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Balancing Private Property and The Common Good: Is The Irish Constitution a Barrier to Rent Control?

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ABSTRACT

Ireland currently faces the largest housing crisis in its modern history. With spiralling rents, a lack of housing supply and record levels of homelessness, clearly state action of some kind is needed. Rent control is one such measure that has been consistently proposed by opposition parties and housing activists. Despite this, the Irish government has repeatedly refused to countenance rent control, claiming that it would violate the Irish constitution's protections for private property pointing, to legal advice to that effect. Though the Irish constitution does have protections for private property, these protections are expressly to be balanced with the principles of social justice and the courts have explored this balance throughout the substantive jurisprudence. It is submitted that to suggest that the constitution is a barrier to rent control is misguided and fails to take into account the nuances of the case law developed by the courts over the past several decades. The case law surrounding the interaction between private property and the common good in Ireland's constitution is complex, varied and often context-specific. In spite of this however, key principles can be clearly identified. This article examines the constitutional jurisprudence arising out of conflicts between private property and the common good, considering the drafting background and the interpretive approaches adopted throughout the case law. It will distil the core principles, critically analyse and then apply said principles to rent control specifically. It concludes by positing that Ireland's constitution is not a barrier to

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rent control and that a well-drafted legislative scheme would in fact be in keeping with the constitution's aim of balancing private property with the exigencies of the common good.

Keywords: rent control, constitutional interpretation, property rights, social justice, proportionality

I. INTRODUCTION

In Article 43 of *Bunreacht na hÉireann* (herein, 'the Constitution'), the Irish State acknowledges the natural right to private property and,¹ further, pledges never to pass a law abolishing the rights of ownership, alienation and inheritance of such property.² In Article 40.3.2, the State also promises to protect from "unjust attack" the property rights of every citizen. While it is clear from these provisions that property rights are explicitly protected by the Constitution, this right is far from absolute. Indeed, the Constitution makes it clear in the that these principles should be regulated by the principles of social justice³ and that the State may "delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good".⁴ The question as to what social justice and the exigencies common good are, and to what extent they can delimit property rights, has been the subject of a great degree of litigation and judicial consideration throughout the superior courts' jurisprudence.

While some of the case law concerning property rights is of considerable vintage, never before has housing policy been more relevant in this jurisdiction. Questions concerning the relationship between the constitutional right to private ownership and the legality of rent control measures has taken on particular relevance and urgency in recent years. Ireland has faced, without doubt, the worst housing crisis in its modern history with record levels of homelessness.⁵ While Ireland has been considered as an international posterchild for economic recovery following the financial crisis of 2008, the high levels of growth belie serious market failure and a lack of state intervention in the housing sector, resulting in soaring rents with critical housing supply issues.⁶ Dublin, a relatively small city by European

¹ Article 43.1.

² Article 43.1.2.

³ Article 43.2.1

⁴ Article 43.2.2.

⁵ Noel Baker, 'Homeless Figures Hit Record High' *The Irish Examiner* (30 April 2019). It should be noted that these figures have reduced somewhat since the publication of the article. This is largely due to distortions in figures caused by emergency measures introduced as a response to the Covid-19 pandemic.

⁶ Ed O'Loughlin, 'Housing Crisis Grips Ireland a Decade After Property Bubble Burst' *The New York Times* (8 August 2019).

standards, is one of the top ten most expensive rental markets in the world.⁷ With high rents, a lack of affordability and record homelessness, it is beyond apparent that urgent action is needed to rectify the situation. Several such measures aimed at enacting rent control that have been introduced in the *Oireachtas* (the Irish lower house of parliament),⁸ have been criticised by the Irish Government as being *prima facie* unconstitutional,⁹ with the clear implication that any form of significant rent control would be considered repugnant to the Constitution. This position, it is submitted, is debateable at best.

