

**Working Notes Issue 48:
The Constitution: Private Property and the Common Good**

Editorial

on Saturday, 03 July 2004.

Dear Reader,

In this issue of Working Notes we examine the report on Private Property of the All- Party Oireachtas Committee on the Constitution Property, published in April 2004. The Report followed a request from the Taoiseach in February 2000 to “consider the present constitutional provisions in respect of property rights and specifically the necessity for up-dating those provisions which pertain to planning controls and infrastructural development”.

In the light of the recent constitutional amendment on citizenship it is interesting to look at the process by which the constitutional provisions on Private Property were reviewed. Following wide consultation, in which the Committee received 140 written submissions from individuals, groups and organizations and subsequently held oral hearings, a comprehensive 133 page report and a further 300 pages in appendices were compiled. The Report includes a detailed review of the constitutional provisions on private property and existing case law, the property market and the planning system, which enabled well-founded conclusions and clear recommendations to be made.

In contrast there was no public consultation prior to proposing the recent change to the Constitution in respect of the right to citizenship. It was not deemed necessary that the All-Party Oireachtas Committee on the Constitution should consider the issue. Consequently, the debate was held in the absence of a thorough analysis. The result was that much information was at the level of anecdote and general impression; the failure of the Government to produce comprehensive research findings hindered a full and balanced assessment of the issues and the consideration of a range of possible policy responses.

The Constitution represents a privileged source and statement of values in Ireland. I believe that, in bypassing established procedures that ensure full public consultation and thorough analysis of issues prior to constitutional change, the Government did a disservice to all people who reside on this island.

Eugene Quinn

Director

Jesuit Centre for Faith and Justice

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The Constitution: Private Property and the Common Good**

A Green Light for a New Agenda on Housing and Planning

on Thursday, 24 June 2004.

Jerome Connolly

Introduction

One of the most ideologically and economically sensitive elements in any state is the legal and constitutional regime governing the ownership of private property. The regulation, taxation and expropriation of property raise fundamental questions of justice, equity, the right to shelter, the balance between individual rights and the common good. All these matters are addressed in the Report on Private Property of the All-Party Oireachtas Committee on the Constitution, published in April 2004 (1)

Given the all-party composition of the Committee, which included the complete left-right spectrum from Sinn Fein to the Progressive Democrats, the absence of any minority reports from members of the Committee suggests that the Report represents a substantial measure of political consensus. For this reason, it ought to be a major influence in determining the direction of public policy and legislation.(2)

Individual Rights and the Common Good

The Report is part of the on-going, long-term review of the Constitution being undertaken by successive joint committees of the Oireachtas following publication in 1996 of the Report of the Review Group on the Constitution.(3) In February 2000 the Taoiseach asked the Committee to examine the existing constitutional provisions on property rights, particularly as these relate to planning controls and infrastructural development. At the time there was, as there continues to be, intense public concern and debate about the availability and price of housing, and this was presumably also in the Taoiseach's mind when writing to the Committee.

The Committee considered that its principal function was to examine the property rights provisions of the Constitution in general (albeit, as it made clear, in the light of the concrete issues raised by the Taoiseach) and to "express a view as to whether, as , commonly perceived, they are weighted too heavily in favour of the individual". (p. 17)

In essence, the Report considers whether the existing regime governing the individual right to private property in Ireland should be re-balanced to give greater recognition to the demands of the common good and the public interest.

Socio-economic Rights

As part of its examination, the Committee invited submissions on a range of related issues including private property and the common good, house prices and the right to shelter. The reference to "the

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right to shelter" is of particular interest, since there is no right to shelter or housing in the Constitution at present. In the event, a number of submissions were received arguing for the inclusion in the Constitution of either socio-economic rights in general, including a right to housing, or a right to shelter and/or housing in particular. In addition, a number of organisations which made submissions primarily on other topics also endorsed the principle of a constitutional right to shelter and/or housing incidentally to their main topic of concern.

One unexpected and welcome outcome of these submissions was to persuade the Committee that the question of constitutional recognition of socio-economic rights merited "extensive debate". It concluded that a constitutional right to shelter would be better discussed in the context of all the socio-economic rights that had been proposed, rather than in isolation. It decided to defer consideration of whether the Constitution ought to include justiciable socio-economic rights to a later report. (p. 19)

With this decision the Committee has for the first time put the question of constitutionally enforceable socio-economic rights on its agenda. Such a decision is doubly significant since it also suggests that the Committee is not accepting *prima facie* the recommendation of the Constitution Review Group in 1996 that "anti-poverty" (i.e. socio-economic) rights should not be accorded constitutional status.

The Committee's position could be interpreted negatively as postponing indefinitely consideration of socio-economic rights in the Constitution. However, it was under no particular compulsion to give a hostage to fortune by committing itself explicitly in writing to consider these rights in the future. A group of experienced politicians would surely have refrained from doing so unless they were indeed persuaded that the case for constitutional recognition in truth deserved serious examination.

Important Commitment

This commitment is potentially highly significant. If acted on, it means that we would be facing into what might well prove to be one of the most wide-ranging constitutional and human rights debates for many years. Given the scope of socio-economic rights, such a debate would engage political and ideological opinions across the political spectrum. Of course, much of the debate would not necessarily be about widely differing values but about more technical legal and constitutional aspects of how and by what means rights of differing sorts can best be vindicated in practice.

Challenge to Voluntary, Community and Church Sectors

It is certain that there will be articulate and well-organised opposition to giving constitutional status to social and economic rights on various grounds. What is not as certain is whether there will be equally articulate and well-organised groups supporting it. Herein lies the challenge for the community sector, for church groups and leaders, for those who want to redress the growing inequalities in our society, for those who campaign for social and affordable housing, disability rights, more equitable health services, children's rights and many more issues.

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Need for Broad-based Lobby

The challenge is two-fold. The first is not to let the commitment of the Oireachtas Committee slip into oblivion, but to keep it to the forefront of public and political attention. The second is to take seriously the need for a rigorous preparation by a wide range of groups in order to argue the case for social and economic rights. In practice the two go together.

It is not at all clear if the long-term strategic importance of the commitment given in the Report has been so far appreciated by the various interests and sectors mentioned above. If the Committee were to begin to look at the issue this autumn, for example, it is likely that most potential supporters of inserting social and economic rights into the Constitution would be caught unprepared.

What is called for now is a broad-based movement or coalition of interests and individuals, whether formal or informal, to encourage and pool research, to network and provide mutual support, to lobby and campaign for the inclusion of social and economic rights in the Constitution. The research should be done, the arguments well-made and disseminated, the objections noted, pondered and countered, before the present Oireachtas Committee or its successor actually begins to consider the question.

Kenny Endorsed

In considering the two articles in the Constitution dealing with property rights, the Committee had particular regard to an important earlier text, the 30-year old Report of the Committee on the Price of Building Land (1973) (the 'Kenny Report'). The Kenny Report's major recommendation was that local authorities should be empowered to cap the amount of compensation for compulsorily acquired land in designated areas at a level equal to existing use value plus 25%. However, this was never acted on because of purported uncertainty about whether any law putting it into effect might run foul of the Constitution. Subsequent governments of all hues had pointed to such doubts as justification for their unwillingness to act on the recommendation.

