# Context in Compensation Law: Managing Complex Visions of Property

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## Introduction

This paper argues that context is central to determining compensation entitlements in expropriation law, resulting in contingent protection of owners' security of value. To illustrate this, it explores Irish compensation law, which requires judges, in each case where property rights are interfered with, to determine whether an 'unjust attack' has occurred. This paper explains the way in which Irish judges have applied this largely contextual and multi-factorial approach to assessing compensation entitlements in expropriation law. It analyses the complex vision of property that Irish compensation law reflects and seeks to manage through a combination of presumptive rules and contextual judgment.

Internationally, two main approaches to compensation for interferences with property rights tend to be distinguished and framed in oppositional terms: one focused on full compensation through the enforcement of rules, the other focused on contextualised determinations of compensation entitlements and values by reference to the common good. For example, Tom Allen (and following him, Sluysmans et al) contrast these approaches as the liberal and social democrat views of compensation respectively.[1] They characterise the liberal approach as treating compensation as a matter of corrective justice, whereas the social democrat view associates it with distributive justice, introducing a redistributive element into the determination of compensation entitlements and values.[2] Carol Rose distinguishes between Lockean-inspried neo-classical economic approaches to property and civic republican

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[1] Tom Allen, 'Liberalism, Social Democracy, and the Value of Property under the European Convention on Human Rights' (2010) ICLQ 1055.

[2] Allen, *ibid*, 1058, Jacques Sluysmans, Stijn Verbist, Regien de Graaff, 'Compensation for Expropriation: How Compensation Reflects a Vision on Property' (2014) 3 EPLJ 1, 29. See also Glynn S. Lunney Jr, 'Compensation for Takings: How Much Is Just?' (1993) 42 Cath U L Rev 721, emphasising the differing levels of trust in the legislature that these two approaches reflect.

conceptions of property, arguing that disagreements over the significance of these purposes of property '…are manifested in disagreements about the circumstances under which the public may regulate property without compensation.'[3] Somewhat more abstractly, Jane Baron refers to 'information' and 'progressive' theories of property, the fomer concerned with simplicity and efficiency and a conception of property as a 'machine', the latter concerned with dynamic determinations of proprietary entitlement, taking account of property's social function, through an evolving 'conversation'.[4] This paper seeks to demonstrate that while these approaches may be neatly distinguishable in theory, in practice, the (perhaps irresolvable) tension between them may be at the heart of constitutional property law in some jurisdictions, and may be the focus of judicial decision-making.[5] Although as argued by Sluysmans et al, compensation certainly does reflect a vision on property, that vision is not always coherent or easily definable as liberal or social democrat, or as focused on either an information or a progressive theory of property. Rather, these visions may co-exist (comfortably or uncomfortably) in constitutional property doctrine.

This is particularly true in the Irish context, where the text of the Constitution itself instantiates the tension between liberal and social democrat values, with an almost natural law statement of the importance of private ownership juxtaposed against a distinctive articulation of the regulatory power in Article 43.2, founded on the need to secure 'the exigencies of the common good' and 'the principles of social justice'. Andre van der Walt vividly terms this aspect of the Irish constitutional property clause 'the paradox of excluding and caring', which attempts 'to mediate between liberal and communitarian views of society'.[6] Van der Walt suggests that such an approach usually leads to a judicial acceptance of 'an interpretive attitude that reflects some classic

[3] Carol M. Rose, '*Mahon* Reconstructed: Why the Takings Issue is Still a Muddle' (1984) 57 *S. Cal. L. Rev.* 561, 594.
[4] Jane Baron, 'The Contested Commitments of Property' (2010) 16 *Hastings L J* 917.
[5] As Christopher Serkin puts it (discussing the application of the Takings Clause in the US context), 'despite the rich scholarly takings literature, courts seldom follow one particular academic approach, but rather wrestle individually with each case presented.' Christopher Serkin, 'The Meaning of Value: Assessing Just Compensation for Regulatory Takings' (2005) 99 *North Western Law Review* 677, 730.
[6] Andre van der Walt, 'The Protection of Private Property under the Irish Constitution: A Comparative and Theoretical Perspective' in Eoin Carolan and Oran Doyle eds, *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 398, 400.

liberal and some communitarian or social-responsibility elements'.[7] This is borne out in the patterns of Irish compensation doctrine, which moves between formal and contexual decision-making, and between liberal and social democrat values, in a manner that renders coherence and consistency difficult to find. Irish judges draw on the two traditions in an intuitive, *ad hoc*, and often unconscious manner in making contextualised determinations of compensation entitlements and values.[8]

In Part I, I outline the basic structure of Irish compensation law. The remaining parts of the paper explore the significance of context for compensation entitlements and compensation value where property rights are restricted. The questions of compensation entitlement and compensation value are treated as distinctly significant in determining whether interferences with property rights are unjust in Irish law. I conclude that context, and with it contingent protection for owners' security of value, is characteristic of Irish compensation law in the expropriation context. However, the expropriation/regulation distinction is an important marker for judges, and the classification afforded to an interference with property rights impacts considerably on the compensation entitlements and compensation values that follow. Accordingly, a formalist tendency exists in Irish compensation law, evidenced in the use of presumptive rules. Irish compensation law thus mirrors the foundational debate in property theory concerning the optimal balance between stable, predictable rules, with their consequent efficiency gains, and dynamic, contextual determinations of fairness. This tension points to the deeper tension between individual and social values in the protection of private ownership, which, this paper contends, is at the heart of Irish constitutional property law.

## I. The Constitutional Structure of Irish Compensation Law

The Irish Constitution, adopted by referendum in 1937, protects private property rights at two levels: individual and institutional. Article 40.3.2°

[7] *Ibid*, 401.
[8] As Joan Williams notes, "…judges, commentators, and the general public often mix intuitive imagery with imagery that conflicts with it, or combine two rhetorics to form new mixtures, or, occasionally, new compounds that achieve a stable presence in the rhetoric of property." Joan Williams, "The Rhetoric of Property" (1998) 83 *Iowa L Rev* 277, at 280.

requires the State by its laws to protect individual property rights "as best it may from unjust attack, and to vindicate those rights in the case of injustice". It must be read in conjunction with Article 43, which protects the institution of private ownership, and sets out the circumstances in which the exercise of property rights can be delimited. It provides:

> 1.
> 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
> 2.
> 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

Neither Article 40.3.2° nor Article 43 specifically refer to expropriation, nor do they contain any specific requirements in relation to compensation. However, the interpretation and application of compulsory acquisition statutes in Ireland is affected by the Constitution in significant ways, and the courts can invalidate such powers and particular compulsory acquisition decisions if they are regarded as contravening these provisions. When interpreting statutes that enable compulsory acquisition, the courts must presume that they are constitutional, and insofar as possible, adopt an interpretation that is consistent with the Constitution.[9] Furthermore, administrators exercising powers conferred on them by statute are presumed to act in a manner compatible with the Constitution, and have a duty to act in such a manner.[10] No single act exists governing the exercise of compulsory acquisition powers in Irish law. Rather, Irish compulsory acquisition law is made up of a variety of diverse compulsory acquisition powers enacted at different times and for different purposes.

[9] *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317. 340-341.
[10] *Ibid*.

Compensation is a highly relevant, although non-determinative, factor in determining whether an 'unjust attack' on property rights has occurred in breach of the State's duty under Article 40.3.2.[11] Other factors include retrospectivity, lack of fair procedures, unreasonableness and irrationality, discrimination, and lack of proportionality.[12] The proportionality principle is in many (although not all) cases applied by judges to structure their analysis of whether an 'unjust attack' has occurred.[13] This was originally done in *Daly v Revenue Commissioners*, where the High Court applied the proportionality principle articulated in *Heaney v Ireland*, which in turn is taken from the proportionality jurisprudence of the Canadian Supreme Court:

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

Costello P held that if an interference with property rights failed to meet that

[11] In *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*, the Supreme Court held: "…it is clear that where an Act of the Oireachtas interferes with a property right, the presence or absence of compensation is generally a material consideration when deciding whether that interference is justified pursuant to Article 43 or whether it constitutes an "unjust attack" on those rights. In practice, substantial encroachment on rights, without compensation, will rarely be justified."

