For a contrary view, i.e., that property is a form of monopoly that impedes the functioning of efficient markets, see EA Posner and E Glen Weyl, Radical Markets: Uprooting Capitalism and Democracy for a Just Society (Princeton UP 2018).
[52] Cass R. Sunstein, 'On Property and Constitutionalism' (1992) 14 Cardozo Law Review 907.

> reevaluation [sic] by the political process. A high degree of stability is necessary to allow people to plan their affairs, to reduce the effects of factional or interest group power in government, to promote investment, and to prevent the political process from breaking down by attempting to resolve enormous, emotionally laden issues about who is entitled to what.[53]

The power of Sunstein's argument is that it not only applies to actions such as compulsory acquisition of property at full market value by the State, but also warns against any interference in long-recognised property rights for fear of disrupting the stability on which a society depends.

Liberals tend to favour a property system containing minimal restrictions on the ability of persons to transfer their property rights in a market.[54] Their justifications here, to a large extent, dovetail with the views of the law and economics scholars. The latter tend to promote and justify property rights, and minimal state interference therewith, through the application of concepts from the field of Neoclassical microeconomics.[55] It is notable that critiques of the law and economics approach have come from perspectives aligned with communitarianism, progressive property theory and republicanism.[56] This is relevant as, for reasons discussed below, the communitarian tradition in Ireland is intertwined with republicanism.

Perhaps the most significant modern defence of the liberal position is Dagan's *A Liberal Theory of Property*, a text that, interestingly, asserts a liberal theory far more sensitive to communitarian concerns than, say, Sunstein's above.[57] Dagan admits that the challenge of justifying property is 'much heavier and much more pressing than its friends take it to be' since the existence of the current private property regime creates vulnerabilities for many groups of people.[58] Dagan follows the liberal tradition of understanding private property as power-conferring for individuals and therefore promoting of self-authorship and self-determination.[59] However, he is also open to a property regime that restricts the rights of property in 'means of production', as private authority over such resources means significant power over the preferences of others.[60] He favours a background regime to property that ensures everyone is entitled to own some autonomy-enhancing property, an idea with politically social-democratic connotations.[61] Ultimately, of course, Dagan is a liberal thinker. He views property rights interacting with markets as 'empowering' and argues that State interference in property,[62] if required, ought to be undertaken gradually.[63]

Thus, in contrast to the communitarians, liberals emphasise the importance of certainty of property rights for a society to function properly and to achieve economic success.

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[53] ibid 916.
[54] Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 Columbian Law Review 1667, 1667.
[55] See Amy Sinden, 'The Tragedy of the Commons and the Myth of Private Property Solution' (2007) 78 University of Colorado Law Review 533.
[56] Jane B Baron and Jeffrey L Dunoff, 'Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory' (1995) 17 Cardozo Law Review 431, 454-7.
[57] Dagan (n 46).
[58] ibid 243.
[59] ibid 1-3.
[60] ibid 42. 102.
[61] ibid 42.
[62] ibid 185.
[63] ibid 213.

The Irish Constitutional Position

Origin of the Constitution

As discussed above, the Irish Constitution possesses both communitarian and liberal aspects. On the liberal side, for example, the courts have interpreted the Constitution as providing for a strong separation of powers and strong criminal trial rights.[64] Regarding the property clauses however, it will be argued that the Constitution falls squarely at the communitarian end of the values spectrum. This will be done, first, by analysing the text of the Constitution itself and secondly, by reference to case law. Irish courts have not always interpreted the property clauses to give effect to communitarian values but, on the whole, they have increasingly recognised the communitarian basis of the property clauses and have adjudicated accordingly.

As Walsh clarifies with respect to her work, the purpose of delving into the history of the constitutional property clauses is not to assert an 'originalist' reading of the Constitution but to attempt to resolve some of the ambiguity within the meaning of the text itself.[65] The following section engages with the history of the constitutional wording to elucidate the intended meaning of the constitutional property clauses. Clarifying the origin of the constitutional property clauses should aid judges when interpreting those clauses. It is not intended to close off other aids to interpretation.

Historical scholarship shows that Archbishop John Charles McQuaid had a 'considerable influence' on drafting Article 43 of the Constitution, along with Article 45 which was originally intended to accompany Article 43.[66] Correspondence between McQuaid and de Valera clarifies that the former was reading the papal encyclicals *Quadragesimo Anno* and *Rerum Novarum* when providing the latter with draft clauses.[67] Where passages from the encyclicals are placed side by side with Articles 43 and 45, the parallels are striking.[68]

Quadragesimo Anno explicitly dealt with the subject of private property. While it is true that the encyclical defended private property against socialist movements which were perceived as a threat to the institution, Walsh perhaps slightly over-emphasises liberal influence on the encyclicals.[69] By quoting McDonagh's argument that the Catholic Church's strong anti-communism influenced the encyclicals and therefore the Constitution,[70] Walsh does not emphasise the anti-liberal message of *Quadragesimo Anno*.[71] The document contains multiple denunciations of liberal private property and the economic system that it undergirds, including the following:

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[64] See, for example, David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall 1997).
[65] Walsh (n 20) 45-6.
[66] Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hÉireann* (Mercier 2007) 117.
[67] ibid 108.
[68] ibid 117-8. Ultimately, concerns about litigants attempting to sue the state on the basis of the highly communitarian Article 45 'Directive Principles of Social Policy' led to their removal from the cognisance of the courts. However, Walsh has argued that, in balancing the values contained in Article 43, Article 45 could be a useful aid for courts. She refers to a number of cases which provide something of a wedge to bring the principles partially back into judicial cognisance including *Attorney General v Paperlink* [1984] ILRM 373 and *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321. The Indian Constitution explicitly borrowed the wording of many of the Article 45 principles and was amended to prohibit judicial review of any legislation in furtherance of the principles. In an Indian case to be discussed below, the court cited the principles in a communitarian ruling; an indication of possible success from another jurisdiction of Walsh's argument in favour of Article 45. See Walsh (n 20) and Allen (n 11) 47.
[69] Walsh (n 20) 61.
[70] Enda McDonagh, 'Philosophical-Theological Reflections on the Constitution' in Frank Litton (ed), *The Constitution of Ireland 1937-1987* (Institute of Public Administration 1988) 192.
[71] Walsh (n 20) 75.