Following a "close analysis" of the Constitutional text and of relevant case-law, the Committee's Report decisively removes any remaining uncertainty. (p. 39)

The Committee notes that case law since Kenny has determined that the property rights provisions of the Constitution are far from absolute and that sometimes even far-reaching interference with such rights can be justified by reference to the common good. In effect, the Oireachtas now enjoys a wide margin of appreciation in regulating, or even restricting, constitutionally-protected property rights. In doing so, however, it is required to respect the substance of the right in question and to ensure that legislation is based on rational considerations and meets criteria which Irish courts have defined to test legislation which seeks to abridge constitutionally-protected rights. The Committee concludes that the State has a broad discretion whenever it seeks to maintain a due balance between the demands of the common good and the individual's rights in property matters.

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In the light of the developments in contemporary Irish case-law, therefore, the Committee reasons that it would now be "very difficult" to see why the Kenny Report's recommendations would not stand up to constitutional scrutiny. (p. 39) Several cases have made it clear that, since there is no constitutional right to use one's land in a manner inconsistent with appropriate land use restrictions, the value of the land must be measured *prima facie* by reference to existing land use values, rather than possible or anticipated future developmental values (which, of course, are likely to be much greater). The Committee judges that the landowner should, however, receive compensation somewhat above existing use values, possibly up to the Kenny figure of 25 per cent, "if only to assist in repelling any possible constitutional challenge". (p. 40)

By coming unanimously to this conclusion, the Committee effectively sweeps away any remaining grounds for reluctance on constitutional grounds to give the Kenny recommendation the force of law. Whether legislation will be brought forward is now clearly a question of political will rather than constitutional hindrance.

Refusal of Planning Permission

A substantial part of the Committee's survey of developments in case law since 1970 was an examination of whether compensation to a landowner was constitutionally required if he or she was refused planning permission to change an existing land use.

The Committee decided that the outcome of the judicial reasoning in the cases cited is that a landowner cannot claim a constitutional entitlement to compensation for refusal of permission to change an existing land use. (pp. 28-33)

Land Hoarding

The question of the hoarding of large land banks at the edge of urban areas by developers to keep prices artificially high was considered. The Committee did not come to any conclusions about the extent of this problem, but took the view that the planning system as it currently operated served to facilitate "those with the resources to buy up development land and hold on to it". (p. 86). It concluded that any failure to act in relation to the matter was not caused by the requirements of the Constitution nor was the question resolvable by constitutional amendment. The Committee argued that the problem can be dealt with by legislation - for example, through tax changes encouraging early use of zoned land and penalising failure to use it expeditiously. (p.42)

'Special Cases'

A number of 'special cases' were also looked at by the Committee. On the matter of ground rent, it took the position that while a ground landlord's ground rent represents a right to an income which "in principle" is constitutionally protected, the abolition of ground rent would not be unconstitutional provided adequate compensation was paid. It recommended that the government should prepare legislation to abolish ground rents on foot of adequate compensation. (p. 51)

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After reviewing the question of access to the countryside, on which quite a number of submissions were received, the Committee concluded that no constitutional amendment was needed to enable the introduction of legislation that would provide a balance between the common good and the rights of individual owners. (p. 56)

The Property Market

The Report includes a comprehensive analysis of the operation of the property market. It is not possible here to do more than pick out some of the key points made in this analysis.

The Committee concludes that the 'normal' rules of economics do not apply directly to the property market. This is due to widespread imperfections, including the fact the number of buyers and sellers in the property market, and its various sub-markets, is limited. This often means that either category may be able to unduly influence trading and prices, with the result that "the smooth operation of the market can be inhibited to a point where the normal criteria of supply and demand may not apply." (p. 76)

Property prices are usually very high in relation to the incomes of those wishing to buy houses, with the result that a substantial and increasing number of people are precluded from owning homes. In one of the most significant admissions of the Report, the Committee acknowledges that:

“property markets will not of themselves supply everyone with a house which they can own. Where there is an overall shortage of housing, those at the bottom end of the market will be priced out because the market rations the available accommodation among competing bidders. On the other hand if property prices are low, supplying those at the bottom end of the market may not be sufficiently profitable to encourage development. It follows that direct, non-market provision of accommodation will be necessary at all stages of the cycle.” (p. 73) (Emphasis not in original)

The Committee therefore accepts that a housing economics policy "more in tune with societal requirements than pure market requirements" is needed. (p. 73)

Another salient characteristic of property and particularly house markets is their sensitivity to tax policies. Ireland is exceptional in western countries in not having local taxes on residential property to fund local government. According to the Committee, by encouraging people to keep more of their investment wealth in housing this actually keeps house prices higher in Ireland than they would otherwise be. (p.76) It fights shy, however, of overtly recommending the reintroduction of local taxes on residential property - presumably from an understandable desire to avoid political suicide.

In general, the Committee concludes that "unfortunately" policies in relation to housing, planning and taxation have taken insufficient account of the various characteristics specific to property markets, or of the interaction between planning and urban property, and this has led to "deficiencies that manifest themselves in particularly high development land prices". (p. 77)

Analysis of the Planning System

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The Report also provides a detailed analysis of the operation of the planning system and its interaction with the property market. Again, only a brief indication of this analysis can be given here.

The Committee criticises the prevailing understanding of the planning system which sees problems arising from development as being amenable to basically administrative solutions working independently of market forces. Interventions based on such a misunderstanding mean that market forces are frequently frustrated or contradicted. The Committee holds that high development land prices originate in our planning system because of its effect in restricting the amount of zoned and serviced land available to the market. Equally to blame are delays in planning decisions and slow supply of infrastructure such as sewage and roads by local authorities, which hold back the start of new construction.

The Committee's analysis leads it to identify as critical the zoning and servicing of an adequate amount of development land, while recognising that what constitutes adequacy is a matter of judgement. (pp. 84-5) The planning system "should be designed and managed to make the market work in the interests of the common good". (p. 86)

Charges on Unused Development Land

The Committee urges that in adopting their development plans, local authorities should ensure that sufficient land is zoned to meet anticipated need. It goes on to propose a system of progressively increasing charges on development land over the duration of a development plan. The base rate for such a charge would be set with reference to the priority attributed in the plan to the urgency of developing particular lands. The charge would increase after six years to a level equal to the difference between the development land value and the agricultural land value, at which point the owner "may be presumed to have chosen to forgo the benefit of having land zoned for development". (p. 87) The local authority could then compulsorily acquire the lands in the interest of the common good.

Such a scheme would enable local authorities to secure the release of development land whose owners were neither actively pursuing its development nor releasing it on to the market. This would help to overcome one of the defects of the present planning system, which, as the Committee recognises, puts owners of development land in somewhat of a monopoly position, and gives an incentive to developers to act against the public interest by timing their disposals to maximise the gain to themselves. "This situation", says the Committee, "is not a flaw thrown up by market economics, it is the way the planning system is allowed to operate" (emphasis added). (p. 88) In saying so, the Committee puts the onus to rectify matters squarely on the public authorities.

Social and Affordable Housing

The Committee begins its discussion of what it calls the "special case" of social and affordable housing with the following words: "There are serious and difficult questions surrounding the constitutional status of rights to housing. Whatever about these questions, one thing is certain, the provision of shelter is a prerequisite of human existence". (p. 100) Many might feel that the second

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sentence goes a long way to establishing a prima facie case for a constitutionally protected right to housing.