[12] Per McMahon J, *JJ Haire & Co. Ltd. v. Minister for Health and Children* [2009] I.E.H.C. 562.

[13] For detailed analysis of the application of the proportionality principle in the context of Irish constitutional property law, *see* Rachael Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 DULJ 1.

test, it would be constitutionally impermissible.[14] The Supreme Court in *Re Article 26 and Part V of the Planning and Development Bill, 1999*, approved this approach.[15] Some commentators have lauded the flight to proportionality by the courts as a desirable response to the vagueness of the concepts of 'the exigencies of the common good' and 'the principles of social justice' in Article 43.[16] The scientific, objective language of the proportionality principle seems less susceptible to unprincipled, *ad hoc* decision-making than the language of Article 43. In fact, the application of proportionality analysis has not enhanced the transparency or predictability of judicial decision-making in Irish constitutional property law.[17] Furthermore, there has been a resurgence of judicial interest in the text of Article 43, with the Supreme Court in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* arguing that courts should consider the nature of the property rights at issue, whether the interference entailed a regulation of property rights in accordance with the principles of social justice and the common good, and whether it constitutes an unjust attack on property rights.[18]

## II. Context and Compensation Entitlements

The application of the 'unjust attack' standard in Irish law, and with it the determination of the entitlement to compensation for interferences with property rights, is context dependent. A variety of factors may operate to deny an owner any entitlement to compensation for an interference with his or her property rights, thus minimising the security of value that the Constitution guarantees in respect of such rights. This part considers the role of the nature of the interference, its objective, and the owner's notice of it, in determining

[14] [1994] 3 IR 593,12.
[15] [2000] 2 IR 321, 1350.
[16] See Gerard Hogan 'The Constitution, Property Rights and Proportionality' (1997) 32 *Ir Jur* 396, O'Donnell.
[17] As Carol Rose puts it in the context of the Takings Clause in the US context, '[c]ourts apply the "test" but actually decide cases on the basis of undisclosed, ad hoc judgments of the kind and extent of diminution that constitutes takings'. Carol M. Rose, '*Mahon* Reconstructed: Why the Takings Issue is Still a Muddle' (1984) 57 *S. Cal. L. Rev.* 561, 566. See also Walsh, n 13.
[18] [2005] 1 IR 105, 291. See also *Shirley v AO Gorman* [2006] IEHC 27.

compensation entitlements, to illustrate the contextualisation of compensation entitlements in Irish constitutional property law.

***(a) The Nature of the Interference with Property Rights***

The entitlement to compensation for interferences with property rights in Irish constitutional law is not determined on a categorical basis, such that outright expropriation of the full 'bundle of rights' always demands compensation and lesser interferences never demand compensation. Rather, a spectrum is identified between less and more far-reaching interferences with the exercise of property rights, and discretion is reserved to judges to determine at which point any individual case shades into compensatory entitlement. Thus the approach is in principle focused on the fairness of the impact on property rights, rather than the type or nature of the impact. However, the classification of an interference as either expropriatory or regulatory has in practice been very influential in judicial determinations of severity of impact – expropriations are presumptively sufficiently severe to warrant compensation, regulations of use are not. Accordingly, the nature of the interference triggers default rules concerning compensation entitlements.

This approach was established in C*entral Dublin Development Association v Attorney General*, which involved a wide-ranging challenge on property rights grounds to the constitutionality of the Local Government (Planning and Development) Act, 1963 (introducing planning control for the first time in Ireland).[19] Kenny J described the circumstances in which compensation was constitutionally required for interferences with property rights as follows:

> If any of the rights which together constitute our conception of ownership are abolished or restricted (as distinct from the

[19] Kenny J summarised the key functions of the Act as follows: "[o]ne of its main objects was to impose on planning authorities an obligation to make plans for their areas and their permission was made necessary for any development so that they could ensure that the objectives of the plan would be carried out. Other objects were to secure the renewal of obsolete areas in cities and towns, to give planning authorities control over the use of buildings and land and to create powers to enforce the development plans and to give compensation to the owners of property who had suffered loss because they had not been granted planning permission." *Ibid*, at 81.

> abolition of all the rights), the absence of compensation for this restriction or abolition will make the Act which does this invalid if it is an unjust attack on property rights.[20]

Accordingly, the notion of 'unjust attack' is the litmus test for determining whether an interference with property rights falling short of outright expropriation requires compensation. A contextual determination of fairness of impact is required in such cases. Outright expropriation of all of the incidents of ownership presumptively requires compensation:

> …while some restrictions on the exercise of some of the rights which together constitute ownership do not call for compensation because the restriction is not an unjust attack, the acquisition by the State of all the rights which together make up ownership without compensation would in almost all cases be such an attack.[21]

Kenny J's analysis indicates that compensation may be payable for both expropriations and restrictions in Irish law. The closer the interference comes to the 'total acquisition' end of the spectrum, the more likely it is that compensation will be required. However, Kenny J did not address a number of important denominator issues in his framework. He did not indicate whether an outright acquisition of all of the rights of ownership would have to be *permanent* to warrant compensation, or whether compensation would be required for a *temporary total appropriation* of property rights, for example where property is occupied by the State for a defined but limited period of time for some public purpose.[22] In addition, he did not clarify the spatial conception

[20] (1975) 109 ILTR 69, at 86. In *M & F Quirke & Sons v An Bord Pleanála*, O'Neill J re-stated Kenny J's approach in *Central Dublin Development Association* with approval, saying:
"…not all interferences with property rights will require compensation to be paid to ensure constitutional legitimacy. Compensation will be required in circumstances where property is wholly expropriated or where the bundle of rights which constitute ownership are substantially taken away but lesser interferences with property rights would not require compensation"
[2010] 2 ILRM 91, at 110.

[21] *Ibid*.

[22] The courts have not in any subsequent case indicated whether a temporary but total appropriation of property rights would warrant compensation, as for instance where property is occupied by the State for a defined but limited period of time for some public purpose, although in the pre-1937 case of *Rooney v The Minister for Agriculture*, Powell J accepted that the temporary acquisition of property for public purposes could give rise to an entitlement to compensation. [1920] 1 IR 176. In *Condon v Minister for Labour*, McWilliam J emphasised

of property that underpinned his compensation principles. For example, it was not clear whether an expropriation of one acre of land out of a fifteen acre site owned by an individual would require compensation. Kenny J failed to explain whether an appropriation would have to take an owner's full "bundle of rights" over a relevant resource or thing *in its entirety*, or whether the total expropriation of *part* of the property would engage the presumptive constitutional requirement for compensation. Although the matter has never been addressed explicitly in Irish law, it seems clear from subsequent cases that total expropriation of any part of an owner's physical property gives rise to a presumptive entitlement to compensation.[23]

Despite these gaps, Kenny J's framework laid the foundations for the development of compensation jurisprudence in Irish constitutional property law that is largely contextual, but is guided by the presumptive principle that outright expropriation of property requires compensation, whereas restrictions imposed on the exercise of property rights do not require compensation. His approach was given renewed authority by the recent decision of the Supreme Court in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*. In that case, the Supreme Court stressed the materiality of compensation in determining whether an unjust attack on property rights has occurred and held, '[i]n practice, substantial encroachment on rights, without compensation, will rarely be justified."[24] This test seems to restate the 'unjust attack' framework established in *Central Dublin Development Association* in different words. However as will be seen in the next parts, this presumptive principle is only part of the picture – the nature of the interference with property rights, albeit influential, is considered alongside a range of other contextual factors to determine whether an uncompensated interference is unjust on that basis.

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the fact that the impugned prohibition on the implementation of agreed pay increases for bank workers was temporary and did not permanently deprive anyone of a pecuniary advantage in holding that the measures were justifiable in the interests of the common good. (11 June 1980) (HC), at 12.