> Property, that is, 'capital,' has undoubtedly long been able to appropriate too much to itself. Whatever was produced, whatever returns accrued, capital claimed for itself, hardly leaving to the worker enough to restore and renew his strength. […] It is true, indeed, that things have not always and everywhere corresponded with this sort of teaching of the so-called Manchesterian Liberals; yet it cannot be denied that economic social institutions have moved steadily in that direction.[72]

In contrast to the liberal vision of property, Pius XI promulgated a vision of ownership with a 'twofold character', individual and social.[73] With respect to the social dimension, people had to consider not only their own interests and desires but also those of the common good. In terms of defining the duties property holders had in relation to the common good, the State had the primary role.[74]

Reflecting Thomism, the encyclical states that the law of social justice prohibits the exclusion of one part of society from the wealth produced by society as a whole.[75] The *superflua* discussed above also appear and the text states that a person's superfluous income is 'not left wholly to his own free determination'.[76] The rich are instead bound to practice almsgiving, beneficence, and munificence. While the emphasis here may be on individuals themselves redistributing some of their resources, in the context of the document's overall emphasis on public authority, the implication is that the State is sanctioned to undertake redistribution of property.

Beyond the evidence for the direct influence of *Quadragesimo Anno* on the text, during the parliamentary debates over the new Constitution, de Valera again reflected the encyclical's philosophy in his response to opposition TDs,[77] including the future Taoiseach, and barrister, John A. Costello. Far from understanding the property clauses as a 'classic "first generation" statement of liberal, civil and political rights,' in the words of O'Donnell,[78] the contemporary opposition feared Article 43 had the potential to enable a future left-wing government to carry out property confiscation without compensation.[79] De Valera strongly rejected this contention and explicitly referred to the dual character of property, individual and social, an idea directly derived from *Quadragesimo Anno*.[80] Even while robustly defending Article 43 from accusations of being communist-friendly, de Valera strongly emphasised the social aspect of property rights, reiterated their subjection to the common good, and emphasised a natural law understanding of property rights.[81]

Two prominent churchmen who had some influence on the drafting of the property clauses in varying ways, Father Edward Cahill and Father Alfred O'Rahilly, felt the clauses did not sufficiently reflect Catholic social teaching, mainly because they feared the legal class's education in the British legal tradition would lead to a liberal interpretation of the

[72] Encyclical of Pius XI, 'Quadragesimo Anno' <https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html> accessed 2 January 2022, para 54.
[73] ibid [45].
[74] ibid [49].
[75] ibid [57].
[76] ibid [50].
[77] Anthony Coughlan, 'The Constitution and Social Policy' in Frank Litton (ed), *The Constitution of Ireland 1937-1987* (Institute of Public Administration 1988) 154.
[78] O'Donnell (n 2) 429.
[79] Dáil Deb 12 May 1937, vol 67, col 210.
[80] Dáil Deb 11 May 1937, vol 67, col 171.
[81] Dáil Deb 13 May 1937, vol 67, col 215.

Constitution. Cahill wrote that 'individualistic and Liberal [sic] principles of English jurisprudence' influenced many Irish lawyers and there was a 'real danger' that the 'intentions' of the Constitution would thereby be frustrated.[82] Hogan argues that Cahill was 'prescient' in this view and that courts have somewhat adopted an individual-centred approach to property rights.[83] Cahill's anxiety over the ability of legal minds to understand the meaning of the language of Article 43.2 should serve to remind those legal minds of the philosophical basis for Article 43.2 rather than absolving them of their responsibility to properly construe the text simply because judges have failed to do so on previous occasions. As Walsh notes, judges are mandated by the Constitution to engage with the communitarian values of Article 43.2; it is not an optional exercise.[84]

The connection between Article 43, *Quadragesimo Anno* and Thomist philosophy has long been recognised by commentators.[85] Mr Justice Brian Walsh, writing extrajudicially, opined that the Constitution reflected almost perfectly the Thomistic conception of property discussed above. Indeed, his understanding of Irish constitutional property rights mirrors the values of the progressive property theorists in the US and their emphasis on the obligations of property rights holders:

> The starting point must be a philosophical concept of what are property rights. [...] Nobody is given the right to accumulate property and retain it and to assert that right against the requirements of social justice. [...] Strictly speaking one cannot claim as of right more property than one requires for one's own support. While the right of private property exists in the interests of the common good it is subordinate to the common good. [...] The reference in Article 43 Section 1, to 'maoin tsaoghalta' or 'external goods', in contrast to 'goods of the body' and 'goods of the soul', provides the clue to the philosophy in question. These were the ideas of St Thomas Aquinas.[86]

Mr Justice Brian Walsh went on in the same passage to contrast the Thomistic philosophy of Irish constitutional property law with both the absolutism of the French Civil Code and the common law's orientation in favour of property rights.[87] If Mr Justice Brian Walsh's contention that the values of Irish constitutional jurisprudence on property rights are Thomist is correct then it follows that property rights that protect the material security of human beings are worthy of greater protection than property rights that protect returns on investment; a position for which there is some authority (as discussed later). However, while Thomism is undoubtedly an influence on the values to be applied to constitutional property rights in Ireland, it would be a stretch to argue that Thomism must be the sole metric with which to evaluate such rights.[88]