The Committee says it was impressed by the clarity with which a number of named organisations presented the level of housing need which exists, quoting for example the CORI submission, which showed that while the number of households on local authority waiting lists had grown by 76% between 1996 and 2002, the overall stock of local authority social housing had increased over the same period by less than 5%. (p. 101)

Despite its earlier warning about the danger of ignoring basic market forces, the Committee is clear that "social and affordable housing are special cases that must be treated by special interventions". (p. 104) The Committee is unequivocal that:

“at some basic level the provision of a certain amount of social housing.. should be seen as part of the basic supports of a civilised society.”(p. 103)

Social housing should be regarded as part of the infrastructure needed for society to operate and should be provided and funded in the same way as other basic infrastructure. The Committee argues that this can be done through the simple step of amending section 48 of the Planning and Development Act, 2000 to include social housing under the definition of "public infrastructure and facilities". Such a step "would enable local authorities to include the cost of providing the planned supply of social housing in the scheme for determining the amount of development levies." (p. 103)

The Committee emphasises that in providing social and affordable housing care must be taken to ensure that this is in addition to the accommodation supplied by the market. Otherwise, it says, resources would only be shuffled around, reducing supply to the market, with the likely result of raising prices, which would be perverse. It suggests that the issue could be addressed by local authority development plans identifying lands that would be reserved for social and affordable housing. (p. 104)

There are many who might disagree with the Committee's observation that the fact that providing more subsidised accommodation is likely to elicit increased demand, giving the misleading impression that the problem of housing need was growing. For many years, the number of jobs increased without leading to a commensurate drop in unemployment figures, reflecting the fact that many people who had previously given up looking for work because they felt there was no work to be had. The same is as likely to be true of subsidised housing, where at present many people have simply abandoned the idea that they will ever be able to get accommodation of their own through any channel, market or social.

National Development Forum

The Committee outlines the criticisms of the planning system contained in the submissions it received - including shortages in zoned land, delays in planning decisions, failures in transparency and accountability. (p. 109) There is acknowledgement that the revelations of tribunals have shaken public confidence in the part played by politicians in the zoning and re-zoning of lands in particular.

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(p.122) The Committee puts forward a series of recommendations to address the concerns raised, including the interesting proposal that there should be a government-appointed national forum for the built environment "through which the best thinking and practice would be made available continuously to the whole planning system" (p. 123). The forum's membership, it is suggested, should be drawn from the planning, construction, property and environmental interests as well as the state regulatory bodies concerned with planning. Whether by accident or design, the inclusion of representatives of social housing organisations and other NGOs concerned with housing is not mentioned, despite the attention given throughout the Report to social housing needs. It is to be hoped that this omission will be rectified if such a forum is established

Conclusion

The All-Party Committee gives a decisive green light to the introduction of legislation empowering local authorities to compulsorily acquire land at existing use value plus say 25%, rather than at its potentially much higher value as development land. It blames, not the principle of a planning system, but the way the existing system is operated in practice, for failing to supply an adequate flow of serviced and affordable development land to the market. In these two crucial areas it firmly lays responsibility at the door of the legislature and public authorities to reform the current highly unsatisfactory situation. It denies government any longer the excuse that the constitutional provisions on private property represent a barrier to legislative action.

The Report is unusually significant in its unequivocal statement of the need for non- market provision of housing. The Committee makes a cogent case for using the strengths of the market to provide housing for most people, but argues strongly that social housing should be seen as part of the State's general infrastructural provision. In doing so, it is very clearly asserting that the market should not be allowed free rein, and that shelter is a basic human requirement which a civilised society will ensure for everyone, including those dispossessed by raw market forces.

The challenge now is to see the recommendations of the Committee translated into action. As negotiations on a new partnership agreement open, trade unions and the members of the social pillar might give serious consideration to requesting that a commitment to act on the Report be included in any new agreement.

Notes

1. The All-Party Oireachtas Committee on the Constitution, Ninth Progress Report: Private Property, Dublin: Stationery Office, 2004.
2. In addition to the 133-page main Report, there is an appendix of nearly 300 pages containing the texts of a "broad and representative" selection of the 140 written submissions received by the Committee. The Report aside, this offers a valuable source for anyone concerned with the various social, constitutional and legislative aspects of private property in Ireland.

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Since the Report is likely to remain a reference point for a long time to come, and given its complex and interlocking subject matter, one cause for regret is that a more detailed subject index, including the appendix containing submissions to the Committee, was not included.

This would have made a document of this importance more easily consulted and referred to. Bearing in mind that modern word processing packages now enable such indexes to be quickly and easily compiled, it is to be hoped that future reports of the Oireachtas Committee, especially if they continue to be of this quality, will be provided with full subject indexes, and indeed more detailed tables of contents.

3. Constitution Review Group Report, Dublin: Stationery Office, 1996.

Housing : A Growing Trend towards Inequality

on Thursday, 24 June 2004.

Margaret Burns

Introduction

The recommendations of the All-Party Oireachtas Committee on the Constitution on the right to private property and its relationship with the requirements of the greater social good, take on particular significance when seen in the context of Ireland's recent unprecedented demand for housing and infrastructural development, arising from nearly a decade of high levels of economic growth.

A key factor underlying the jump in the demand for housing has, of course, been the rise in population: the 2002 Census showed an increase of 8% since the previous count in 1996. Ireland's growing population includes an increased number of people in the key household formation groups. The total the number of households rose by 14.7% between 1996 and 2002. There has been a fall in average household size, which is now dropping towards the European average of 2.63: whereas the average household contained 3.34 persons in 1991, this fell to 2.91 in 2003. (1) The rapid growth in employment and incomes have also been critical influences on housing demand.

The scale of new house building over the past nine years is certainly striking: in total nearly 400,000 new homes have been completed. Recently published statistics show that 2003 was the ninth successive year of record house building: 68,819 dwellings were completed, an increase of 19% on the output in 2002, which in turn was an increase of 19% on the previous year's figure. (2) The level of completions in 2003 was nearly 160% higher than that in 1995 (26,500).

Ireland has now by far the highest rate of house building in Europe. In a comment on the housing output for 2002, the ESRI pointed out that this was an "exceptionally high level of completions for an economy the size of Ireland" and was "equivalent to 22.7 per cent of completions in Germany, a country with a population of over 82 million." (3)

House Prices

House prices in Ireland have risen by over 60% since 1998. The figures for 2003 show yet further upward movement in prices of both new and second-hand houses. Nationally, new houses rose in price by 13.4% on the previous year and second-hand houses by 16.3%. In the Dublin area, prices rose by 13.1% for new houses and by almost 20% for second-hand. (4) The average price of a new house nationally in 2003 was €224, 567 (in Dublin, €291,646) and of second-hand houses, €264, 898 (in Dublin, €355,451). (5)

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The 2003 price increases indicate that the moderation in prices which had taken place by 2001 has ceased; the latest increases, occurring as they do in the year which saw the highest ever level of new completions, challenge the reliance on increased supply as the means of moderating prices. (6)

With house prices over the past decade increasing six times faster than the consumer price index, and salary levels rising at an average of 3% while houses rose by well into double figures, (7) it is understandable that there is considerable public concern about the affordability of housing. A recent study for the Combat Poverty Agency points out that although house prices have risen much more rapidly than incomes, falling interest rates and rising after-tax incomes have meant that mortgage repayments, as a percentage of disposable incomes, have not risen as dramatically as the house price increases would at first sight indicate. (8)

However, the study acknowledges the potential danger to 'affordability' should there be a rise in interest rates. What is also of concern is that 'affordability' is usually based on the assumption of two-earner households; this has huge implications for the choice or lack of choice couples may have about having children, the timing and number of children they have, and whether there will be an option for one or other parent to stay at home full-time, should they wish to do so. The report on the Public Consultation Fora on family life, carried out to mark the tenth anniversary of the International Year of the Family, noted that participants had cited the costs of housing "as being particularly instrumental in driving the trend towards two-earner households". (9)

The other dimension of affordability is, of course, being able to become a house purchaser in the first place. The Combat Poverty study acknowledged the problem of accumulating what is now an ever-increasing sum to make up the deposit for a house, particularly for those paying high rents in private rented accommodation. Just as high long-term unemployment brought the phenomenon of the 'discouraged worker', who would give up on the possibility of getting a job, so persistently high house prices may have brought the 'discouraged buyer' who is stuck in the private rented sector and can see no immediate, or even long-term prospect, of escape.