While exploring this issue is of course of pertinence to policy-makers in Ireland, the housing crisis and assorted issues outlined above are far from unique to that jurisdiction. The debate around the balancing of private property rights and the broader needs of society are relevant to observers in Britain, the wider common law world and beyond. This article aims to examine in-depth, the legal relationship that exists between legislative attempts to control rent and the Constitution's protection of the right to private property. In doing this, it will first briefly consider the drafting background to both Constitutional provisions before moving on to examine the considerable case law surrounding the issue of restrictions on the right to private property. The article will critically analyse the position taken by the courts throughout the substantive jurisprudence, assessing to what extent the decisions have balanced the right to private property with general societal concerns with a key focus on distilling the core principles that underlie the courts' decisions. The article then will outline one of the most recent proposals for rent control measures; analysing whether it could be viable given the aforementioned principles from case law. Finally, the article will conclude by seeking to answer the question as to whether and in what form rent control is permissible in accordance with the Constitution.

II. DRAFTING CONTEXT AND EARLY CASE LAW

For outside observers who may not be in any way familiar with the legal background of the current Constitution, it is helpful to first begin by exploring the provisions relating to property and the cultural context within which the framers

⁷ *ibid.*

⁸ For example, the Rent Freeze (Fair Rent) Bill 2019, Dáil Éireann, No. 99 of 2019. This Bill is discussed further below.

⁹ See, for example, Minister for Housing, Eoghan Murphy TD's comments below, note 77.

drafted said provisions. For clarity, the provisions of Article 40.3.2 and 43 read as follows:

Article 40.3.2: “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”.

Article 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.

1.2 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.

2.2. 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”.

While the 1922 Constitution of the Irish Free State did not contain any provisions pertaining to property rights,¹⁰ the current Constitution bears many of the hallmarks of Catholic social teaching popular at the time of its drafting.¹¹ This ethos, heavily inspired by the Church’s views on the moral nature of property, sought to firmly protect the institution of private property against the perceived threat of socialism. Though the role of the Catholic Church in the drafting of the Constitution has at times been overstated, that influence is nonetheless evident

¹⁰ Gerard Hogan, Gerry Whyte, David Kenny and Rachel Walsh, *Kelly: The Irish Constitution* (5th edn., Bloomsbury 2018) 2348.

¹¹ Rachel Walsh, ‘Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Critique’ (2011) 33(1) *DULJ* 86, 115.

in the text and offers clues as to the balance the framers sought to strike between private property and the social concerns considered important to Catholic teaching.

While the case law has long since departed from these roots,¹² it is still important to note the origins of the provisions when considering their development and why such confusion has arisen in relation to their impact. It should also be noted from the outset, that interpretations of Article 40.3.2 and Article 43 have been the subject of uncertainty and the Courts have taken a number of approaches to their interaction with one another. This pertains specifically to the question of which Article actually protects property rights and whether they should be read as protecting separate concepts of property or holistically as a wholesale protection of property in all its forms. Arguably, this delineation is of little modern relevance and not strictly relevant to the current question facing legislators, thus it shall not be explored in extensive detail, save only to observe that the older case law generally regarded Article 43 as being the principle protection of the concept of private property whilst Article 40.3.2 protected other forms, i.e. intellectual property, etc.¹³ In modern times, however, the courts have largely looked to both of these provisions as having a very close relationship to one another.¹⁴

An area of uncertainty with far more relevance is the delimiting clauses in Article 43, especially the meaning of “social justice” and “the exigencies of the common good”. This question has been the subject of both academic and judicial commentary. Indeed, the aforementioned Catholic social teachings in respect of property would seem to be of particular relevance here in determining what the framers may have envisaged in respect of the balancing of property rights with societal needs.¹⁵

Initial judicial consideration of the interaction between fetters on property rights and their protection in the Constitution generally held that the concepts of social justice and common good were unquantifiable and a matter for the *Oireachtas* rather than the Courts.¹⁶ In *Pigs Marketing Board v Donnelly*,¹⁷ this reasoning is clearly expressed by Hanna J commenting on the meaning of social justice:

“In a court of law, it appears to me to be a nebulous phrase, involving no question of law for the courts, but questions of ethics, morals, economics and sociology, which are, in my opinion,

¹² Gerard Hogan, ‘The Constitution, Property Rights and Proportionality’ (1997) 32(1) *The Irish Jurist* 373, 382.