[23] See eg *The Planning and Development Bill case* [2000] 2 IR 321, where owners were held to have a presumptive right to compensation where 20% of a site was subject to compulsory acquisition. Similarly *Chadwick v Fingal County Council* [2008] 3 IR 66 clearly proceeds on the basis that an owner is entitled to compensation where part of his land is the subject of outright expropriation by the State.

[24] [2005] 1 IR 105.

***(b) Redistribution and 'No-Compensation'***

There is an important line of authority in Irish constitutional property law that holds that there is a relationship between the extent to which compensation is required to legitimise an interference with property rights, and the worthiness of the objective pursued by the interference. The purpose for which the interference is undertaken by the State can be counted twice, both to justify the interference, and to justify the absence of compensation for that interference. This flows from the emphasis in Article 43 on 'the principles of social justice' and 'the exigencies of the common good', which concepts have been interpreted as introducing a redistributive element into compensation law in Ireland. For example, where the objective of an expropriation is particularly consonant with "the principles of social justice", the Irish courts have held that compensation may not be required. The presumptive requirement for compensation in such cases can be displaced by the objective, on the basis of a contextual determination of its worthiness in light of the values enshrined in Articles 40.3.2 and 43.

This line of authority began in *Dreher v Irish Land Commission*, which concerned the compulsory acquisition of land by the Land Commission, which was charged with redistributing land to ensure the economic viability of agricultural holdings.[25] Under s. 2 of the Land Bond Act 1934, all money paid by the Commission had to be through an issue of land bonds "equal in nominal amount to such purchase money."[26] An order was made for the compulsory acquisition of the plaintiff's land, and the judicial commissioner determined that the compensation payable was £30,000 in 9 ¾ % land bonds equal in nominal value to the value of the property. The plaintiff challenged s. 2 unsuccessfully on the basis that the value of the bonds was less than £30,000 at the time of the hearing.

Walsh J highlighted the contextualisation of the entitlement to compensation resulting from Article 43's reference to "the principles of social justice" and "the exigencies of the common good":

> The State in exercising its powers under Article 43 must act in accordance with the requirements of social justice but clearly

[25] [1984] ILRM 94.

[26] The Land Commission could only pay cash where land was offered for sale under s. 27 of the Land Act 1950, which was not the case in *Dreher.*

> what is social justice in any particular case must depend on the circumstances of the case…it may well be that in some particular cases social justice may not require the payment of any compensation upon a compulsory acquisition that can be justified by the State as being required by the exigencies of the common good. [27]

On this view, while compensation is *ordinarily* required in cases of expropriation, and *may* be required in other cases depending on the severity of the impact on property rights, the 'principles of social justice' and the 'exigencies of the common good' can operate to deny the entitlement to compensation in a particular context. Accordingly, the context of a particular expropriatory decision may displace the presumptive entitlement to compensation.

*Dreher* formed the basis for the identification of a type of ownership obligation in *O'Callaghan v Commissioners of Public Works*. *O'Callaghan* concerned legislation that allowed a preservation order to be issued without compensation.[28] The effect of the order was to limit the owner to grazing livestock on his land, thereby significantly limiting his liberty to use the land.[29] In the High Court, McWilliam J focused on the nature of the restriction, employing the regulation/expropriation distinction to reject the contention that the effect of the order was to sterilise the land by abolishing the owner's "bundle of rights."[30] O'Higgins CJ in the Supreme Court also emphasised the fact that the preservation order simply prohibited him from destroying the monument, implying that the order merely restrained blameworthy and harmful conduct.[31] However, his primary focus was on the compelling need, in

[27] [1984] ILRM 94.
[28] Section 8 of the National Monument Act 1930 (as amended by s. 3 of the National Monuments (Amendment) Act, 1954) provided for the issuing of such orders by the Commissioners for Public Works. The effect of the order was to limit the owner to grazing livestock on his land.
[29] Section 14 of the 1930 Act set out restrictions on the use of land the subject of preservation orders, including, e.g. for ploughing.
[30] [1983] ILRM 391, at 397, hereafter, *O'Callaghan*. He felt that the owner was not deprived of all normal use of the land. He relied on *Central Dublin Development Association* to uphold the legislation, reasoning that the control of use imposed by the preservation order was no different to the control of use endorsed by Kenny J. *Ibid*, at 399.
[31] [1985] ILRM 364, at 367. On the role of blameworthiness in assessing compensation entitlements, see also Jeffrey M. Gaba 2007. "Taking 'Justice and Fairness' Seriously: Distributive Justice and the Takings Clause" (2007) 40 Creighton Law Review 569, 587.

the interests of the common good, to protect the monument from destruction. He held that the consequent restriction on the exercise of his property rights reflected the 'common duty' of all citizens to secure the preservation of such monuments.[32] Accordingly, the absence of compensation for the effects of the preservation order was held not to constitute an unjust attack on the landowner's property rights.

Overall, the perceived worthiness of the aim of an interference with the exercise of property rights is a highly significant factor in determining whether compensation is constitutionally required to prevent an 'unjust attack'. This illustrates the redistributive element incorporated into Irish expropriation law through, in particular, the mandate given to the State by the Constitution to delimit the exercise of property rights so as to secure 'the principles of social justice.' Strict reciprocity does not have to be established, and individual owners may be required to sacrifice some of the value of their property in the interests of the common good.[33] However, the application of the proportionality principle, coupled with the 'unjust attack' standard, indicates that a degree of long-term reciprocity of advantage and fairness in individual burdening is required.[34] The courts have not given any general guidance on when a burden is likely to be so onerous as to constitute an unjust attack requiring compensation.

Hanoch Dagan argues that uncompensated interferences with property rights are permissible '…if, and only if, the disproportionate burden of the public action in question is not overly extreme and is offset, or is likely in all probability to be offset, by benefits of similar magnitude to the landowner's current injury that she gains from other – past, present or future – public actions (which harm neighbouring properties). [35] However, Dagan does not indicate when a burden is 'overly extreme', meaning that his test does not answer the key question of how much is 'too much' any more clearly than a

[32] [1985] ILRM 364, 36.8

[33] As Hanoch Dagan notes, '[b]roadly applied, strict proportionality would bar any reconfiguration of the distribution of the aggregate of resources, wealth, and legal rules.' Hanoch Dagan, *Property: Institutions and Values* (OUP, 2011) 96.

[34] Dagan argues that reciprocity of advantage insists 'both on a long-term rough equivalence of burdens and on disallowing overly extreme transient imbalances, while still refusing to enforce short-term proportionality.' *Ibid*, 101.

[35] *Ibid*, 103.

stand-alone proportionality test, or indeed the 'unjust attack' standard in Article 40.3.2. Nonetheless, his focus on off-setting benefits is something that the Irish courts have considered in the context of discrete regulatory regimes, which is discussed below. Furthermore, Dagan argues that the degree of political empowerment of a burdened group should be relevant to compensation entitlements.[36] This factor was applied by the Irish Supreme Court in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*, holding that the impact of interferences with the property rights of vulnerable groups was proportionality more severe.[37] However, the victim-focus entailed by such an approach has not been developed in subsequent cases.

### *(c) Economic Crisis*

In recent years, the Irish courts have recognised that the economic context forms an important backdrop to the constitutional interpretation of 'unjust attack' and can weaken compensation claims. In *Re Article 26 and the Health (Amendment) (No 2) Bill 2004,* the Supreme Court held that property rights (in that case, of vulnerable elderly persons) could not be abrogated without compensation purely to relieve the State of a financial burden, except to avoid an extreme financial crisis.[38] Building on this, subsequent courts held that an extreme financial crisis existed in Ireland, which in recent years formed a significant part of the context for determining compensation entitlements. For example, in *J & J Haire and Co Ltd v Minister for Health*, McMahon J held:

> … the word 'unjust' in 'unjust attack', must be read in the light of the unusual economic crisis that necessitated the introduction of the 2009 Act. All the evidence before the court was to the effect that the State is facing an unprecedented economic crisis, whereby the State is forced to introduce drastic economies and cuts across the board. These economic realities must inform the interpretation of the constitutional phrases in assessing what the State can do and what distributive measures it must take to

[36] *Ibid*, 107, 111, 144. He further argues that restrictions imposed at a local level entail a greater degree of reciprocity, and less need for compensation. *Ibid*, 105-107, 147-148. In addition, he argues that the nature of the resource in question should affect compensation entitlements. *Ibid*, 146-147.