Commentators sympathetic to a liberal viewpoint of the Constitution, not finding Article 43 conducive, often turn to Article 40.3.2° instead. Judges have also found the simpler wording of Article 40.3.2° more attractive than the 'tortured syntax' of Article 43.[89] Article 40.3.2° appeared to be an avenue for the entrance of liberal values into constitutional adjudication

[82] Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012) 573.
[83] ibid 96.
[84] Walsh (n 20) 183.
[85] See Walsh (n 21).
[86] Brian Walsh (n 2) 148.
[87] ibid.
[88] Walsh (n 20).
[89] Ronan Keane, 'Land Use, Compensation and the Community' (1983) 18 Irish Jurist 23, 32.

of property rights. However, as was pointed out in *Moynihan v Greensmyth*, even the State protection of property from 'unjust attack' in Article 40.3.2° 'is qualified by the words 'as best it may' which 'implies circumstances in which the State may have to balance its protection of the right as against other obligations from regard for the common good.'[90] Walsh highlights the fact that where State protection of property rights from 'unjust attack' has been centred by judges, Article 43 values have been marginalised.[91]

In the context of commonwealth constitutions, Allen has written about what might be termed liberalism creep, a phenomenon where post-colonial states chose to imbue their new constitutions with communitarian values but where courts at a national and commonwealth level have handed down judgments that favoured individual rights over those of the community.[92] The most prominent example of this occurred in India where the Supreme Court struck down legislation that provided for graduated scales of compensation for compulsory acquisition of lands from the aristocratic *zamindar* class.[93] The legislature responded with constitutional change and the courts were forced to compromise. Allen discusses the relationship between ownership of property and political power and argues that the preference judiciaries in post-colonial states have historically had for individuals over communities created a 'real risk' that those communities could be deprived 'of their capacity to define their common identity' and their ability to enrich their own lives having fought to achieve independence.[94]

The Land Question

As discussed earlier, there has been a failure by courts and commentators to even attempt to understand the meaning of Article 43's wording despite its clear origin in Catholic social teaching. An aspect of this failure, arguably, has been the further failure to situate constitutional property rights in their historical context, particularly in relation to the historical land question in Ireland.[95]

The connection between the political battle over ownership of land in Ireland and constitutional property rights is clear. Mr Justice Walsh extrajudicially opined that judicial approaches to property rights have been 'conditioned by history and the land struggle'.[96] Prior to Mr Justice Walsh, JM Kelly had enquired as to how certain conservative commentators' views on constitutional property rights could be reconciled with the compulsorily purchase and redistribution of land carried out through the Land Acts.[97]

Wylie describes the stages through which increasingly strong legislation led to the redistribution of land from landlords to tenant farmers.[98] He further describes the evolving role of the Land Commission in the process whereby the vast majority of Irish agricultural land changed possession. *Lyall* describes how the Land Act 1881 was contemporaneously denounced as an infringement of landlords' property rights as it required a landlord to compensate a tenant for disturbing his occupancy and to compensate him further for

[90] [1977] IR 55 (SC) 70.
[91] Walsh (n 20) 95.
[92] Allen (n 11) 109-110.
[93] ibid 49-53.
[94] ibid 110.
[95] See John Cleland Wylie, *Wylie on Irish Land Law* (6th edn, Bloomsbury Professional 2020) ch 1.45-1.56.
[96] Brian Walsh, 'Foreword' in James O'Reilly and Mary Redmond (eds), *Cases and Materials on the Irish Constitution* (Incorporated Law Society of Ireland 1980) xx-xi.
[97] John Maurice Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd edn, Allen Figgis and Co 1967) 173.
[98] Wylie (n 95) ch 1.45-1.56.

improvements made to the property.[99] Later Acts, including those introduced during the Free State period and following the introduction of the Constitution, granted the Land Commission very significant powers to intervene in property rights.[100] Wylie very directly sees the history of increasing State intervention in property as informing the 1937 Constitution.[101] Indeed, senior civil servants were worried about the prospect that constitutional property rights could allow challenges to the work of the Land Commission, a very practical concern in 1937 when the Commission continued to transform Irish land-holdings.[102]

In cases such as *Fisher v Land Commission*[103] and *Foley v Land Commission*,[104] the social importance of the Land Acts and Land Commission was recognised. *Fisher* involved a challenge to the Land Acts which argued it was unconstitutional that the Acts did not bestow a right of appeal to the courts following expropriation of land by the Land Commission from a tenant. The land could be re-occupied by the Land Commission on the basis of one of a number of reasons listed in the 1939 Act, including for the improvement or rearrangement of a land holding. While the decisions of the High Court and Supreme Court would now be considered bad law given the evolution of separation of powers and fair procedures, their recognition of the significance of the Land Question is of note. The High Court stated that the main object of the legislation must have been the 'common weal' in the form of relief for 'small holders struggling with uneconomic farms'.[105] The Court stated further:

> the Legislature (i) conceived that the public interest demanded a more equitable distribution of certain estates, involving the curtailment or the total expropriation of some proprietors to minister to the land hunger of the afflicted smaller people; (ii) saw that, whatever compensation might be paid, public policy alone could justify the necessary interference with lawful rights of property in land […].[106]

The Supreme Court echoed the above, stating that the 'main task' of the Land Commission was the creation of a 'peasant proprietorship of a certain standard'.[107] The words of the High Court above were stated by Gavan Duffy J, the same judge who would go on to give the ruling in *Buckley v Attorney General*,[108] a judgment considered to be much less deferential to the Oireachtas on the matter of property rights and of separation of powers. Gavan Duffy J refers to the 'land hunger of the afflicted smaller people', a phrase that echoes the famine period and shows the continuing resonance of the Land Question in the 1940s. This suggests that while the courts were not willing to allow the legislature deprive citizens of their property rights for political motives and without fair procedures, as had occurred in *Buckley*, they were willing to defer to the legislature on property rights when the legislation in question had clear and recognisable social goals. Another case involving a challenge to the powers of the Land

[99] Howlin (n 23) 375.
[100] These included the Land Law (Commission) Act 1923 during the Free State era and the Land Acts 1933, 1936 and 1939; the 1936 and 1939 Acts being introduced by the Oireachtas in response to certain judicial decisions that affected the power of the Land Commission. See Brendan Edgeworth, 'Rural Radicalism Restrained: The Irish Land Commission and the Courts (1933-39)' (2007) 42 Irish Jurist 1.
[101] Wylie (n 95) ch 1.61.
[102] Hogan (n 82) 327.
[103] [1948] IR 3.
[104] [1952] IR 118. (SC).
[105] *Fisher* (n 103) 10
[106] ibid.
[107] ibid 26.
[108] [1950] IR 67.