¹³ See for example *Attorney-General v Southern Industrial Trust* [1957] 94 ILTR 161.

¹⁴ *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105.

¹⁵ Walsh (n 11) 88.

¹⁶ See for example Gavan Duffy J’s comments in *Fisher v Irish Land Commission* [1948] IR 3 at 57.

¹⁷ *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413.

beyond the determination of a court of law".¹⁸

A more assertive role for the Courts was envisaged in *the Sinn Féin Funds* case.¹⁹ In the Supreme Court, O'Byrne J held that the Act, which in that case concerned the appropriation by the State of monies belonging to the old Sinn Féin party, was repugnant to Article 43 of the Constitution. The Court further held that the suggestions advanced by the Attorney General to the effect that Article 43 only existed to prevent the total abolition of private property were incorrect.²⁰ The case of *Foley v Irish Land Commission*²¹ similarly refused to recognise the claim that the *Oireachtas* had sole discretion as regards deciding on the limitations of property rights.²²

In summary, much of the early case law and jurisprudence concerning the practicalities of the constitutional text were built upon in the *Blake v Attorney General*²³ case as well as the antecedent judicial developments. The early case law defined the role of the Courts in reviewing such restrictions on property although complex questions about the importance of the text remained.

III. MODERN JURISPRUDENCE: PROPORTIONALITY IS KEY?

The seminal case in the area of restrictions on constitutional property rights is the case of *Blake v Attorney General*²⁴ (herein '*Blake*'). *Blake* involved a challenge to the constitutionality of the Rent Restrictions Act 1960 (as amended), specifically to parts II and IV of the Act, which the plaintiffs claimed were invalid with regard to Article 43 of the Constitution. Parts II and IV of the Rent Restrictions Act 1960 concerned restrictions on rent and restrictions on recovery of possession respectively. The background to the aforementioned act revolves around restrictions on rent which were originally introduced by the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.²⁵ The Act and its various restrictions were repeatedly renewed in subsequent legislation until the Rent Restrictions Act 1960 aimed to make them permanent. The rented properties subject to these rents were thus restricted to greatly depressed values, in some instances for properties whose potential rent was valued at nineteen times that of what was permissible under

¹⁸ *ibid*, Hanna J at 418.

¹⁹ *Buckley & Ors v Attorney General* [1950] IR 67.

²⁰ *ibid*.

²¹ *Foley v Irish Land Commission* [1952] IR 118.

²² Hogan and others (n 10) 2372.

²³ *Blake v Attorney General* [1982] IR 117.

²⁴ *ibid*.

²⁵ *ibid* 210.

the act.²⁶ It was on the basis that the plaintiff landlords sought to challenge the act, claiming that the level of restrictions was an unjust act on their property rights and was not regulated by any principle of social justice.

It was held in both the High Court and unanimously in the Supreme Court that the rent control measures in the act were repugnant to the Constitution. In his judgment, O’Higgins CJ set out a number of reasons why the legislation constituted an “unjust attack” under Article 40.3.2 and was “unfair and arbitrary”.²⁷ Higgins CJ points to a number of untenable aspects of the legislation – specifically, the lack of compensation, the absence of any power to modify the restriction itself, the fact that there was no regard for the financial needs of landlords and the lack of review mechanism for the rents themselves.²⁸ The last ground was in and of itself unconstitutional according to O’Higgins CJ and was labelled as “an inherent injustice which cannot be ignored”.²⁹ The Court also took issue with the fact that the burden of providing cheap social housing had been unfairly placed on landlords. With Part II found to be unconstitutional, the Court further held that Part IV was unable to exist independently from the impugned Part II and thus fell also.³⁰