[37] [2005] 1 IR 105, 206. Tom Allen notes that the European Court of Human Rights takes this approach in relation to the value of compensation, since it holds, 'general financial conditions do not provide sufficient justification to depart from market value compensation.' Allen, n 1, 1069.

[38] [2005] 1 IR 105.

> ensure not only the stability of the economy, but the stability of the State itself.[39]

*Haire* concerned the constitutionality of changes made to the fees for the provision of public services paid to pharmacists that were introduced in regulations enacted pursuant to s. 9 of the Financial Emergency Measures in the Public Interest Act 2009.[40] McMahon J held that the plaintiffs did not have a contractual right to continued fees at a particular level, and consequently he determined that the legislation was not an "unjust attack" on property rights. However, he also concluded *obiter* that even if the plaintiffs did have such a property right, it would not have been unjustly attacked by the impugned reductions.[41]

Accordingly, extreme circumstances of general economic crisis weigh against individual compensation entitlements for interferences with property rights, since the payment of compensation is often inconsistent with the intentionally redistributive aims of legislative measures in a crisis context. Owners must accepted greater levels of uncompensated burdening where the financial situation in the State is precarious. In this way, the legislative objective again weighs in to weaken owners' security of value on a contextual, contingent basis.

### *(d) Notice and Expectations*

A further contextual factor that affects the entitlement to compensation, particularly for restrictions on use, is whether the owner was on notice of a restriction when he or she purchased or invested in a property.[42] The scope of

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[39] [2009] IEHC 562. See also *Unite the Union v Minister for Finance* [2010] IEHC 354, *MacDonncha v Minister for Education* [2013] IEHC 226, *Dellway Investments v National Asset Management Agency* [2010] IEHC 364.

[40] [2009] IEHC 562.

[41] He noted various features of the scheme in concluding that it was a proportionate restriction. Under s. 9 (4), a process of consultation had to take place before regulations could be introduced. The Minister had to take a specified list of matters (including existing contracts) into account and was required to set rates that were "fair and reasonable" in light of the Act's objectives (s.9 (5)). Even then, the regulations were open to annulment by the Oireachtas (s. 9 (16)), and had to be reviewed on an annual basis, with both the Ministers for Health and Finance required to consider the appropriateness of any changes in the rates payable to pharmacists (ss. 9 (13) and 13). Finally, pharmacists were permitted to withdraw from providing services for the State upon giving 30 days notice, regardless of their contractual obligations (s. 9 (8)).

[42] These factors echo considerations applied in the regulatory takings context in the US, where reasonable investment backed expectations, prior notice of regulation, uncertainty of

the resulting legitimate expectations concerning a given property's value are relevant to the entitlement to compensation.

As was just discussed, in *O'Callaghan*, O'Higgins CJ rejected the contention that s. 8 of the National Monuments Act 1930 (as amended) was unconstitutional because it allowed preservation orders to be issued restricting the use of land without compensation.[43] He held that the uncompensated restriction on user suffered by the plaintiff was justified in part by the fact that he had notice of the restriction prior to purchasing the land.[44] This reasoning suggests that where a person invests with knowledge of an existing, or possible future interference with the relevant property rights, compensation is less likely to be required for such limitations. The underpinning rationale for this approach is presumably that such interferences do not undermine any expectations of value legitimately formed in relation to the use of the land. Furthermore, it is assumed in these circumstances that the market will have adjusted prices to reflect the impact of legislative restrictions on property rights. Consequently, to compensate an owner for the impact of a restriction of which he was aware in advance would be to compensate him for a loss he has not suffered.[45]

The influence of this factor on compensation entitlements was also evident in the Supreme Court's decision in *Pine Valley Developments v The Minister for the Environment*, which held that compensation was not required where the applicants bought property based on its value with a grant of outline planning permission attached that was subsequently found to be void because its grant was *ultra vires* the Minister for the Environment's powers.[46] The Court argued, "[t]he purchase of land for development purposes is

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economic return, and operation in a highly regulated field have all been cited as relevant factors in determining whether a taking goes 'too far' and requires compensation. See eg Robert Melz, 'Takings Law Today: A Primer for the Perplexed' (2007) 34 Ecol. L. Q. 307, 338-340.

[43] [1985] ILRM 364. He quoted Walsh J's *dicta* in *Dreher* approvingly without addressing the fact that *Dreher* concerned compensation for the compulsory acquisition of land, whereas *O'Callaghan* involved a restriction on the use of land. *Ibid*, at 368.

[44] *Ibid*.

[45] See also *Webb v Ireland* [1988] 1 IR 353, at 395-6. However, in *Brennan v The Attorney General*, Barrington J said "…the concept of 'horizontal equity' springs from the fact that the people adapt themselves to any legal system. It can hardly be used to defend the legal system." [1983] ILRM 449, at 479.

[46] [1987] 1 IR 23.

manifestly a major example of a speculative or risk commercial practice."[47] The Court held that market forces, changes in planning decisions and a variety of other factors could all adversely affect property values.[48] In such a context, an owner was on notice as to potential reductions in property values. Balancing those considerations against the public interest in protecting those exercising statutory powers from compensation claims where they have not acted *mala fides*, the Court concluded that there was no "clearcut" obligation on the State to compensate the applicants for the decrease in the property's value resulting from the void planning permission.

Accordingly, compensation entitlements are context-dependent in Irish law, since an owner's notice (whether actual or presumed) of the possibility of a particular interference with property rights is relevant to his/her entitlement to compensation where such interference occurs. Notice can stem from regulatory changes or trends, or from the obvious risk of market changes impacting on property values.

## III. Context and Compensation Value

Context has a significant impact on the value of compensation payable in Irish expropriation law. Depending on the circumstances, an adversely affected owner may be entitled to compensation at market value, or at more or less than market value. As in relation to compensation entitlements, the debate centres what is necessary to prevent an 'unjust attack' on property rights in the particular circumstances of a given case.

### *(a) 'Just Compensation'*

The first in a crucial line of cases suggesting the permissibility of sub-market value compensation was *Dreher v Irish Land Commission*, which, as noted above, also recognised the constitutional permissibility of uncompensated

[47] *Ibid*, at 37.
[48] *Ibid*. Similarly in *Re Article 26 and Part V of the Planning and Development Bill 1999* the Supreme Court held '[e]very person who acquires or inherits land takes it subject to any restrictions which the general law of planning imposes on the use of the property in the public interest', such that compensation should not be payable in the context of planning control. [2000] 2 IR 321 353.

expropriations in certain circumstances. In *Dreher*, Walsh J also set out a number of important principles concerning the value of compensation:

> It does not necessarily follow that the market value of lands at any given time is the equivalent of just compensation as there may be circumstances where it could be considerably less than just compensation and others where it might in fact be greater than just compensation.[49]

Accordingly, Walsh J distinguished between 'just compensation' and the market value of lands, and suggested that the measure of 'just compensation' was context-dependent.