Commission, *Foley*, chose to follow *Fisher* and to distinguish *Buckley*. The Supreme Court in that case referred to the Land Acts as 'a very important branch of our social legislation'.[109]

The more recent case of *Shirley v A. O'Gorman & Co Ltd* provides further evidence of the courts' recognition of the historical significance of land in Ireland when determining questions of property rights.[110] *Shirley* concerned a challenge to legislation which allowed tenants in business premises to buy out the ground rent from their landlord in some instances at prices only one eighth of market value. The High Court rejected the challenge and in doing so stated that it was entitled to consider 'the social history of the country' in order to provide context to the challenged legislation.[111] The social history in question here was that of the Land Question and the redistribution it brought about from the land-owning class to the tenant class. This context was required in determining whether the legislature had social justice in mind when passing said legislation. Peart J concluded that social justice had been a significant factor for the legislature, and this was crucial in his rejection of the constitutional challenge.[112]

Complementarily, other scholars have emphasised how the Land Question must be understood against the colonial context of Irish history. As suggested by Walsh above,[113] understanding that context is crucial for understanding why property rights in an Irish context are to be distinguished from Britain and the United States. Allen has described how former colonies who became members of the commonwealth chose to place different emphases on property rights, usually of a communitarian nature, than their colonisers.[114] Walsh and Fox O'Mahony argue for the existence of a unique Irish conception of property in contrast to Britain, centring the idea of property as security;[115] a point further discussed below. So at variance with Britain was the Irish experience of property rights that the first draft constitution for the Irish Free State put forward by Cumann na nGaedheal contained a property rights provision that was influenced by a Soviet constitution with the 'Soviet character' of the property clauses being a factor in its rejection by London.[116] The fact that it was put forward in the first place by what became Ireland's staple centre-right party illustrates how the independence struggle shaped the Irish understanding of property rights.

It is unsurprising that a country like Ireland with a colonial history intimately tied to the Land Question would choose to place a different emphasis on property rights than certain other common law jurisdictions. While Irish law remains based on the common law, the Constitution is the exact place to pursue general modifications of the common law. The Constitution's preamble itself centres the struggle for independence.

The political ideology which framed that anti-colonial struggle was republicanism and its influence can also be seen on the Constitution.[117] In reformulating land law through the Law and Conveyancing Law Reform Act 2009, the Law Reform Commission justified changes to

[109] *Foley* (n 104) 153.
[110] [2006] IEHC 27.
[111] ibid.
[112] ibid.
[113] See 'Origin of the Constitution' section above.
[114] Allen (n 11) 109-110.
[115] Rachael Walsh and Lorna Fox O'Mahony, 'Land Law, Property Ideologies and the British-Irish Relationship' (2018) 47 Common Law World Review 7, 23.
[116] ibid 18. See also Thomas Mohr, 'British Involvement in the Creation of the First Irish Constitution' (2008) 30 Dublin University Law Journal 166
[117] McDonagh (n 70) 197-8; Coughlan (n 77) 145.

common law property rules on the basis of the republican character of the State.[118] Indeed, Daly has argued for republicanism as the solution to the falling away of natural law as an 'underlying public philosophy' of the Constitution.[119] As judges must necessarily interpret the Constitution against some set of values, given that value-free interpretation is impossible for a document that expressly mandates the courts to balance various principles against each other, Daly argues that republicanism holds the most appropriate set of values.[120] Republicanism is easily reconciled with communitarian property theory as the republican conception of freedom is as freedom from domination, as opposed to the liberal conception of freedom as freedom from interference.[121] Freedom from domination accords, for example, with property as material security more so than with property as a vehicle for the pursuit of profit.

Whatever the political potential of the constitutional property provisions, the evolution of case law has bounded that potential in particular ways. The point about the influence of republicanism and anti-colonialism, however, does complement both the importance of the Land Question in the Irish constitutional constellation and, ultimately, the communitarian character of the constitutional property rights provisions. The Land Question context reveals the extent to which the Constitution envisages the possibility for comprehensive redistribution and reconfiguration of property rights.

Blake-Madigan – A Threat to Communitarian Property Jurisprudence

The relationship between Articles 40.3.2° and 43 is critical for determining whether the Constitution leans communitarian or liberal on property rights since the Constitution's communitarian content emanates from Article 43 with its references to 'social justice' and the 'exigencies of the common good'. The courts' position on the relationship has continuously changed over the years with many judgments contradicting each other often without one expressly overruling another.[122] While it appeared at one point that 40.3.2° might predominate in constitutional interpretation, the communitarian values of 43 have re-emerged as a crucial component in constitutional property rights adjudication.