On the surface, this would seem a resounding repudiation to rent control measures however, it is submitted, that upon reading the judgment of O’Higgins CJ, it is clear that the legal position is more nuanced. Despite the fact that the key test for proportionality, as established in *Heaney v Ireland*,³¹ had not been set out, it is clear that the same core reasoning underlining that decision is present in the instant judgment. It is submitted that the fundamental issue in *Blake* was not the restriction of property rights *per se*, but rather the unreasonable manner in which said restrictions were implemented.

Following the ruling in *Blake*, the Government responded by introducing the Housing (Private Rented Dwellings) Bill 1981 which aimed to plug the legislative gap that had left many of the previously controlled tenancies in an uncertain position.³² The 1981 Bill aimed to phase out rent control by providing a rebate scheme for landlords although payments were still substantially below market

²⁶ *ibid* 122.

²⁷ *ibid*, 140.

²⁸ *ibid*.

²⁹ *ibid*.

³⁰ *Blake v Attorney General* [1982] IR 117, 141.

³¹ *Heaney v Ireland* [1994] 3 I.R. 593.

³² See Higgins CJ’s comments contemplating such issues in *Blake v Attorney General* [1982] IR 117, at 141-142.

value.³³ This continued restriction was again viewed as an unjust attack and as a result, the Bill did not survive its Article 26 reference to the Supreme Court.³⁴

Subsequent key cases have built upon the principles set out in *Blake*. One of these key cases is *Re Article 26 and Part V of the Planning and Development Bill 1999*.³⁵ Here, the Court held that the restriction on developers and landowners was appropriate as it did not unfairly discriminate and that the unequal treatment was permissible. Further, the Court recognised the need for discretion to be given to the *Oireachtas* in legislating. The proportionality test was again evident in the judgment and the application of proportionality has been repeatedly endorsed subsequently.³⁶

One of these is another seminal case concerning restrictions on property rights, *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*.³⁷ In that case, the proposed Bill sought to retroactively make certain charges for public healthcare that had been unlawfully applied at the time, lawful.³⁸ The charges were to disproportionately hit elderly persons of limited means and would deprive them of any right to recovery. In striking down the Bill, the Supreme Court found that the retroactive element was repugnant to the protections on property rights contained within Article 40.3.2 and Article 43.³⁹ The Court held that the Bill would have impacted vulnerable, elderly people and that their rights deserved particular protection from unjust attack.⁴⁰

As has been shown throughout these key cases, the modern jurisprudence has largely settled many of the questions regarding the standard required for assessing the constitutionality of a restriction of property rights, in particular introducing a harmonious reading of both Articles 40.3.2 and 43. The decision in *Blake* provides particular guidance in examining the permissibility of rent control.

³³ J.C.W. Wylie, *Landlord and Tenant Law* (Bloomsbury 2014) para 1.26.

³⁴ *Re Reference under Article 26 of the Constitution of the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181. These tenancies would eventually be governed by the Housing (Private Rented Dwellings) Act 1982 which is still in operation. For further see J.C.W. Wylie, *Wylie on Irish Land Law* (Bloomsbury 2020) para 20.32.

³⁵ *Re Art. 26 and Part V of the Planning and Development Bill* [2001] 2 IR 321.

³⁶ See for example in *BUPA Ireland Ltd v The Health Insurance Authority* [2006] IEHC 431 and recently in *Rafferty v Minister for Agriculture* [2014] IESC 61.

³⁷ *In the matter of Article 26 of the Constitution and in the matter of the Health (Amendment) (No.2) Bill 2004* [2005] IESC 7.

³⁸ s1(5) Health (Amendment) (No 2) Bill 2004, Dáil Éireann, No. 57 of 2004.