Subsequent cases have focused on Walsh J's *dicta* on this point in holding that the 'principles of social justice' may not always require compensation (where a compensation entitlement arises) to reflect market value. For example, in *Re Article 26 and Part V of the Planning and Development Bill 1999*, the Supreme Court relied on it to hold that market value compensation was not an absolute requirement where property was expropriated.[50] The Planning and Development Bill proposed the imposition of social and affordable housing conditions on grants of planning permission, which would result in the transfer of land, serviced sites or housing units to local authorities in return for existing use value compensation. This excluded the value attributable to the grant of planning permission, and thus the Supreme Court acknowledged that the operation of Part V would result in landowners receiving significantly less than market value compensation.[51] It reaffirmed the presumptive entitlement to compensation for expropriation, stating that an owner was ordinarily entitled to at least the market value of any property compulsorily acquired by the State in the public interest.[52] However, while it was "unquestionably of importance," the Court said that this default rule was not absolute. The Court characterised land-use regulation as an exceptional case that did not require the payment of market value

[49] [1984] ILRM 94, at 96. The market value of land bonds fluctuated between the date of their issuance and the date of trial. However, Walsh J emphasised that the yield from the bonds was considerably better than that obtainable on deposits from banks. *Ibid*, at 97.
[50] [2000] 2 IR 321.

[51] *Ibid*, at 349.
[52] *Ibid*, at 350.

compensation, invoking *Central Dublin Development Association* to support this conclusion.[53] However the principles set out in *Central Dublin Development Association* were not strictly applicable to Part V of the Bill, because the Bill empowered local authorities to compulsorily acquire property in specified circumstances, not to restrict the use of land. This mischaracterisation, whether intentionally or not, helped the Court to rationalise its deviation from the default rule of market value compensation, on the basis of the presumptive distinction between compensation entitlements for restrictions and expropriations discussed in the last part of this paper.

In both the Planning and Development Bill case, and the subsequent decision of the Supreme Court in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*, the unusual circumstances of the cases in *O'Callaghan* and *Dreher* were highlighted, although those decisions were not overruled. On this basis, and given the general affirmation of the market value compensation requirement in the Planning and Development Bill case*,* Donal O'Donnell (formerly a Senior Counsel, now a Supreme Court judge) stated, "…the argument that *Dreher* and *O'Callaghan* were harbingers of a new approach that less than market value compensation is required, is now so debilitated as to be almost beyond usefulness." This overstates the extent to which the Supreme Court can be said to have clearly moved away from its earlier tendency to weaken the claim to market value compensation by reference to the importance of the public objective at stake. While the Planning and Development Bill case indicates that market value compensation should usually be paid for the compulsory acquisition of private property, it clearly holds that exceptions may be made to that principle where justified by reference to the 'principles of social justice' and the 'exigencies of the common good'. This introduces significant uncertainty into the scope of the protection that the Constitution affords to property rights, in particular, to the value of such rights where appropriated or abrogated in the public interest.

Similarly, in *Shirley v AO Gorman*, the objectives of the regulatory context in which compensation fell to be paid influenced the value of the

[53] *Ibid*, at 352-353. (Omission of "on" in reported judgment.)

compensation required by the constitutional protection of property.[54] The case concerned the application of a statutory landlord and tenant scheme, which enabled tenants to acquire the fee simple interest in rented properties in certain circumstances. While Peart J held that normally a person who is compulsorily deprived of property in the public interest should receive at least market value compensation, he upheld s. 7 of the Landlord and Tenant (Amendment) Act, 1984. It fixed the price at which a landlord could be required under s. 8 of the Landlord and Tenant (Ground Rents) (No. 2) Act, 1978 to sell the fee simple in his property to a tenant at one-eighth of the amount that a willing purchaser would give and a willing vendor would accept for the property. Peart J felt that this value fairly and reasonably reflected the landlord's residual interest in the property, since in most cases where s. 7 applied, the landlord lacked the right to retake possession of the property and was only entitled to receive a small rent from the tenant. He held that the residual nature of the landlord's interest also justified the exclusion of development value. Thus, given the applicable regulatory context, the market value of that nominal interest was more than fairly reflected in the compensation calculation method prescribed by the impugned statute. Crucial in this regard was Peart J's conclusion that the overall scheme of regulation aimed at transferring ownership to tenants, was consonant with the aims of Article 43, in particular, with the 'principles of social justice'. The decision involved detailed judicial interrogation of the meaning of 'social justice', with Peart J concluding that 'social justice in the context of property rights means that there ought to be at least a fair, as opposed to equal, distribution of property amongst all members of the society, so that justice is achieved'. On this basis, he held that the worthiness of the impugned legislation's tenant enfranchisement objectives justified progressive curtailment of the landlord's interest in his property. This in turn reduced the value of the compensation that the State was required to pay upon the forced transfer of that interest.

The Supreme Court on appeal noted that but for the statutory scheme, the owner could have sold the property for a higher price on the market, explaining, '[w]hat is at issue is the acquisition of the landlord's property at a

[54] [2006] IEHC 27.

price fixed by the legislation so as to favour the purchaser and to the disadvantage of the seller.'[55] Interpreting the statute in a manner compatible with the landlord's constitutional property rights, the Court held that the requirement in s. 10 that the lessee demonstrate that the permanent buildings on the land were not erected by the lessor or any superior lessor or any of their predecessors in title, referred to all of the permanent buildings.[56] The Court found this interpretation to be constitutionally required given the one-eighth valuation. [57] Otherwise, the Court held, it would be possible that a lessee could acquire a fee simple interest for one-eighth of market value in circumstances where the lessee had only contributed to the structures on the land in a minor way. [58] This indicates that the court considered that heavily discounted private-to-private redistribution of property would only be appropriate where beneficiaries had significantly contributed to the value of the transferred land.

Overall, the worthiness of the objective of an interference with property rights is very influential in determining the value of any constitutionally required compensation. Market value compensation is the default rule in cases of expropriation, but that can be displaced by considerations of the common good and social justice. Accordingly, the legislative objective operates at three stages in Irish expropriation law: to justify the expropriation, to determine whether an entitlement to compensation exists, and to determine the appropriate measure of such compensation. The scope of owners' security of value is shaped by judges in accordance with their intuitive understanding of the fairness of the burden placed on owners, given the public objective sought to be realised.

### *(b) The Role of Context in Determining Market Value*

Generally in constitutional property doctrine, "market value" is taken to mean the price that a willing vendor would accept and a willing purchaser would pay for something at a specific time. For instance, in the *Planning and*

[55] [2012] IESC 5 [78].
[56] Under the Act the lessee was assisted by a presumption that the buildings were not all constructed by the lessor.
[57] [2012] IESC 5 [59-60].
[58] *Ibid*, [61]. Upon this interpretation, the Court held that the Act did not apply to the land in question. *Ibid*, [84].

*Development Bill case*, the Supreme Court described the market value of residential land as the price that it might be expected to fetch on the open market with its development rights taken into account.[59] However, as Sluysmans et al point out, the meaning of market value is not neutral, but rather is '…shaped by the way property is (in a political way) 'valued'', which in turn reflects the status of property in a particular society.[60] The meaning of "market value" in Irish constitutional property law is clearly context-dependant and political in a number of respects.

First, and most basically, market value is necessarily dependent on the fluctuation of markets for particular forms of property. As Walsh J noted in *Dreher*, '[t]he market value of any property whether it be land or chattels or bonds may be affected in one way or another by current economic trends or other transient conditions of society.'[61] Thus the concept of market value is necessarily context-dependent and dynamic. Furthermore, external market forces can affect the value of compensation paid out by the State. This factor was key in *Dreher*, where Walsh J stressed that while the interest rate set for land bonds sought as far as possible to reflect the market value of acquired land, the value of land bonds was necessarily subject to market forces outside the control of the Minister.[62] Consequently he held that the impugned section went "...as far as is reasonably possible to take into account the results of inflation and fluctuating rates of interest so far as they are reasonably foreseeable."[63]

Second, legal definitions of market value are influenced by pragmatic public purse considerations. For example, in *In Re Murphy*, Henchy J rejected the plaintiff's argument that the intended use of acquired land for public housing should be taken into account in assessing compensation.[64] He noted that under the terms of the Acquisition of Land (Assessment of

[59] [2000] 2 IR 321, at 349. In *Rafferty v The Minister for Agriculture*, McGovern J held market value to mean the price payable to replace acquired property, rather than the price that the acquired property itself could have made on the open market. [2008] IEHC 344, at [14].
[60] Jacques Sluysmans et al, n 1, at 28.
[61] [1984] ILRM 94, at 96. The market value of land bonds fluctuated between the date of their issuance and the date of trial. However, Walsh J emphasised that the yield from the bonds was considerably better than that obtainable on deposits from banks. *Ibid*, at 97.
[62] [1984] ILRM 94, at 97-98.
[63] *Ibid*, at 97.
[64] [1977] IR 243.