Many early cases in Irish constitutional property jurisprudence ruled that the property rights comprehended by Article 40.3.2° were those listed in Article 43.[123] The question of the relationship between these articles *appeared* to be definitively answered in *Blake-Madigan*,[124] a case involving a challenge to rent control legislation, where the ruling on the relationship between Articles 43 and 40.3.2° was to the detriment of the former and the communitarian values contained therein.[125] *Blake-Madigan* has never been expressly overruled and many of its rulings continue to cast a shadow of doubt over how the legislature can constitutionally intervene in property rights.[126]

[118] Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34 – 2004) 34.
[119] Daly (n 5) 91.
[120] ibid 104-6.
[121] Pettit (n 33) 40.
[122] Hogan and others, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) ch 7.8.
[123] See *Foley* (n 104) and *Attorney General v Southern Industrial Trust* [1960] 94 ILTR 161.
[124] *Blake v Attorney General* [1982] IR 117 (SC).
[125] Gerard McCormack, 'Blake-Madigan and Its Aftermath' (1983) Dublin University Law Journal 205, 224.
[126] See Hilary Hogan and Finn Keyes, 'The Housing Crisis and the Constitution' (2021) 65 *Irish Jurist* 87, 89.

The facts in *Blake-Madigan* involved a particularly extreme infringement of the plaintiffs' property rights.[127] The legislation in question imposed rent control to the extent that rent was between nine and nineteen times less than the market rate. Combined with onerous obligations to repair the premises in question and strong protections for tenants from eviction, the plaintiffs argued that the legislation effectively rendered their properties of no financial benefit. O'Higgins CJ stated that the Constitution offered a 'double protection' for property, a general guarantee that the State could not abolish private property as per Article 43.1 and a protection for individuals that their specific items of property would be protected as per Article 40.3.2°.[128] This interpretation would have made Article 40.3.2° the clause of real importance and effectively side-lined Article 43 values almost entirely from adjudication.

The court went on to rule that, as the legislation affected the plaintiffs' property rights and as it did so without justifying why this particular group of individuals were being singled out, i.e. persons who happened to have property rights in rent-controlled dwellings, it constituted an unjust attack.[129] The means of the tenants in question or of the landlords were not factors in the legislation nor did the legislation provide any compensatory factor to the landlords for the interference in their property. The rent control provisions were therefore unconstitutional. The court did not explicitly rule on the recovery of possession aspect of the legislation. It acknowledged restriction of landlords' rights in that respect could be justified in certain circumstances but as those restrictions were part of a legislative package with unconstitutional elements in this instance, the whole legislation must fall together.[130] The case concluded by gently pointing out that the legislature should protect the tenants in question by passing new legislation that would determine fair rents and provide for a degree of security of tenure.[131]

The Bill proposed by the legislature to fill this lacuna was referred to the Supreme Court by the President under Article 26 of the Constitution and the resulting judgment appeared to further cement the *Blake-Madigan* decision itself. The Bill envisaged a period where tenants would pay a higher rent each year until, after five years, they would be paying market value.[132] The court ruled that market value rent was the 'just and proper rent' and found the bill unconstitutional on the same basis as *Blake-Madigan*; that it constituted an unjust attack on the plaintiffs' property rights without justification.[133] On the face of it, the Article 26 case appears to enshrine a right to market rent.[134] Christman points out that granting full income rights such as the right to receive market rent would amount to allowing full bilateral trades with no regulation, taxation or interference.[135] It would preclude any regulation by the State that related to the distribution of resources and would thus infringe upon state sovereignty. Cohen further argues that property rights as a guarantee to investors of a return on their investment is akin to the State guaranteeing private actors a percentage of the value produced by society as a whole; a position clearly at odds with a communitarian constitutional jurisprudence.[136]

[127] *Blake-Madigan* (n 124) 132.
[128] ibid 135.
[129] ibid 136-40.
[130] ibid 140.
[131] ibid 142.
[132] [1983] IR 181 (SC).
[133] ibid 190.
[134] Walsh (n 20) 142-3.
[135] John Christman, 'Distributive Justice and the Complex Structure of Ownership' (1994) 23 Philosophy & Public Affairs 225.
[136] Cohen (n 39) 13.

A short number of years later, however, the same Chief Justice who had given the ruling in *Blake-Madigan* gave a judgment in *O'Callaghan v Commissioners of Public Works* that contained an altogether different approach.[137] In doing so, he was influenced by the intermittent judgment in *Dreher v Irish Land Commission*, a case where the Land Commission carried out a compulsory purchase for monies marginally below market value.[138] Walsh J had stated in *Dreher* that any State action authorised by Article 43 could not by definition be unjust for the purposes of Article 40.3.2°.[139]

The plaintiff in *O'Callaghan* had claimed legislation which allowed the Commissioners of Public Works to make a preservation order protecting a national monument on his land without providing him with compensation was unconstitutional. The Supreme Court ruled the plaintiff was not entitled to compensation. Referring to *Blake-Madigan*, the court disagreed with the role in constitutional property rights to which that case had consigned Article 43. It stated that Article 43 did 'more than merely institutionalise private property'.[140] It 'authorises' the State to regulate the exercise of the property rights referenced in that article. When the question of an 'unjust attack' on a property right was raised, Articles 43 and 40.3.2° ought to be read together 'so as to give effect, in so far as possible, to both provisions'.[141]

This position was generally followed thereafter with the ruling in *Dreher* emphasised, that is, if a piece of legislation conforms to Article 43 then it is necessarily constitutional for the purposes of 40.3.2°.[142] In more recent years, the relationship between the Articles has been summarised as that they 'mutually inform each other'.[143] It is important to therefore note that, since *Dreher* implicitly overruled the Supreme Court's interpretation of Article 43 in *Blake-Madigan*, if a case with the same facts were being decided today then courts would have to apply different considerations, i.e. it would have to apply communitarian values to the legislation.