³⁹ *In the matter of Article 26 of the Constitution and in the matter of the Health (Amendment) (No.2) Bill 2004* [2005] IESC 7.

⁴⁰ Brendan Glynn, 'A Cold Front – The Development and Theory of the Proportionality Test in Constitutional Law and Its Application To The Question Of The Constitutionality Of The Purported Rent Freeze' (2020) 38(5) I.L.T. 70-72.

In the subsequent jurisprudence, the Court has clearly expressed preference for the proportionality test.⁴¹

IV. CRITICAL ANALYSIS

While the text of the Constitution clearly envisages restrictions on property rights, the case law has further fleshed out the meaning of the delimiting provisions and has given clarity as to the key concerns that the State must have regard to when utilising these provisions. It is submitted that what consistently arises from the case law is that proportionality is essential to assessing any measure that aims to restrict property rights. As Walsh notes, the proportionality test as set out in *Heaney* is prevalent through many of the aforementioned judgments in this area of law⁴² as well as, *inter alia*, *Iarnród Éireann v Ireland*⁴³ and *Gorman v Minister for the Environment*.⁴⁴

As aforesaid, the proportionality test was first set out in *Heaney v Ireland*⁴⁵ and it is a three-limbed test. The measure must be rationally connected to the objective and not arbitrary unfair etc.; must impair the right as little as possible and; must be such that their effect on rights is proportionate to the objective. As will be illustrated, each case turns on its facts and there are a variety of factors that are taken into consideration by the Courts when evaluating a challenged measure.

Deference of the courts to the policy decisions of the *Oireachtas* is a key element of development within the jurisprudence; Indeed, such hints of that deference can be observed in some of the earliest case law dealing with the courts' role in interpreting Article 43.⁴⁶ This principle will be applied when considering the first part of the proportionality test, i.e. that the measure is rationally connected to its objective. Generally speaking, a degree of deference has been shown by the Courts in assessing whether a measure is rational and objectively justified; something that has been noted throughout the case law. For example, in *Shirley v A. O'Gorman Co. Ltd.*,⁴⁷ Peart J, in rejecting the plaintiffs claim, noted that a certain level of deference was required when considering these measures and that the Court

⁴¹ Rachel Walsh, 'Opinion on the Implications of Constitutional Property Rights for Responses to the Housing Crisis' (2021), <https://www.academia.edu/41273377/Opinion_on_the_Implications_of_Constitutional_Property_Rights_for_Responses_to_the_Housing_Crisis> accessed on 21 July 2021, see 14.

⁴² Rachel Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31(1) DULJ 1-34, 5.

⁴³ *Iarnród Éireann v Ireland* [1996] 3 IR 321.

⁴⁴ *Gorman v Minister for the Environment* [2001] 2 IR 414.

⁴⁵ *Heaney v Ireland* [1994] 3 IR. 593. This decision imported the test from the Canadian case of *Chaulk v R* (1990) 3 SCR 1303.

⁴⁶ See Hanna J's comments (n 18).

⁴⁷ *Shirley v O'Gorman* [2012] 2 IR 170.

should be slow to substitute its own views for those of the *Oireachtas*.⁴⁸ In applying the principles of proportionality, the Court will defer to the *Oireachtas*' judgment in respect of the validity of a law's objectives as was seen in *Re Article 26 and Part V of the Planning and Development Bill 1999*.⁴⁹ As Maddox notes, clearly the Courts are required to have a large degree of deference in these matters in order to respect the separation of powers and allow the *Oireachtas* to legislate effectively.⁵⁰ However, it should be clarified that while the Courts will grant a wide amount of discretion, they will still require that the objective not be entirely vague.⁵¹