Compensation) Act 1919, "...while the basic rule is that the measure of compensation is to be the open market value of the land, the arbitrator must leave out of the reckoning of that value the existence of the proposed local authority development."[65] He noted that this exclusion was necessary to realise the public interest, because otherwise the acquisition of land for socially desirable purposes would be impeded by the prohibitively high prices that would be set for such land in light of the proposed development.[66] While ordinary purchasers would have to accept any price increase that might derive from their apparent need for particular premises, for example for an expansion of their own neighbouring premises, local authorities were legitimately immunised from that market impact. This demonstrates that pragmatic public-purse considerations feed into the meaning of "market value".

Third, in the context of discrete regulatory systems, "market value" may take on a particular meaning. For instance, in *Maher v the Minister for Agriculture*, inactive milk-quota holders objected to regulations that in effect required them to either resume milk production or sell their quota to the Minister for Agriculture at a price they contended was below market value. Murray J rejected this contention, saying "… 'open market' is hardly an apt term since the market in milk, and hence its price, is a creature of the particular market conditions created by the regulatory regime itself."[67] He held that the maximum price fixed by the Minister struck a fair balance between existing quota-holders and those wishing to acquire quota, and further, that the opportunity to sell at the prices created by the old regulatory regime surrounding milk quotas was not a property right protected by the Constitution.[68] Similarly in *Pine Valley Developments* and *Re Article 26 and Part V of the Planning and Development Bill 1999*, the courts characterised grants of planning permission by the State as enhancing land values, and accordingly giving rise to no entitlement to compensation where they were

[65] *Ibid*, at 254.
[66] *Ibid*.
[67] [2001] 2 IR 139, at 232. Similarly in *Pine Valley Developments* and *Re Article 26 and Part V of the Planning and Development Bill 1999*, the courts characterised grants of planning permission by the State as enhancing land values, and accordingly giving rise to no entitlement to compensation where they are taken away or adversely affected through regulatory changes.
[68] *Ibid*, at 233-234.

taken away or adversely affected through regulatory changes. These decisions reflect the 'social democrat' view of property, which, as Allen points out, holds that the value of property is at least in part created by social/community action, which reduces the strength of any right-based claim to compensation for the reduction of property values through such action.[69] The compensation decisions relating to discrete regulatory regimes indicate that the courts regard the presence of 'implicit in-kind compensation', in the form of parallel restrictions on the rights of others (which in turn may cause regulatory permissions to have economic value), as a significant factor that influences the entitlement to compensation and the value of compensation payable to an owner adversely affected by regulation.[70] Such benefits are understood to offset the burdens imposed on the owner, thereby helping to realise reciprocity of advantage, as envisaged by the proportionality principle and the 'unjust attack' standard.

***(c) 'Make-Whole' Compensation***

Another aspect of the context of expropriations that affects the value of compensation payable is the nature of the acquired property. The Irish courts have in a series of cases held that "make-whole" compensation is required where land is compulsorily acquired in the public interest.[71] The default statutory framework for compensation assessment in the context of compulsory acquisition of land is an important focus of the decisions, which may distinguish them from the case-law considered earlier in this part of the paper – the courts have not connected this line of jurisprudence to their general compensation decisions. Accordingly, the applicability of the 'make-whole' compensation principles outside of this narrow context seems doubtful, even though as will be seen, the courts articulate the 'make-whole' principles in general terms.

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[69] Allen, n 1, 1076.

[70] See Richard Epsstein, *Supreme Neglect*: *How to Revive Constitutional Protection for Private Property* (OUP, 2008), 49-50.

[71] Christopher Serkin notes that the current scholarly argument in favour of make whole compensation is based on the aim of forcing the government to internalize the costs of its actions. Christopher Serkin, 'The Meaning of Value: Assessing Just Compensation for Regulatory Takings' (2005) 99 *North Western Law Review* 677, 705.

In the Supreme Court's decision in *Comyn v Attorney General*, Kingsmill Moore J stated that a compensation award should achieve equivalence from the perspective of the dispossessed owner.[72] He reasoned (as a matter of statutory, not constitutional, interpretation):

> it seems to me that common law, common sense and common decency speak with one voice and lay down the overriding principle that when a man has been compulsorily dispossessed of his property, whether by individual, corporation, or State, he shall receive in exchange whatever the property was worth to him. He did not ask to have his property taken. If it is taken for the public weal he should not be a loser. [73]

Kingsmill Moore J said, 'every element of value to the owner must receive its proper compensation', including diminution in good will, future value (for example, potential value for building purposes), loss of profits, removal expenses etc.[74] He qualified this by holding that when assessing compensation, account should not be taken of the personal views or attachments of the owner concerning the property, thereby ruling out subjective value compensation.[75] He further noted the contextual significance of market value, stating that while market value might often be a good indicator of value to the owner in cases where there is a ready market and ascertainable measure of price for a property, in some cases there might be no available market or recognised market price.[76]

The High Court affirmed equivalence as the guiding principle for compensation for compulsory acquisition of land in *Gunning v Dublin Corporation*.[77] The plaintiff discovered that his garage was to be compulsorily acquired. To mitigate his loss, he acquired new premises nearby. He claimed compensation for the market value of the acquired premises, and for other costs incurred such as relocation costs, temporary loss of business, double

[72] [1950] IR 142, 167 (SC).
[73] *Ibid*, 167.
[74] *Ibid*, 170-171.
[75] *Ibid*, 168.
[76] *Ibid*, 169.
[77] [1983] ILRM 56.

overheads, compensation for time spent seeking new premises, and compensation for miscellaneous disturbances. The question was whether such costs were recoverable as compensation for disturbance under Rules 2 and 6 of the Acquisition of Lands (Assessment of Compensation) Act, 1919, which is the Act that governs the calculation of compensation for compulsory acquisition in most (but not all) cases. Carroll J held, "[t]he underlying principle is the principle of equivalence. The owner should be able to recover personal loss imposed on him by the forced sale – otherwise he will not be fully compensated – but he should recover neither more nor less than his total loss."[78] She stated that compensation for disturbance "…seeks to put the owner, in so far as money can do so, in the same position as if the compulsory acquisition had not taken place."[79] The losses that the plaintiff prevented through his actions were natural and probable consequences of the acquisition of his property, so he was entitled to recover compensation for his avoidance measures.[80] Significantly, the decision in *Gunning* (as in *Comyn)* was not based on the constitutional property clauses, but rather on an interpretation of the 1919 Act, influenced by English precedent.