Moreover, the Article 26 case was intimately related to *Blake-Madigan* itself and cannot be read without the aid of the latter judgment. The Oireachtas' bill sought to legislate as *Blake-Madigan* had suggested; to protect the now precarious tenants in question by providing for 'fair' rents. The Article 26 case seemed to then rule that the only fair rent was market rent. Such a contradiction may be resolved by looking to the fact the Article 26 judgment again reiterated that no justification was provided for why property owners of rent-controlled dwellings should, in particular, be subjected to infringements of their rights. If no such justification was provided and no reference to the circumstances of the tenants was made, then the court could perhaps only conclude there was no reason why market rent would not be the assumed rent. It is arguable, therefore, that where a better justification is provided by the Oireachtas for why it seeks to diverge from market rent as the norm and, in light of *Dreher*, especially where issues of social justice and the common good arise, courts should not apply the logic shown by the Supreme Court in the Article 26 case. Courts have not applied such logic in practice, and this further indicates that these cases should be seen as results produced by unique sets of facts and a unique application of the law, focusing only

[137] [1985] ILRM 364 (SC).
[138] [1984] ILRM 94 (SC).
[139] ibid 96.
[140] *Blake-Madigan* (n 124) 367.
[141] ibid.
[142] See, *inter alia*, *ESB v Gormley* [1985] IR 129 (SC) 150; *Lawlor v Minister for Agriculture* [1990] 1 IR 356 (HC) 373; *Clancy v Ireland* [1988] IR 326 (HC) 336; *Murphy v GM* [2001] 4 IR 113 (SC) 157; *Re Article 26 and the Health (Amendment) Bill 2004* [2005] 1 IR 105 (SC) 200.
[143] *J & J Haire v Minister for Health* [2010] 2 IR 615 (HC) 644 quoting *JM Kelly: The Irish Constitution* (4th edn, Lexis Nexis 2003) 1993. The same language was used in *Flynn v Breccia* [2015] IEHC 547 [246].

on Article 40.3.2°. The rent control cases therefore represent a road not travelled for the courts and a road now cut off by further developments.

An argument might be made that the Constitution's placement of property rights alongside such liberal rights as freedom of assembly in Article 40 connotes a liberal understanding. While this argument may have some merit, like the other rights contained therein, the rights associated with liberalism contained in Article 40 have consistently been ruled not to be absolute.[144] Article 40.3.2°, then, may simply be a guarantee that the Oireachtas, 'under the disguise of a claim that they were promoting the common good', cannot unfairly and disproportionately interfere with property rights.[145] Examples of such unfair and disproportionate interferences may be seen in *Brennan v Attorney General*[146] and *Daly v Revenue Commissioners*[147] where legislation produced demonstrably unfair tax results for individuals without any social justification.

Even where cases appear to have had pro-property rights outcomes, communitarian values have taken centre stage, for example in the *Health Bill* case (discussed below).[148] In *Re Article 26 and the Employment Equality Bill 1996*, the court held that the goal of equality in the workplace did justify a delimitation of property rights via forcing employers to make their workplaces more adequate for disabled employees.[149] The bill was ruled unconstitutional only because it attempted to realise its goal by placing onerous burdens on employers, not taking account of their respective means. Thus, the Court's issue was with how the law applied, the problem being with the unequal sharing of the burden rather than the existence of the burden itself.

Neither has the proportionality doctrine ultimately impeded the realisation by the Oireachtas of social justice and common good considerations through regulation of property rights. While that doctrine will not be discussed in this article, it is important to point out that certain commentators have argued that the doctrine had somewhat erased Article 43 values from judicial discourse.[150] It is submitted that this outcome, although it had been a threat, did not ultimately occur as some of the case law discussed in this section and later sections illustrate.

There is now consistency in that all constitutional property rights must be evaluated with communitarian criteria in mind. While the property rights of individuals will also be given due consideration, the spectre of liberalism creep denuding the communitarianism of Article 43,[151] which was arguably raised in the *Blake-Madigan* judgment, has largely been abated.

Liberal Aspects of Article 43

To evaluate the extent to which communitarian values predominate in Irish constitutional property jurisprudence, it is important to also consider the possible liberal aspects of Article 43 and their potential to create a countervailing tendency. While 43.2 speaks of social justice, the common good and the regulation of property rights in accordance with those principles, 43.1 states that the right to the ownership of external goods is a natural right, antecedent to positive law. The concept of a natural right to the private ownership of external goods

[144] E.g., in respect of freedom of expression. See Hogan and others (n122) paras 7.6.07 – 7.6.136.
[145] *Central Dublin Development Association v Attorney General* [1975] 108 ILTR 69 (HC) 85.
[146] [1984] ILRM 355 (SC).
[147] [1995] 3 IR 1 (HC).
[148] *Re Article 26 and Health Bill* (n 142).
[149] [1997] 2 IR 321 (SC) 367-8.
[150] Hogan (n 1) 377.
[151] See McCormack (n 125) 224.

appears at first sight to be a strong private property guarantee. Private ownership is placed into the realm of natural rights and therefore outside the realm of political contestation.

In *Blascaod Mór Teo*, Budd J situated 43.1 in its historical context, stating that it connoted 'a rejection of fascism and totalitarianism in the sense of recognising the right of the individual to own property rather than the State owning all assets.'[152] This claim has some historical basis in that de Valera's government did not wish to be perceived as communist-friendly.[153]

However, with further analysis, it can be seen that Article 43.1's natural rights language is not as strong of a property rights guarantee as it might first appear. The question of the natural law conception of property returns the discussion to natural law philosophers such as Aquinas who, as discussed earlier, do not necessarily have an absolutist perspective on private property. A strict reading of the clause shows that it guarantees no more than that the *general* rights to own objects and to transfer them may not be abolished. In a 1937 internal memorandum, one of the Constitution's drafters, JJ McElligott, made the point that, on the basis of the text alone, Article 43.1's wording was sufficiently general that it could theoretically have allowed the State to prohibit the ownership of land.[154] In a more contemporary context, Pettit made a similar point when he argued that Article 43 could only be understood as a right to be able to own external goods under *some* system of positive law; it did not impose any particular form on the ownership rights that the positive law was required to establish.[155]

Nevertheless, Article 43.1 does have certain liberal connotations. *Blake-Madigan* ruled that it provided a general protection for the institution of private property.[156] By enumerating the rights to transfer, inherit and bequeath property as further rights protected, the Constitution to some extent separates from property rights, but provides protection to, rights to transfer property associated with freedom of contract. By referencing both property and rights to transfer it, the Constitution guarantees some form of a market in property. It could be argued that Article 43.1 suggests, though does not necessitate, a property rights regime grounded on liberal ideas of strong property rights and markets. The State's ability to intervene in property rights is thus to a certain extent bounded. In connotation at least, Sunstein would find much to admire in this article.