When considering the second and third limbs of the test, the Courts have examined a number of issues including the ways in which measures affect parties concerned and the exercise of their property rights with regard to the needs of the society. In *Blake*, the Court clearly took issue with the fact that the social objective of achieving cheap housing had been unfairly passed onto a specific group in society - landlords. This shifting of the burden was something the Court felt was disproportionate and constituted an unjust attack on property rights. Unfair restrictions on a certain class or discrimination have also led to measures being struck down. One such instance of this was in *Re Article 26 and the Employment Equality Bill 1996*.⁵² In this case, the proposed bill aimed to provide for disabled workers by requiring that employers change their premises to accommodate any special facilities that may be required for disabled workers. The Court noted the laudable aim of the legislation but took issue with the onerous obligation on employers.⁵³ As was noted by Humphreys J there was no provision made for smaller firms and, given the wide definition of disability under the Bill, it was impossible to estimate the potential cost implications for employers of implementing these changes. The Bill was in effect transferring the cost and burden of providing special facilities onto employers which was found to be repugnant to the Constitution.⁵⁴ This echoes the sentiments expressed in *Blake*.

With respect to the foregoing however, it is submitted that this case law does not mean a section or division of society cannot be required to fund or bear the burden of a specific policy. Examples of such restrictions include compulsory acquisition,⁵⁵ requirements to pay property tax,⁵⁶ the seizure or forfeiture of assets

⁴⁸ *ibid* para 204.

⁴⁹ *Re Art. 26 and Part V of the Planning and Development Bill* [2001] 2 IR 321.

⁵⁰ Neil Maddox, 'Rent Control and the Constitution' (2020) (3) CPLJ 25.

⁵¹ See Budd J's comments in *An Blascaod Mór Teo v Commissioners of Public Works (No 3)* [1998] IEHC 38.

⁵² *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

⁵³ *ibid* 331.

⁵⁴ *ibid*.

⁵⁵ *Egan v An Bord Pleanála* [2011] IEHC 44.

⁵⁶ *Madigan v Attorney General* [1986] ILRM 136.

subject to suspicions of criminal acquisition.⁵⁷ One of the key cases in this line of case law is *O'Callaghan v Commissioners for Public Works*.⁵⁸ The facts of this case concerned a landowner's challenge to a preservation order issued under s8 of the National Monuments Act 1930 in respect of a historic hillfort on the landowner's property. The landowner claimed that the order, which forbade any disturbing of the ground within proximity of the hillfort without permission from the Commissioners, effectively deprived him from his right to enjoy the land and that the burden borne by him was an unjust attack on his property rights. The Supreme Court in a judgment by O'Higgins CJ plainly dismissed the challenge. The Court noted that the preservation of the land was an exigency of the common good and that the burden of society could be shifted to certain classes in such circumstances. Minimising the impact on landowners while prioritising the public good was a key focus of the Court in the case,⁵⁹ again reflecting the broader principles of proportionality - balancing the rights to achieve the most appropriate level of restrictions and freedoms.

The Court has taken issue with unfair restrictions as was seen in *Daly v Revenue Commissioners*.⁶⁰ In that case, the High Court considered a challenge to the constitutionality of s26 of the Finance Act 1990. The section resulted in a certain group of taxpayers, self-employed taxpayers, being required to pay a large amount of their income tax in advance, including the plaintiff who was under considerable financial strain as a result. Considering the constitutionality of the section, Costello J (as he then was) applied the proportionality test and held that the section had a disproportionate impact on the plaintiff's property rights. Further, he held that as it was a permanent measure that could apply to all tax payers, that it failed the proportionality test and thus was unconstitutional. Finally, the Court has shown general disapproval toward measures that are outdated or do not take into account modern economic circumstances. Such disapproval was apparent in *Blake* and also featured heavily in *Brennan v Attorney General*,⁶¹ a case in which the Supreme Court set aside legislative provisions which provided for land valuations based on methods from the 19th century.

The issue of compensation is another factor that should be considered in brief. Again, proportionality comes into play with the decision of Denham CJ in *Rafferty v Minister for Agriculture*.⁶² In *Rafferty*, the Court stated that someone who has their property rights restricted is entitled in principle to compensation for total

⁵⁷ *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185.