The difficulty in becoming a first time buyer was highlighted in many of the submissions to the All-Party Oireachtas Committee on the Constitution. An analysis in 2002 for four housing organisations, Focus Ireland, Simon Communities of Ireland, Society of St Vincent de Paul, and Threshold, estimated that one third of new households nationally would be unable to purchase a home in the immediate future; the figure for urban areas was higher still, at 42 %, and for Dublin it was 50%. (10) The Public Consultation Fora on family life provide interesting glimpses of the issues as they are being experienced currently: "recent pressure in the housing market in Ireland acts to increase the number of households that contain more than one family." (11) And again, "The costs of housing and education among other things mean that parents still have to if not provide for them at least help their children financially well into their adulthood. The Fora heard instances of parents having to remortgage their house or even in extreme cases to work beyond their planned time of retirement so that they could assist their children." (12)

The difficulties surrounding affordability of house prices now seem to be translating into a decline in the overall percentage of households which are owner-occupied: having peaked at over 80%, this

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had fallen to 77.4% by 2002 and the recent Quarterly National Household Survey indicates that it has declined still further, to 75.2% nationally, and 68.3% in Dublin. (13)

Private Rented Sector

The private rented sector has experienced significant growth in recent years, not just in absolute numbers but as a percentage of overall housing, reversing a long decline. Whereas there were 81,400 privately rented houses in 1991, by 2002 there were 141,500, an increase of 75%. (14) The sector represented 8% of households in 1991 but 11.1 % in 2002.

Alongside the growth in the sector has been a significant increase in rental costs. Ireland had the highest level of rent increases in the European Union in the period 1997 to 2001. (15)

The Combat Poverty Agency report points out that in fact increases in rents were well underway from 1987 onwards, that is, in advance of the boom in house prices. In 1987, rents averaged €45 per week, but by 1999-2000 they had risen 2.8 times in constant money terms and stood at an average of €126 per week. Furthermore, among private renters, the share of household income absorbed by rent came close to doubling, rising from 12.5% to 21%. (16) Recent figures show that the average weekly rent level is now €177.55 nationally; in Dublin it is €224.42. (17)

A particularly noteworthy finding in the report for Combat Poverty was the widening gap over the past fifteen years in the costs of housing experienced by private renters as compared to mortgage holders. "In 1987 private rents and mortgage payments were at similar levels, both in absolute amounts and as a share of household expenditure. Yet by 1999-2000 the average private rent was 1.7 times the average mortgage payment in absolute amounts and was 2.2 times the average mortgage payment as a share of total household expenditure." (18)

The report points out that, in fact, it is in the private rented sector that the most serious affordability problems in the Irish housing system are now occurring. About one fifth of private renters were paying in excess of 35% of their household expenditure on rent (35% being chosen as the point beyond which 'affordability' problems would be likely to occur). "Even among house purchasers in the earliest stages of the family cycle, where mortgage burdens were heaviest, less than 5 per cent had mortgage payments that exceeded the 35 per cent threshold .." (19)

A highly significant finding of the study was that a greater percentage of private renters than of any other tenure group were pushed into poverty (using a poverty line drawn at 60% of median income) as a result of the share of their income going on housing. (20)

This reflects the presence in the sector of a significant number of renters who are on low incomes. Rent allowances under the Supplementary Welfare Allowance scheme were being received by 59,000 households in the private rented sector at the end of 2003, up from 54,200 in 2002. Nearly 40% of renters in 2002 are receiving rent allowance. In the face of increasing rents, and the consequent rise in cost to the Exchequer of rent allowances, it had been a feature of policy to restrict access to and tighten the amounts available under these allowances. In effect, groups who are among the poorest people in the country are being made to bear the cost of rising rents.

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Under the requirements of the Housing (Miscellaneous Provisions) Act, 1992, all landlords are required to register their rented properties with the local authority and to provide certain minimum standards which can be inspected at any time. However, only 22,646 households (16% of the total) are registered. (21)

The Housing Statistics Bulletin for 2003 shows that apart from the Dublin authorities only four local authorities had carried out inspections in relation to registration and only about half had undertaken inspections regarding standards. Of the dwellings inspected, around 40% in both the Dublin Corporation area and the Cork Corporation area were deemed as failing to meet regulatory requirements. (22)

The provisions of the Residential Tenancies Bill, introduced in 2003 but not yet enacted, represent some improvements in terms of security of tenure, long recognised as one of the major problem areas in Irish private rented housing. In the context of the marked increases in rents in recent years, it is disappointing that the Bill is so weak in this area: it provides only that rents can not be set, either at the beginning of a tenancy or at a subsequent revision, at higher than the market rent. It has been suggested that the Bill represents no more than a "limited, tentative, first step" in the process of providing greater protection for tenants. (23)

The rising number of units in the private rented sector may be welcome in so far as it represents an additional availability of accommodation at a time of pressing need, and in so far as it offers greater variety in housing tenures and a flexibility that is important for a growing and mobile labour force. But given the cost of accommodation in this sector, the lack of security and the failure to regulate and ensure standards, the growth in the sector is hardly an unalloyed benefit.

Social Housing

The output of social and voluntary housing rose by nearly 53% between 1995 and 2003. At first sight this may appear impressive but it obscures the fact that the increase is from a very low base: from 2,960 houses in 1995 to 6,133 in 2003 (4,516 of which were built by local authorities and 1,617 by voluntary housing associations). The output by the voluntary sector, while still small in overall terms, has grown significantly, - from 579 in 1999 to 1,617 in 2003, an increase of nearly 180%.

Despite the increases of recent years, local authority and voluntary housing completions have remained below 10% of total output; they represented just 8.8% in 2003. This is in marked contrast to the situation prior to the 1987 public expenditure cutbacks, when local authority output tended to represent between 20% and 30% of total new dwellings; in 1975, for example, it amounted to 33 %.

Reflecting the long period of limited building by local authorities, and the continued policy of selling off housing in this sector, there has been a fall in the percentage of total households living in local authority housing - from 15% in 1971, to 13% in 1981 and to 7% in 2002 (88, 206 households) (24)

Figures for output in local authority and social housing must be seen in the context of housing need; 48, 413 households (consisting of 130,000 people, and it is estimated around 50,000 children) were

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shown to be on waiting lists in the assessment of local authority housing needs carried out in March 2002; this represented an increase of 23.5% on the 1999 figures. An analysis in 2002 of current waiting lists and projected further need highlighted how far short of adequate is the present rate of providing additional social housing: it was calculated that with current levels of provision the annual decline in waiting lists would be so little that it would take up to thirty years to eliminate the lists. (25)

'Affordable' Housing

There are now several schemes in operation to provide 'affordable' housing, that is housing for purchase that is subsidised by public authorities. The most recent of these is the scheme, under the partnership agreement, Sustaining Progress, to provide 10,000 homes on sites already in public ownership. Steps towards implementing this have been taken but no houses have as yet been completed. In 2003, a total of 2,610 houses were provided under the earlier affordable housing and shared ownership schemes. (26)

While the provision of affordable housing is clearly important, there is considerable concern that the government sees its action in this sector as more or less discharging its responsibility to intervene in the provision of housing, with the effect of obscuring the need to provide for those who require social housing. An analysis of the incomes of those on local authority waiting lists in 2002 shows clearly that the majority would not be in a position to purchase a home, even in the affordable housing sector and so would need rented accommodation: 85 % had annual incomes of less than €15,000 and 67 % of less than €10,000. (27) Clearly there is need for greater and sustained action in relation to both social housing and affordable housing.