While these liberal aspects of Article 43 should not be discounted, it is submitted that the legislature has never approached the outer limits of its ability to intervene in the institution of property as protected by Article 43.1. There has never been an attempt to abolish private property and 43.1 has offered little practical value to litigants trying to protect their property rights. Article 43.1 does, however, mandate that when judges apply Article 43.2 values in adjudicating constitutional property rights, the liberal values in Article 43.1 must also be considered.

Application of Communitarian Values

The below sub-sections relate to two areas where the courts have centred communitarian values. The courts' interpretation in these areas demonstrates the emerging dominance of the communitarian tendency in constitutional property law.

[152] [1998] IEHC 38.
[153] See Walsh (n 19) 98.
[154] Hogan (n 82) 513.
[155] Pettit (n 33) 44.
[156] *Blake-Madigan* (n 124) 135.

Planning Law

In recent years, planning law generally has seen many judicial decisions which have applied the communitarian values of Article 43. There has been no resolution but some evolution on the question of whether planning law consists of an interference with property rights, an enhancement of property rights, or whether planning permission is itself a species of property right. For example, *Central Dublin Development* held planning legislation to be an interference with property rights.[157] In two later cases, *Re Article 26 and Part V of the Planning and Development Bill 1999*[158] and *Pine Valley Developments v Minister for Environment*,[159] the Supreme Court took the opposite view and determined that planning permission was an enhancement or enlargement of property rights. In the *Part V* case, the bill in question required owners of land with development rights attached to it to cede 20% of that land to local authorities for monies equivalent to existing use value as opposed to market value.[160] The bill's aim as the provision of housing for people of moderate means in a housing context where such people were increasingly excluded from purchasing property. The consideration that planning permission enhanced property rights was crucial in reaching the communitarian-friendly ruling that the bill was constitutional.[161]

Pine Valley related to a challenge by a purchaser who made its purchase on the basis that an outline of planning permission had been granted only for that planning permission to have been deemed unlawfully granted in another Supreme Court decision.[162] The purchaser claimed its property rights had been infringed by virtue of the latter decision but the court rejected this argument on the basis that a grant of planning permission was an enhancement of property rights. The diminution in value that occurred therefore only affected the enhancement, not the property rights themselves.

In *McGrath Limestone v An Bord Pleanála*, a case where the plaintiff challenged a decision to restrict its ability to use certain quarrying methods on its land, the High Court stated that planning law extended the principles of tort law in that it provided that citizens had a stake in how their community was developed and how that development was regulated.[163] In a recent High Court case, *Clonres CLG v An Bord Pleanála*, the more communitarian position was further asserted by the court which stated private property did not include a right to develop one's land:

> The Constitution is a social contract - not a one-way offer.
>
> Without taking from the principles of land law, we are all, at best, leaseholders on Planet Earth. All property must be held with some view to the benefit of society as a whole and of future generations, and is not to be dealt with as one sees fit. Even the most self made Ayn-Randian entrepreneur draws enormous benefits from her membership of society […] To argue that society's endeavours to ensure that outcome (through development plans, for example) have to be read narrowly and restrictively, while the individual

[157] *Central Dublin Development* (n 145).
[158] *Part V* (n 68) 352.
[159] [1987] IR 23 (SC) 45.
[160] *Re Article 26 and Part V* (n 68) 324.
[161] ibid 353.
[162] *Pine Valley* (n 159).
[163] [2014] IEHC 382 (HC) [10.5].

> property owner can take the full advantage of societal provision both direct and indirect, is to entirely distort the social contract.[164]

Humphreys J's above statement clearly reflects communitarian and republican values. The judgment accords with progressive property theory and acknowledges that the existence of property assumes a society and the institutions which protect property. It is strongly anti-liberal while still recognising property rights. Nevertheless, the question of planning permission's relationship to property rights has not been fully resolved as can be seen by, for example, the judgment in *Sister Mary Christian v Dublin City Council* where the court favoured the *Central Dublin Development* position that planning law curtails property rights.[165]

In these recent cases, the Irish courts have, in a sense, approached planning law through the prism of the normative aspect of property rather than through the descriptive aspect. Assuming a particular set of property rights as inherent to property has the potential to create a liberal bias in the normative evaluation of property rights due to the historical influence of private actors on the concept of property.[166] However, this potential has been somewhat limited by the principles articulated in *Central Dublin Development* which envisage State intervention in property rights as routine, and property rights as far from absolute and not requiring a very high bar to be met to justify State intervention.[167] Kenny J's judgment states that the Irish constitutional position on property is that it was comprised of a bundle of rights as opposed to one unified thing.[168] In an Irish constitutional context, there has been no attempt to list the individual rights of this bundle. The most widely-used enumeration of the bundle comes from Honoré[169] but even Honoré conceded that his bundle described a certain western form of property.[170] Honoré recognised the political significance of property rights[171] in a later essay explicitly arguing against Nozick's libertarian theory of property rights and for a system of redistribution by the State not dissimilar to that of Aquinas.[172] While there is no doubt in practice that property in Ireland has not diverged substantially from other western property rights systems, the centrality of communitarianism to the constitutional undergirding of property in Ireland raises the possibility that in order to determine what rights are included in the bundle in an Irish context, values must be part of that discussion.