However, in *Dublin Corporation v Underwood*, the Supreme Court placed the equivalence principle adopted in *Gunning* in interpreting the 1919 Act on a firm constitutional footing.[81] The plaintiff issued a compulsory purchase order for the respondent's two investment properties. The arbitrator referred a case-stated to the High Court to determine whether or not he should take the owner's reinvestment costs into account. Budd J held categorically, "[t]his State does not permit expropriation of an asset (which, by definition, has a value calculable in money terms) without payment of compensation"[82], without making reference to Walsh J's earlier judgment in *Dreher*. He held that the protection of property rights in Article 43 of the Constitution demanded that the Act should be interpreted so far as possible to achieve exact equivalence in pecuniary terms through an award of

[78] *Ibid*, at 62.
[79] *Ibid*, at 64.
[80] *Ibid*, at 65.
[81] [1997] 1 IR 69.
[82] *Ibid*, at 76.

compensation.[83] On that basis, he concluded that the arbitrator should award compensation for reinvestment costs.[84]

On appeal, Keane J upheld Budd J's decision, holding that an interpretation of the Act that allowed for reinvestment costs was constitutionally required. He said:

> It would be patently unjust, in my view, for the dispossessed owner to receive less than the total loss which he has sustained as a result of the compulsory acquisition: such a construction of the relevant legislation would be almost impossible to reconcile with the constitutional prohibition of unjust attacks on the property rights of the citizens.[85]

Keane J accepted that the respondent would have continued to hold the relevant properties as investments but for the acquisition, and furthermore, that he would sustain additional expenses in buying a replacement property, in the form of stamp duty, legal fees and agent's fees.[86] As a result, compensation for those losses was constitutionally required.[87]

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[83] *Ibid*, at 96-97.
[84] *Ibid*, at 116.
[85] *Ibid*, at 129.
[86] Keane J did acknowledge that there might in some cases be very remote consequences for a property owner flowing from a compulsory acquisition order that would not be compensable, but he felt that the plaintiff's reinvestment costs were not too remote, and could be recovered under Rule 6 of the 1919 Act, either as compensation for disturbance, or as one of the "other matter(s) not directly based on the value of land" for which compensation could be paid under the 1919 Act. *Ibid*, at 129 -130.
[87] In reaching this conclusion, Keane J approved an important extract from Scott LJ's judgment in the key English case of *Horn v Sutherland*:

> (1) *"Prima facie,* the purchase price for the land to be taken pursuant to the notice to treat is the market value of the land, and whether to an unwilling or a willing seller, is for this principle, so far as concerns that value, irrelevant.
> (2) The estimation of that value must take into account future and potential value, including what is known as 'special adaptability'.
> (3) It must be ascertained as at the moment when the notice to treat was given.
> (4) The rule of market value necessarily pre-supposes the presence of the seller in the market, there offering his land for sale in a normal state for that market – that is, in a condition to attract the ruling price there. If its state is better than normal, it should attract a better price. If it worse than normal, or if the buyer will have to spend money to bring it up to normal, the seller must expect a reduction on the normal price.
> (5) In the case of a sale by private treaty or auction, the seller cannot put in his pocket more than the net market value. He can recover no loss to which he is put by his decision to part with his land, but on a compulsory sale, the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by

However, McGovern J recently cast some doubt on the constitutional need for compensation for consequential losses where property rights are expropriated in the public interest. *Rafferty v The Minister for Agriculture*, arose out of the foot and mouth disease crisis in February 2000, and concerned the culling of the plaintiffs' sheep flocks on foot of a ministerial order.[88] The plaintiffs' sheep were not actually infected with the disease. The plaintiffs contended that the compensation paid to them under the Diseases of Animals Act 1966 was inadequate, because it did not capture their consequential losses. They argued that the particular traits of their animals should have been considered in assessing the compensation they were awarded. However, McGovern J declined to apply make-whole compensation principles, concluding that the affected farmers had received more than market value compensation, and that the denial of compensation for all of their consequential losses was constitutional.

McGovern J stressed the particular statutory framework surrounding compulsory acquisition of land in distinguishing the 'make-whole' compensation principles, noting that the 1919 Act (which had been at issue in *Comyn*, *Gunning* and *Underwood*) expressly provided for additional elements of compensation that were not present in the Act in issue in *Rafferty*.[89] He concluded that a constitutional requirement of compensation for consequential losses in such circumstances "…could have enormous implications for the Exchequer, and impose a serious and disproportionate burden on the taxpayer."[90] Consequently he said:

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> the forced sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement, because otherwise, he will not be fully compensated.

But here we come to the other side of the picture. The statutory compensation cannot, and must not, exceed the owner's total loss, for, if it does, it will put an unfair burden on the public authority or other promoters who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss."

[1941] 2 KB 26, 48.

[88] [2008] IEHC 344.

[89] *Ibid*, at [35]. Like the Supreme Court in the *Planning and Development Bill case* [2000] 2 IR 321, McGovern J quoted the European Court of Human Right's judgment in *James v United Kingdom* (1986) 8 EHRR 123, which held that the European Convention on Human Rights did not guarantee a right to full compensation in all circumstances.

[90] *Ibid*, at [38].

> It seems to me that the Courts should draw a distinction between compensation based on a finding of fault, and a scheme of compensation to ameliorate hardship, in the absence of fault. While *restitutio in integrum* may be the yardstick for the former, the authorities opened to me clearly establish that this is not the criterion to be used for compensation for loss of property compulsorily taken for the public good.[91]

Applying this approach, McGovern J held that it was a constitutionally permissible delimitation of the plaintiffs' property rights to grant them less than make-whole compensation. He supported this decision by noting that other people adversely affected by the outbreak were not compensated by the State for their losses, which he held was relevant to the proportionality of the restriction imposed on the plaintiffs' property rights. For example, he referred to the impact that restriction of movement orders had on those earning a livelihood through tourism.[92] However, such restrictions affected the *use* that people could make of their property, whereas the culling scheme *expropriated* the plaintiffs' property.

One possible way of understanding this decision may be as a 'calamity' case, where the singling-out for a diminution in compensation for expropriation was based on objective criteria not easily susceptible to political manipulation, resulting in less justification for make-whole compensation.[93] *Rafferty* involved a compensation scheme stemming from the State's response to an external crisis, as opposed to a proactive decision to expropriate for some public purpose, such that the State lacked the ability to choose whether to expropriate the affected property. On this interpretation, the objective of the interference with property rights again contextualises compensation law, by limiting the value of compensation payable by reference to legislative intention. Such an approach further reinforces the redistributive aspect of Irish compensation law.

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[91] *Ibid*, at [39].
[92] *Ibid*, at [26].
[93] Jeffrey M. Gaba, 'Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause' (2007) 40 *Creighton L Rev* 569, 590.

It remains to be seen whether the Supreme Court will in a future case move away from the strict view of the need for equivalence in *Underwood*, in favour of the more pragmatic approach favoured by McGovern J in *Rafferty*, at least outside the context of compulsory acquisition of land in the context of the 1919 Act. Such a move would mark a sharp differentiation between compensation for the expropriation of land, and for the expropriation of other forms of property, involving a two-tiered, context-dependent approach to compensation valuation. "Make-whole" compensation principles would apply apply in most cases where land is compulsorily acquired, but "market-value" principles would apply in all other cases of substantial interference with property rights. This distinction does not have a clear constitutional justification – the text of the Constitution does not distinguish between rights over land and rights over other property, nor have the courts articulated reasoning to support such a distinction. It suggests a preoccupation on the part of the courts with land as the paradigmatic form of "private property", meriting near-absolute protection against under-compensated expropriation. On this view, rights further from the core of the court's image of property can be more readily restricted in the public interest without compensation, or can be under-compensated. Such an approach may be attractive to Irish judges, who have adopted a very broad understanding of what constitute property rights for the purposes of the Constitution (extending to, for example, shares[94], contractual rights[95], and pensions[96]). This in turn creates concerns about imposing excessive constraints on legislative freedom. A hierarchy of property rights, mapping onto a decreasing scale of compensation entitlements and values, may be attractive in such a context as a means of maintaining a broad constitutional understanding of property that is consistent with legislative primacy in the sphere of social and economic policy.

## Conclusions: The Impact of Context on Compensation

The basic principle of Irish compensation law in the expropriation context remains that set out in *Central Dublin Development Association*, namely that

[94] *PMPS v AG* [1983] 1 IR 339.
[95] *Ibid*.
[96] *Cox v Ireland* [1992] 2 IR 503.

an interference with property rights will almost always require compensation if it appropriates all of the incidents of ownership, and it may require compensation in cases falling short of full appropriation if the absence of compensation would cause an "unjust attack" on property rights. Accordingly, the expropriation/regulation distinction provides important guidance as to likely compensation entitlements, but is not determinative.