Homelessness

The official figure of 5,581 homeless persons is widely challenged by groups working with the homeless who argue that the true scale of the problem is considerably greater. Recent years have seen important policy initiatives in the area of homelessness, with the development of integrated strategies at local level in an attempt to provide a co-ordinated response to the different but related needs of homeless people, including accommodation, health, welfare and other supports. Spending on services to address homelessness has also increased. But it is telling that in a presentation to a conference in March 2004, the Simon Communities of Ireland found it necessary to point out that "this focus on the complexity of homelessness has sometimes been at the risk of neglecting the fact that the primary need of someone who is homeless is housing". It stated unequivocally that in taking the integrated strategy forward: "the first issue is to put housing back at the centre of homelessness policy." (28)

Right to Housing

Ireland has ratified a number of international covenants which include a right to housing, notably the International Covenant on Economic, Social and Cultural Rights. Under Article 11 (1) of this, States parties are required to "recognise the right of everyone to an adequate standard of living..

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including adequate, food, clothing and housing..."

It is important to bear in mind that in fulfilling the obligation to recognise the right to housing, States parties are expected to do so in light of the overarching requirements of Article 2.1 of the Covenant. This obliges each States party to implement the rights of the Covenant "to the maximum of its available resources" with a view to "achieving progressively" their full realisation. Ireland is now more wealthy than ever before; in accordance with Article 2.1, its obligation to respect and implement the right to housing under the Covenant is therefore all the greater.

In a General Comment on the interpretation of Article 11 (1), the UN Committee on Economic, Social and Cultural Rights, notes that: "The right to adequate housing.. is of central importance for the enjoyment of all economic, social and cultural rights." (29) It emphasises that the right to adequate housing "applies to everyone" and that it "should not be interpreted in a narrow or restrictive sense" - equated, for example, with minimal provision of shelter. Interestingly, the Committee also says that the interpretation of the right should not be one that "views shelter exclusively as a commodity." Rather, it says, it should be seen as " the right to live somewhere in security, peace and dignity" (30)

In its Concluding Observations on Ireland's Second Report under the International Covenant in May 2002 the UN Committee urged Ireland to " accelerate its social housing programmes in order to reduce the waiting times for social housing" and to enhance its efforts to provide accommodation for the Travelling Community. (31)

In ratifying the revised Social Charter of the Council of Europe, Ireland opted not to ratify Article 31, on the right to housing. This article commits States parties "to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination, to make the price of housing accessible to those without adequate resources". The Government stated that Ireland was not in a position to accept the provisions of this article - despite the fact that it had already ratified the Covenant on Economic, Social and Cultural Rights without any such reservation. The Government did not provide any explanation as to why it was not in a position to ratify Article 31; it did, however, indicate that it would consider doing so at a later date. This year Ireland submits a progress report on implementing the Charter: this would surely be an opportune occasion for the Government to sign up to this article.

Growing Inequality

There have been many beneficiaries of the housing boom of recent years - land-owners, developers, the construction industry, and clearly also a larger majority of households since most are home owners. Of the last group, those who have benefited most are people who own their homes outright (60 %) and those who purchased before the take-off in prices. When account is taken of the fact that there is no taxation on domestic property and that there has been a reduction of capital gains taxation, the benefits to people in these groups are considerable. Those who have paid the price of the boom are recent buyers who may have struggled to enter home ownership and are vulnerable to

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any increase in interest rates, people in the private rented sector, those on waiting lists for social housing and the homeless.

The growing division in Irish housing is reflected particularly in the increased incidence of second-home ownership. A quarter of all houses built in 2003 were second (holiday) homes. The Mid-Term Evaluation of the National Development Plan highlighted the extent to which this housing is publicly subsidised both through tax reliefs and the provision of infrastructure.. (32) The study also highlighted the role which holiday homes play in pushing up house prices in rural areas, making house purchase more difficult for local residents.

The Framework Document for the review of National Anti-Poverty Strategy in 2001 stated that an anti-poverty strategy must support a "process of sustainable development" and such a process would imply, among other things, that "the housing system would not deepen or reinforce social inequalities or division". (33)

This, however, is what appears to be happening in Ireland at present. The division in housing is, of course, related to income, but this alone does not capture the full dimension of the issue, since home ownership is high across all income groups. The deepening inequality is also intergenerational: 'older' Ireland which benefited enormously from an array of grants, tax reliefs and subsidies in order to get onto and climb the property ladder seems at times all too inclined to pull the ladder away from many of the younger generation.

Perhaps the most important development of all in recent years is the emergence of what has been called the commodification of Irish housing: the extent to which housing is increasingly regarded for its capital value, seen as a potential pension, a location for investment, rather than what it should be - the provision of shelter, a place that is home, a right to which every person, no matter what age, employment status, or income has an entitlement.

Notes

1. See Central Statistics Office, Census 2002: Volume 13 - Housing, Dublin: Stationery Office, Table 9, p. 24; Central Statistics Office, Quarterly National Household Survey: Housing and Households, Third Quarter, 2003, Dublin: Central Statistics Office, 2004, p. 1.

2. Department of the Environment, Heritage and Local Government, Annual Housing Statistics Bulletin 2003, Dublin: Stationery Office, 2004, p. 10.

3. Adele Bergin et al, Medium Term Review 2003-2010, Dublin: The Economic and Social Research Institute, 2003, p. 59.

4. Department of the Environment, Heritage and Local Government, Annual Housing Statistics Bulletin 2003, p. 7.

5. Ibid p. 36.

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6. The Irish Home Builders Association in its submission to the All-Party Committee on the Constitution stated: "It is clear that a moderation in house prices has occurred consistent with the significant increase in supply since 1998. We believe that this moderation will be sustained if supply is maintained at levels consistent with demand." (The All-Party Oireachtas Committee on the Constitution, Ninth Progress Report: Private Property, Dublin: Stationery Office, 2004, Appendix 3, A171.)
7. P.J. Drudy and Michael Punch, "Problems and Inequalities in the Irish Housing System: the Case for Policy Change" : Executive Summary of paper to tasc, 22 February January 2004 (available on www.tascnet.ie)
8. Tony Fahey, Brian Nolan and Bertrand Maitre, Housing, Poverty and Wealth in Ireland, Dublin: Combat Poverty Agency and the Institute of Public Administration, 2004, pp. 16-7.
9. Mary Daly, Families and Family Life in Ireland: Challenges for the Future, Report of Public Consultation Fora, Dublin: Department of Social and Family Affairs, p. 37.
10. Focus Ireland, Simon Communities of Ireland, Society of St Vincent de Paul, and Threshold, An Analysis of Housing Strategies and Homeless Action Plans, Dublin, 2002.
11. Mary Daly, Families and Family Life in Ireland, p. 26.
12. Ibid pp. 31-2.
13. Central Statistics Office, Census 2002: Volume 13 - Housing, Table 18, p. 41; Quarterly National Household Survey: Housing and Households, Third Quarter, 2003, p. 1. %.
14. Census 2002: Volume 13 - Housing, Table 19, p. 42. Tony Fahey, Brian Nolan and Bertrand Maitre, Housing, Poverty and Wealth in Ireland, p. 35.
15. P.J. Drudy and Michael Punch, "Problems and Inequalities in the Irish Housing System: the Case for Policy Change" : Executive Summary of paper to tasc, 22 February January 2004 (available on www.tascnet.ie)
16. Tony Fahey, Brian Nolan and Bertrand Maitre, Housing, Poverty and Wealth in Ireland, p. 46.
17. Central Statistics Office, Quarterly National Household Survey: Third Quarter 2002 - Housing and Households, Table 9a, p. 12.
18. Tony Fahey, Brian Nolan and Bertrand Maitre, Housing, Poverty and Wealth in Ireland, p. 47.
19. Ibid p.47.
20. Ibid p.57.
21. CORI Justice Commission, Policy Briefing: Housing and Accommodation, Dublin, March 2004, p. 6.
22. Annual Housing Statistics Bulletin, 2003, p. 65.