Property Rights Holders

A second area that reveals the communitarian understanding of property rights at the heart of Irish constitutional jurisprudence is the recognition that the strength of property rights can vary based on who holds those rights. This idea is intertwined with the idea of property as corresponding to security. Christman posits that property rights relating to the material security of the individual are deserving of greater protection than those relating to profit-making.[173]

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164 [2021] IEHC 303 [84].
165 [2012] 2 IR 506 (HC) 561.
166 Pistor (n 10) 89-91.
167 *Central Dublin Development* (n 145) 85.
168 ibid.
169 Honoré's standard incidents are the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary. Anthony Maurice Honoré, 'Ownership' in Anthony Guest (ed), *Oxford Essays in Jurisprudence* (Oxford UP 1961) 370.
170 Anthony Maurice Honoré, 'Property, Title and Redistribution' in Larry May and Jeff Brown (eds), *Philosophy of Law: Classical and Contemporary Readings* (Wiley Blackwell 2010) 265.
171 Honoré (n 169) 372.
172 Honoré (n 170) 267-8.
173 Christman (n 135).

The question as to whether companies held constitutional property rights was not definitively answered in the affirmative until *Iarnród Éireann v Ireland* which did not set out a comprehensive reasoning as to why companies ought to have such rights.[174] Previous cases had not recognised such rights, but indirectly protected property owned by companies by virtue of protecting the property rights of shareholders. *PMPS v Attorney General* had held that companies, as creatures of positive law, could not have constitutional property rights under the Constitution as the property rights protected therein arose to 'man, in virtue of his rational being'; the wording of Article 43.1.[175] Prior to *Iarnród Éireann*, the Constitution Review Group had recommended that constitutional property rights should not be extended to corporate persons.[176] The arguments put forward by those in the majority included the contention that constitutional rights were intended to relate to human beings. They also included the possibility that recognition of constitutional property rights of corporate persons could mean 'corporate resources and financial power' would be marshalled to challenge the constitutionality of legislation and thereby have 'legal, financial and social consequences.'[177]

Despite the ruling in *Iarnród Éireann*, there has been further judicial recognition that constitutional rights may apply differently to human persons than to corporate persons. *Kelly* cites the High Court cases of *Digital Rights Ireland v Minister for Communications*[178] and *Smith v Considine*[179] as examples of this recognition but comments that the courts have not offered any guidance as to how the rights may differ as between the categories.[180] Some indication of how Irish courts factor in the differences in who holds property rights may be seen in *Pine Valley*. Without specifying the exact causal relationship with its decision, the Supreme Court placed a strong emphasis on the fact that the company's investment was of a speculative and commercial nature in its conclusion that no compensation was payable on foot of the removal of the planning permission attached to the properties in question.[181]

Re Article 26 and the Health Bill concerned proposed legislation that would retrospectively declare lawful nursing home charges imposed without legal basis on elderly patients of limited means.[182] The Supreme Court held the bill repugnant to the Constitution. It stated that there was a 'moral quality' to the right to ownership of property and this quality was 'intimately related to the humanity of each individual'.[183] The court proceeded to find that property rights of persons of 'modest means' must be particularly deserving of protection since 'any abridgment' of their rights would be 'proportionately more severe in its effects'.[184]

Decisions such as these illustrate that, despite the existence of constitutional property rights for body corporates, the courts will not treat property rights as protection for profit-seeking investments the same as property rights which serve the material security of human persons. This is an area where Irish constitutional property rights jurisprudence demonstrates clear

[174] [1996] 3 IR 321 (SC) 345-6.
[175] [1983] IR 339 (HC) 349.
[176] Constitution Review Group, *Report of the Constitutional Review Group* (Government of Ireland Stationery Office 1996) 364.
[177] ibid 363.
[178] [2010] IEHC 221 [51].
[179] [2017] IEHC 22 [12].
[180] Hogan (n 144) para 7.8.42.
[181] *Pine Valley* (n 159) 46.
[182] *Re Article 26 and Health Bill* (n 142) 200.
[183] ibid 201-2.
[184] ibid 201-2.

communitarian values, whether or not the implications of these values have yet been fully realised.

Conclusion

The Irish Constitution, as interpreted by case law, requires the Article 43.2 concepts of social justice and the common good to be engaged with and applied by the courts when they adjudicate on constitutional property rights. The meaning of these concepts must therefore be given a proper analysis. This article has set out the normative theories of property with the potential to assist with such an analysis and has used those theories to conduct the analysis.

The genesis of the Irish constitutional provisions on property rights lies in the communitarian teachings of the Catholic Church. The historical record shows the direct influence of Church figures on the text and, indirectly through those figures, the influence of papal encyclicals. The influence of Thomism has also been felt in Irish constitutional property jurisprudence, an influence finding its way into that jurisprudence through the papal encyclicals and Catholic social teaching generally. It is of note that these communitarian influences are consistent with republicanism, a significant influence in the formation of the Irish constitutional order. The Land Question discussion illustrates the objects envisaged by these communitarian values: redistribution of property rights and reconfiguration of property relationships. At least in respect of property rights, there is a strong argument that these tendencies inform the underlying public philosophy of the Constitution.

While liberalism has a place in Irish constitutional jurisprudence generally, the spectre of liberalism creep denuding the communitarian spirit of the Constitution with regard to property rights has receded in recent years. Recent decisions in areas such as planning law shows how the courts have increasingly centred communitarian values.

It may be concluded from this article as a whole that Irish constitutional property rights jurisprudence possesses a relatively unambiguous theory of property rights. The communitarian values of Article 43 provide a prism in determining the extent to which property rights may be intervened in by the Oireachtas. Following some initial contradictory currents in the case law, a consistent communitarianism in constitutional property rights adjudication has recently been emerging. The analysis set out in this article corroborates the validity of this emerging position.