In addition to the nature of the interference, various other contextual factors feed into the assessment of "unjust attack", such as the notice that an owner has of a restriction, the extent to which the affected interest is created by, or affected by, market forces, the vulnerability of the affected owners, the feasibility of paying compensation, whether the property taken is land or some other form of property, and most significantly, the perceived legitimacy of the legislature's objective. In applying this patchwork of variable, context-specific considerations, the courts oscillate between their desire to enhance certainty through the use of presumptive rules (e.g. compensation is almost always required where property rights are expropriated, and almost never required where the use of property is restricted, compensation is almost always payable at market-value) and the need to respond to the key delimiting principles in Article 43 (the 'exigencies of the common good' and the 'principles of social justice') through contextual analysis.

This tension in compensation law between contextual and rule-based decision-making is symptomatic of a deeper tension between liberal and communitarian ideals in Irish judges' intuitive notions of distributional fairness. Judges struggle to reconcile the desire on the one hand to protect individuals against exploitation in the public interest, and on the other hand to facilitate the State in securing the common good through redistribution in the form of the non-payment of compensation or the payment of reduced compensation. The latter concern is particularly raised in cases where the objective of the legislation is attractive from a public-regarding perspective, and so the public interest in the non-payment of compensation becomes linked intuitively with the overall worthiness of the objective.

Accordingly, there is no clear-cut liability rule protecting the value of property rights in all cases in Irish law. Rather, there is *presumptive* liability rule protection for outright expropriations of land, and *potential* liability rule

protection for all other interferences with property rights. Such contextual decision-making, entailing unpredictability for owners concerning security of value, is an inescapable feature of Irish compensation law that reflects the complex vision of property established in Article 43 of the Constitution. As Christopher Serkin notes, 'the scope of liability rule protection is determined by how courts actually value the right,'[97] and that valuation in Irish law reflects the competing values concerning private ownership that are enshrined in the Constitution. Constitutional property rights adjudication in the context of provisions that protect private property rights against "unjust attack", subject to a regulatory power delineated by "the principles of social justice" and exercisable to secure "the exigencies of the common good" structurally demands contextual judgment.[98]

This aspect of Irish compensation adjudication need not prove fatal to the efficiency of property law. As Henry Smith notes, '[n]o useful system employs no context or makes maximal use of context (whatever that would be); rather, systems fall on a spectrum.'[99] He argues that a combination of core exclusion and liability rules, and a periphery of governance rules (demanding contextual judgment), is required in property systems.[100] The Irish compensation framework involves such a combination of legal techniques. However, the Irish experience illustrates that this combination is effective only if clear judicial reasoning is offered to support to aspects of compensation decisions: first, the movement from exclusion and liability rules to governance rules in particular cases; second, the *application* of governance rules, and the resulting situated, contextual judgment. To-date, these moves have been implicit and unarticulated in the doctrine, and have not been justified by reference to the constitutional property clauses and the values that

[97] Christopher Serkin, 'The Meaning of Value: Assessing Just Compensation for Regulatory Takings' (2005) 99 *North Western Law Review* 677, 680.
[98] As Gaba puts it in discussing the determination of distributive fairness required in applying the Takings Clause of the Fifth Amendment of the US Constitution, it 'expressly requires judges to engage in social and philosophical judgments that many would say are beyond their competence (used both in the sense of judges' institutional role and their intelligence.) Jeffrey M. Gaba, 'Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause' (2007) 40 *Creighton L Rev* 569, 594.
[99] Henry E. Smith, 'Mind the Gap: The Indirect Relationship between Ends and Means in American Property Law' (2009) 94 *Cornell L Rev* 959, 975.
[100] Ibid, 967, 976. See also Henry E. Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31 *Journal of Legal Studies* S453.

they enshrine. Such doctrinal incoherence creates problems of judicial accountability, and of certainty and predictability. As Susan Rose-Ackerman points out, unpredictability in constitutional property rights adjudication limits owners' ability to predict the restrictions that may be imposed on their property rights and to make investment decisions accordingly.[101] Accordingly, it limits the substantive protection afforded to property rights - the individual values sought to be protected by property rights, as well as the social gains in terms of efficient exploitation of resources that property helps to secure, are undermined by excessive instability in proprietary entitlements.

To-date, the Irish courts have not formulated any theory for working out this deep tension in the Constitution's protection of private property rights, but rather have inconsistently employed a variety of factors and distinctions to rationalise their judgments on what constitutes an 'unjust attack' on property rights, and have oscillated between a focus on the text of the Constitution, and on the proportionality principle. Consequently, layers of indeterminacy have built up within the doctrine, since both the constitutional basis for particular decisions and their implications for future decisions are often unclear. The Irish courts need to provide clearer guidance on the manner in which redistributive considerations shape compensation entitlements, and on the factors that justify deviation from their stated presumption that expropriation requires at least market value compensation. The 'paradox of excluding and sharing' enshrined in the Irish constitutional protection of property, albeit complex, should not be treated as a licence for *ad-hocery* in constitutional property rights adjudication.

Accordingly, the best case scenario for improvements in Irish compensation law seems to be for judges to build upon and improve the basic structure that has been employed to-date, by employing presumptive compensation rules (such as the expropriation/regulation distinction and the presumption in favour of market value compensation), supported by more fulsome and frank judicial articulation of the role of context in displacing those rules in particular cases. In order to do so, the courts should place the question of "unjust attack" at the heart of their analysis of exceptions to

[101] Susan Rose-Ackerman, 'Against Ad-Hocery: A Comment on Michelman' (1988) 88 Colum L Rev 1697. See also Dagan, *Property: Values and Institutions* (n 33) 148-149.

presumptive compensation rules, and should clearly articulate the considerations that influence their decisions on that question. Furthermore, they should relate their analysis to the values relfected in Article 43, and should more openly develop those values through purposive analysis, involving systematic analysis of the social aims of decisions that protect property constitutionally.[102] As Joseph Singer argues, imposing such a standard "…is likely to constrain judges better than a theory that suppresses the truth of conflict and which protects judges from having to make the hard choices implicated in hard cases."[103] While such an approach will not achieve certainty concerning security of value, it should over time enhance the predictability of compensation entitlements and values, through the guidance provided by presumptive rules and the accumulation of clear precedent on what contextual factors justify setting aside such rules. This greater predictability would not have to be at the cost of legislative freedom in social and economic matters, since judges would retain discretion to take account of matters such as the worthiness of a legislative objective in adjudicating upon compensation entitlements. Accordingly, more predictability would not entail moving to a strict reciprocity approach to compensation. In addition, more explicit reasoning from judges in their compensation decisions would facilitate reasoned debate about the merits of those decisions, and about the property and other constitutional values that they affect. Such debate is difficult where judges do not state clearly the reasons for their decisions and the choices that they entail.

These improvements in Irish compensation law would have wider benefits for the coherence of Irish constitutional property law as a whole, since, as Serkin notes, 'the compensation inquiry is not independent of the constitutional protection afforded to private property.' Jurisdictions such as Ireland that seek to protect both liberal and social democrat visions of

[102] Gregory Alexander, *The Global Debate over Constitutional Property* (University of Chicago Press, 2006) 59. See also ibid, 215-223, for further discussion of the merits of purposive analysis in constitutional property law.

[103] Joseph S. Singer, *Entitlement: The Paradoxes of Property*, (Yale University Press, 2000) 213. See also Gregory Alexander, arguing that a formalist approach to takings doctrine risks '…foreclosing edifying public conversation about power and its distribution in society'. Gregory Alexander, 'Takings, Narratives and Power' (1988) 88 *Colum L Rev* 1752, 1773. For a similar argument in the context of the Takings Clause, see Leigh Raymond, 'The Ethics of Compensation: Takings, Utility and Justice' (1996) 23 *Ecology L Q* 577, 622.

property must accept the necessary complexity that this creates for constitutional property law, and indeed for property law in general. Such complexity imposes a significant burden on judges to manage it so as to secure both the individual and social values protected by property. Perfect predictability and coherence seems to be an unattainable goal in such a context, but at least in Ireland, a much more efficient judicial management of our complex constitutional vision of property is required. Without it, our aims in protecting property rights will be seversely undermined.