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23. Seamus Murphy SJ "The Residential Tenancies Bill, 2003: A Tentative First Step", Working Notes, Issue 46, September 2003, p. 9.
24. Census 2002: Volume 13 - Housing, Table 19, p. 42.
25. Focus Ireland, Simon Communities of Ireland, Society of St Vincent de Paul, and Threshold, An Analysis of Housing Strategies and Homeless Action Plans, Dublin, 2002.
26. Annual Housing Statistics Bulletin, 2003, p. 54.
27. Department of the Environment, Heritage and Local Government, Housing Statistics Bulletin: September Quarter 2002.
28. Simon Communities of Ireland, "Taking the Integrated Strategy Forward", paper to conference, 21 February 2004, p. 4.
29. United Nations, Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, General Comment 4: The Right to Adequate Housing, 1991, n. 1.
30. n. 6; n. 7.
31. United Nations, Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, 05/06/2002 (E/C.12/1/Add. 77), n. 32.
32. John Fitz Gerald et al, The Mid-Term Evaluation of the National Development Plan and Community Support Framework for Ireland, 2000 to 2006, Dublin: Economic and Social Research Institute, 2003, pp. 252-3.
33. Goodbody Economic Consultants, Review of the National Anti-Poverty Strategy: Framework Document, Dublin, 2001, p. 43.

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Private Property and the Constitution

on Thursday, 24 June 2004.

Seamus Murphy, SJ

In April 2004, the All-Party Oireachtas Committee on the Constitution published its Ninth Progress Report.(1) The Report discusses whether the provisions of the Irish Constitution concerning property rights obstruct social justice and the common good in the area of land and housing, with regard to purchase, planning and infrastructural development.

The opening lines of chapter 1 of the Report state its origin and purpose:

“In February 2000 the Taoiseach ...asked the committee to consider the present constitutional provisions in respect of property rights and specifically the necessity for up-dating those provisions which pertain to planning controls and infrastructural development. In effect, therefore, the committee was asked to traverse much of the ground covered by the Report of the Committee on the Price of Building Land in 1973 ('the Kenny Report') and to examine afresh the question of whether the Constitution imposes unnecessary impediments to legislation which would either control or otherwise regulate the price of building land on the one hand or which would seek to eliminate many of the obstacles to the speedy roll-out of major infrastructural projects on the other hand.

In this context, the committee considers that its principal function is to examine the property rights provisions of the Constitution generally (albeit principally from the standpoint of the planning and development process) and to express a view on whether, as commonly perceived, they are weighted too heavily in favour of the individual.” (2)

This is what the Report does, in language that is clear, focused and incisive.(3)

Does it Matter?

What has that to do with everyday matters such as rents, schools, and community development? The answer: a lot. Crudely put, land-speculators and rackrent landlords have made huge profits at the expense of ordinary people, in part because it was believed that the Constitution sets the property rights of individuals above social justice. As a consequence, it was believed that the Supreme Court would overturn any law that would attempt to restrict profits in the interest of fairness and the common good.

The Report convincingly shows that belief to be false. The property clauses in the Constitution and the Supreme Court's interpretation of them do not prevent capping the price of building land, limiting compensation or rent, reducing land-speculation or land-hoarding, and other reforms of the planning and rezoning process.

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The practical implications for the lives of Irish people and communities could be far-reaching, even revolutionary. It is important, then, that all concerned about social justice be aware of the Report's finding and their potentially huge significance. They mean that there is no constitutional roadblock preventing the government implementing the reforms listed above to make Irish society fairer and less unequal. No longer may political parties claim that the Supreme Court won't let them make such reforms. Interested groups should push them to give substance to their initial welcome for the Report by pressing ahead with the introduction of legislation to give effect to its findings.

However, there are also interested groups strongly opposed to any change. It is important to understand the issues.

The Constitution on Private Property

In the 1970s, a government-appointed committee recommended (in the famous 'Kenny Report') that local authorities should be empowered to acquire land (for housing) for which the owner would receive its current (typically agricultural) use value plus a maximum of 25%. However, the recommendations of the Kenny Report were not implemented, for reasons that are not entirely clear.

Yet, after reading the Report of the All-Party Committee, as well as the important submission made by the Law Reform Committee of the Law Society,⁽⁴⁾ it seems strange that the idea gained currency that in Irish

constitutional law and jurisprudence private property rights always trumped the common good.⁽⁵⁾

Let us look first at what the Constitution says about property rights.

One article includes the right to property among personal rights.

Art. 40.3: 1. The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

The second focuses on the nature and extent of property rights and the limits that may be placed on their exercise.

Art. 43.1: 1. The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. 2. The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

Art. 43.2: 1. The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

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

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From a theoretical viewpoint, interpreting these provisions may be difficult. An optimistic view would see Art. 43.1 and Art. 43.2 balancing and complementing each other; a more sceptical view would see them as almost contradictory, giving with one hand and taking away with the other. But on either view, one could not say that the Constitution gives such primacy to the right to private property and such unlimited scope to its exercise, that the common good and social justice count for nothing.

The Courts on Private Property

Since the Constitution came into force in 1937, a body of decisions has accumulated and a pattern has emerged. A number of developments are worth consideration.

First, as the Report of the All-Party Committee notes, "a significant majority of constitutional challenges in the area of property rights fail".(6) Similarly, the submission by the Law Reform Committee of the Law Society suggests that the notoriety of the few successful cases merely illustrates the fact that cases taken normally fail. It quotes an Irish constitutional law expert to the effect that, in light of decisions handed down, the Supreme Court's view is that:

"legislation will not constitute an unjust attack on property rights if passed to reconcile the exercise of those rights with the requirement of the common good, and if consonant with principles of social justice."(7)

The Committee cites a long list of cases where the 'exigencies of the common good' were taken as sufficient justification for various statutory restrictions on private property.(8)

The Committee notes that challenges to changes in the laws on licensing or permits affecting the value of individuals' property are also typically unsuccessful. A case in point is the taxi-drivers' challenge to the de-regulation of the trade on the grounds that it led to taxi-plates losing their value. The case failed; the court pointed out that the taxi-plate's earlier value had been created solely by government legislation, so the taxi-drivers could not reasonably claim that their property rights had been unjustly violated when new government legislation removed that value.

Normally, restriction of an individual's exercise of property rights is to be compensated. However, the courts do not require that compensation be necessarily paid in the case of refusal of planning permission or in the case of a zoning decision reducing a property value.(9)

Second, it is curious that the implications of the few successful challenges were so greatly exaggerated. One can understand why some property-owners might have done so, but it is puzzling that public administrators and civil servants also subscribed to this view of the constitutional position. This was particularly the case with respect to the *Blake v the Attorney General* (1981) case, where the Rents Restrictions Acts (1946-67) were struck down as violating landlords' property rights.

This was widely interpreted at the time, and later, to imply that rent control per se had now been deemed inherently unconstitutional. It was also taken to imply that any form of price control

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affecting land or housing would be deemed unconstitutional.(10) This was one reason the Kenny Report was never acted on.

Yet a careful reading of the judgement shows that the Supreme Court did not deem rent control unconstitutional. What it said was that the particular form of rent control found in the Rents Restrictions Acts - rent freeze, when coupled with indefinite security of tenure - was unconstitutional, and that indefinite security of tenure, when coupled with rent freeze, was unconstitutional. That left open the possibility that either on its own might be constitutional. This would apply even more so in the case of rent controls not involving a rent freeze, such as limiting rent increases to no more than the annual inflation rate.(11)

Third, in the 1990s the idea of proportionality began to play a role in court decisions in this area. This was significant.

Commenting on the language used in Art. 40.3.2 and Art. 43, the Constitution Review Group remarked several years ago that such terms as 'unjust attack', 'principles of social justice', and 'the exigencies of the common good' were 'particularly open to subjective judicial appraisal'. (12) There is some truth to this criticism, but as the Review Group itself admitted, it would be hard not to allow some latitude to the judiciary in interpreting the Constitution.(13)

Besides, the degree of latitude is gradually whittled down as a body of decisions accumulates, setting precedent and guidelines for future decisions. Greater precision has emerged through the use of the doctrine of proportionality, laid out by the President of the High Court in 1994, where he stated that a statute or other government regulation curbing some constitutional right could be defended only if the following conditions are met:

“The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
- (b) impair the right as little as possible, and
- (c) be such that their effects on rights are proportional to the objective.”(14)

The Report judges that doctrine to have influenced subsequent court decisions, in particular the case that both the All-Party Committee and the Law Reform Committee of the Law Society see as very significant, viz. *Re Article 26 and the Planning and Development Bill, 1999*. (15)

That case concerned a legislative proposal requiring developers seeking planning permission for residential housing to set aside up to 20% of the development for social and affordable housing. Explicitly citing the criteria for proportionality, the court found that the bill was not unconstitutional.(16)

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The Law Reform Committee of the Law Society draws attention to another passage in that judgement where the court stated:

“It can scarcely be disputed that it was within the competence of the Oireachtas to decide that the achievement of these objectives would be socially just and required by the common good. It is accepted on behalf of the State that the use of planning legislation, which has traditionally been concerned with the orderly and beneficial planning and development of the physical environment, for a purely social objective of this nature is novel and even radical. The court is satisfied, however, that it is an objective which it was entirely within the competence of the Oireachtas to decide to attain, as best it could, by the use of planning machinery.”(17)

It can no longer be held that the Supreme Court sets the rights of private property above the principles of social justice or the requirements of the common good. The court is prepared to go quite a way with the legislature, provided only that

(1) the government can make a reasoned and reasonable case for the law in question, (2) the restriction on private property is fair and not arbitrary, and (3) the social good to be achieved warrants or is proportionate to the restriction on the exercise of property rights.

Thirty years after the Kenny Report was shelved, there is no longer any excuse for the government not implementing its main recommendation, viz. that agricultural land rezoned for residential purposes should be purchasable by a local authority for no more than its existing value plus a maximum of 25% of that sum.

At present, the exorbitant price of building land gives excessive profits to a few at the expense of the many, exacerbating socio-economic inequality and putting the cost of home-ownership beyond the reach of many. One example will illustrate. It was recently reported in the Sunday Business Post (30 May 2004) that nine acres of land rezoned for residential purposes went in value from €135,000 to approximately €1.8 million (from €15,000 to €200,000 an acre). The price of windfall of thirteen times the original value of the land accruing to the owners solely through the actions of the local authority will have to be borne by those who will be housed on that land.

When contrasted with what the Kenny Report recommended, the gross unfairness in our current system cries out for reform.

Catholic Social Thought on Property

Since private property is such an important and sensitive issue, the rest of this paper considers other approaches to the right to property.

The balance between the public good and the rights of private property is a concern of Christian ethical thought, as represented in (for example) Catholic social thought. Its principles on property include the following.(18)

General: property and the common good

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1. The material goods of the world are ultimately for all people.
2. Accordingly, every one has a right to a sufficient amount of the earth's goods.
3. This implies a right to private property and a limit to its scope or exercise.
4. The right to private property applies not merely to individuals, but also to families, co-operatives, companies, etc.
5. The right to property is part of the common good. Hence there is no dichotomy between them.
6. The limitation of the exercise of the right to property, where necessary in the public interest or to give effect to the principles of social justice, is also part of the common good.

The right to private property

7. The right to property is a natural right, anterior to positive law.(19) It is a moral quality inherent in human beings. Accordingly, the state ought recognise and vindicate it, and can neither create nor abolish it.(20) Attempts to abolish it, removing economic freedom from individuals and other non-state bodies, lead to loss of religious, political, intellectual and other freedoms.
8. Property is good because it is an expression of personality, affording opportunities for social and economic service, providing incentives to work, and is a condition of civil liberties.(21)

The social mortgage on property

9. In Christian thought, since God made and 'owns' the world, private property is a stewardship, and the human property-holder a trustee. Property has duties as well as rights, and private property carries a social mortgage. (22)
10. The social mortgage is paid, not just in the currency of justice (giving what one owes others) but also in that of solidarity and charity (being generous with what one neither owes nor needs). Surplus wealth should be given to those in need and to charitable causes.(23)
11. Contemporary Christian thought sees work (rather than land as in ages past) as the primary source of wealth, and as the basis for the right to property. Ownership of the means of production is legitimate if, and only if, it serves work.(24) The property owner has a duty (of what could be called 'productive justice') to use the material goods in his or her possession productively. Thus, the social mortgage is also paid in productive justice.

The role of the public authority

12. The public authority has a duty to promote the common good, and hence the right to limit the exercise of property rights where necessary for that purpose.
13. Such limitations may involve (a) preventing individuals from using their property in certain ways, and (b) taking property from owners who cannot or will not use the property productively.
14. In imposing limitations, the state is bound by the principles of social justice (for example, no arbitrary seizure, no arbitrary selection of groups or individuals, clear public policy grounds for the limitation). It must pay compensation.
15. Nothing in the foregoing treatment of the right to property precludes the state from pursuing a radically egalitarian policy - for example, setting limits to the amount of property individuals may own.(25) Practical recognition of the right to property of some could require limiting the amount

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others hold. The right to property is limited, not just by the common good, but by the nature of the right itself.

As is apparent, in Catholic social thought the right to private property is defended, limited and generally contextualised by the common good.

A Rights-based Alternative

Recent years have witnessed the emergence of a rights-based approach.⁽²⁶⁾ Its origin lies in the various UN and other international documents specifying rights accruing to people as human beings, or as women, children, labourers, migrants, disabled persons, prisoners, and others.⁽²⁷⁾ Given that the conceptual framework of rights has acquired international currency since 1948, there is much to be said in its favour.

In the case of the right to property, a rights-based approach would, like the common good approach, provide a context or framework within which that right could be situated. It would specify its relation to other rights, its place in a hierarchy of rights, and the limitations on its exercise in order to keep it in harmonious balance with the exercise of other rights.

A contextual understanding might also alter the internal understanding of the right. Recognition of a right to housing and/or shelter might imply that, since those without proper housing are typically lacking property, it is mistaken to think of the right to private property solely as a right to hold property, because this fails to consider the element of being able to acquire property. One might, for instance, argue that soaring house-prices under certain circumstances constitute a violation of the property rights of, for example, individuals and couples in reasonably well-paid employment yet unable to afford a mortgage.⁽²⁸⁾

No doubt, there will be significant developments along this line of thought in the years to come. Two points are worth noting with respect to that. First, it may not always fit in with the approach based on the notion of the common good. Rights are, after all, inherently a notion of something belonging to the individual and applying to groups (if at all) only by extension of that. To limit the right to property by appeal to the common good and to limit it by appeal to other rights are different strategies (one giving priority to the community, the other giving priority to the individual) leading to theories that both overlap and diverge.

Second, it is sometimes said that the notion of the common good is vague, so it should be dropped, or replaced by the notion of rights. Yet the notion of a human right is also vague. While a civil or political right (i.e., the kind of right created and awarded by the state) is understood completely once one understands the law creating it, a human or natural right is something about human beings that the state or international bodies believe they have discerned and which they choose to recognise, but whose scope and limits may be vague and indeterminate.

Conclusion

Ownership is a complex notion, involving a bundle of rights, rather than one simple right. There

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isn't just one correct way of understanding that complex notion. Within the limits set by avoiding the extremes of abolishing the right to property and making it supreme over the common good, a variety of reasonable approaches is possible. As Ireland grows increasingly wealthy, it becomes more important to discuss and raise awareness concerning the role and purpose of property.

Notes

1. The All-Party Oireachtas Committee on the Constitution (2004), Ninth Progress Report: Private Property, Dublin: Stationery Office, 2004.
2. Report, p. 17.
3. Some submissions proposed inserting socio-economic rights to shelter or housing into Constitution, and making them justiciable (i.e. enforceable by the courts). However, the Committee decided that the issue of socio-economic rights was not directly relevant, yet important enough to be dealt with at a future time, as part of a treatment of all socio-economic rights. See Report, p. 19.
4. See Appendix 3, A203-211.
5. In the sense of being exempt from social control, "ownership has never been absolute. Even in the most individualistic ages, it has had a social aspect .. expressed in such incidents of ownership as the duty to prevent harmful use, liability to execution for debt, and liability to taxation or expropriation by the public authority." (Tony Honoré, "Ownership", in *Making Law Bind: Essays, Legal and Philosophical*, Oxford: Oxford University Press, 1987, p. 190)
6. Report, p. 22.
7. James Casey, *Constitutional Law in Ireland* (3rd ed.), Dublin: Round Hall, Sweet and Maxwell, 2000, p. 677.
8. Report, A205-206: nn. 21-22. For reasons of space, I cannot list them here. The detail offered by the Law Reform Committee of the Law Society provides impressive testimony on the matter.
9. Report, A206: nn. 26-27. See also n. 28 for reference to similar judgments in the US courts, where the distinction between a 'taking' and a 'regulation' determines whether compensation is to be paid.
10. See John Kelly, *The Irish Constitution* (2nd ed.) London: Butterworth, 1984, p. 659. The Report also quotes the Legal Adviser to the Minister of the Environment in the mid-1980s as holding that the Kenny Report's proposal would probably be struck down as an unconstitutional attack on landowners' property rights (p. 25, n. 20).
11. The Law Reform Committee of the Law Society puts it more strongly; see Report, A205, n. 19.
12. Report of the Constitution Review Group, Dublin: Stationery Office, 1996, p. 358.
13. The Review Group's criticism is self-defeating. It proposes revising the property articles, but holds on to such terms as 'principles of social justice' and replaces 'common good' with 'general

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interest'. Yet 'general interest' is more vague and open to subjective interpretation than 'common good'. Either way, the courts will still have to adjudicate. Second, the Group's notion of subjectivity is philosophically naïve. All knowing is subjective, since there can be no knowing without a knower, no objective judgement without a subject to judge. As far as possible, people should correct for bias and prejudice: no more can be expected. Nor can subjectivity be opposed to objectivity. As the philosopher Lonergan put it, objectivity is "the fruit of authentic subjectivity", where 'authentic' refers to cognitive virtues such as attentiveness to data, openness to new ways of understanding it, and critical hard-headedness in one's judgements.

14. Report, p. 28.

15. The Law Reform Committee of the Law Society comments: "The .. 1999 Bill represents perhaps the most intrusive interferences with the rights of property owners to be validated by the courts". (Report, A205, n. 17)

16. Report, p. 31.

17. Report, A207-208, n. 40.

18. For the Catholic view of property, see Rodger Charles (1982), *The Social Teaching of Vatican II* (San Francisco: Ignatius Press, pp. 299-312) for a succinct yet comprehensive outline.

19. Contrary to what is sometimes thought, most rights are not absolute. Most theories recognise hierarchies of rights: some rights outweigh others. Nor does a right's being natural or human, as opposed to civil or political, make it absolute.

20. In its submission to the All-Party Committee, An Taisce rejects the idea that property is a fundamental or human right, arguing (rather confusedly) that it is not "essential to the fulfilment of human potential [or] the maintenance of human dignity and integrity". Thus it is merely "an 'entitlement' that may be exercised only where it is in the public interest" (Report, A16). Against that, the Christian tradition holds that the right to property is essential for those goods, and that its exercise need not be in the public interest, but merely not against it.

21. Taken from Rodger Charles (1982), *The Social Teaching of Vatican II*, p. 308.

22. See John Paul II, *Sollicitudo Rei Socialis* (On Social Concern), Encyclical Letter, 30 December 1987, London: Catholic Truth Society: "Private property, in fact, is under a 'social mortgage', which means that it has an intrinsically social function, based upon and justified precisely by the principle of the universal destination of goods." (n. 42)

23. John Paul II identifies solidarity and charity as linked Christian virtues (*Sollicitudo Rei Socialis*, n. 40). John D. Rockefeller said that once one got rich, one should give it away, and that it was a disgrace to die rich.

24. See John Paul II, *Centesimus Annus* (On the Hundredth Anniversary of *Rerum Novarum*), Encyclical Letter, 1 May 1991, chapter IV, particularly n. 31 and n. 43 (London: Catholic Truth Society). Traditionally, Christian thought has given greater moral weight to the right to use

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property than to the right to hold it. This emphasis is given a new angle in John Paul II's associating the right of economic initiative with the right to private property.

25. It might be neither practical, prudent, nor conducive to socio-economic well-being, for the state to do anything of the kind. But it would not as such constitute an unjustifiable attack on the right to property.

26. See Report, A27-28, A34-38, where Jerome Connolly and CORI employ rights-based approaches.

27. For a compendium of such documents, see Ian Brownlie and Guy S. Goodwin-Gill (eds.), *Basic Documents on Human Rights* (4th ed.), Oxford: Oxford University Press, 2000.

28. Outstanding here is Jeremy Waldron, *The Right to Private Property*, Oxford: Oxford University Press, 1988, showing that the right to private property need not at all entail growing inequality.