⁵⁸ *O'Callaghan v Commissioners for Public Works* [1985] ILRM 365. O'Higgins CJ at 370.

⁵⁹ *Maddox* (n 50) 26.

⁶⁰ *Daly v Revenue Commissioners* [1995] 3 IR 1.

⁶¹ *Brennan v Attorney General* [1984] ILRM 355.

⁶² *Rafferty v Minister for Agriculture* [2014] IESC 61, Denham CJ at para 45.

loss sustained. However, there are legitimate reasons why a right may be restricted and less than full compensation can be given although this is subject to strict scrutiny. Compensation is not required in all occasions however⁶³ and arguably the restriction in *Rafferty* was an extreme example.⁶⁴

Further consideration should also be given to the Courts' general acceptance of and deference to the fact that emergency measures can allow for greater infringement on property rights.⁶⁵ In examining this, a major example is the case law arising from the Financial Emergency Measures in the Public Interest (FEMPI) legislation.⁶⁶ For example in *J & J Haire v Minister for Health*,⁶⁷ a challenge was made to the constitutionality of retrospective amendments to a contract between the State and pharmacists made by virtue of FEMPI. Similar conclusions were reached in *Unite the Union v Minister for Finance*.⁶⁸ In both of these cases, the Court clearly identified the financial crisis as a key consideration in deferring to the *Oireachtas* when considering the permissibility of the infringement on property rights.⁶⁹ One would expect a similar reasoning would be applied by the courts in any challenge to some of the restrictions on property rights introduced to deal with the Covid-19 public health crisis, although the issue has yet to be litigated.⁷⁰

Overall, it can be observed that there are clearly a number of key principles that can be distilled from the core jurisprudence. Firstly, the proportionality test would appear to be the main metric used by the courts to consider the constitutionality a restriction on property rights such as rent control. The courts have moved away from focusing on a purely text-based analysis seen in some of the earlier case law and have adopted a harmonious reading of both Article 40.3.2 and Article 43 in line with the proportionality test. While it has been argued elsewhere that there is uncertainty as to whether or not the traditional proportionality test is the standard that will definitely be used for the courts,⁷¹ it is submitted that proportionality is the most consistent standard utilised throughout the case law and is the most appropriate in assessing the constitutionality of rent control. In utilising the test, the courts will clearly have regard to a number of factors, namely: the level at which the burden is placed on one group of society; whether the

⁶³ *Dreher v Irish Land Commission* [1984] ILRM 94, 97.

⁶⁴ *Rafferty* involved the culling of the plaintiff's entire sheep flock by the defendant as a precaution for the spread of Foot and Mouth disease.

⁶⁵ Hilary Hogan and Finn Keyes, 'The Housing Crisis and The Constitution' (2020) 65 *Irish Jurist* (N.S.) 87.

⁶⁶ Financial Emergency Measures in the Public Interest (FEMPI) 2009.

⁶⁷ *J & J Haire & Co Ltd v Minister for Health* [2010] 2 IR 615.

⁶⁸ *Unite the Union and Paul Gallagher v The Minister for Finance and Others* [2010] IEHC 354.

⁶⁹ Hogan and Keyes (n 65) 90; see also *NAMA v Downes* [2014] IEHC 21.

⁷⁰ Hogan and Keyes (n 65) 92.

⁷¹ Hogan and others (n 10) 2348.

restriction itself could be discriminatory or unfair; whether there is any provision for compensation and; whether there are any specific emergency circumstances that would further re-enforce the necessity of the measure. It is posited that this standard of proportionality is key in examining the constitutionality of any restriction on property rights, including rent control.⁷²

V. APPLICATION TO RENT CONTROL

Having now established the main principles that have emerged from the case law, the issue of rent control can now be turned to in more depth. While *Blake* dealt specifically with rent control, there have been few other major attempts to control rent in domestic legislation until relatively recently. It is proposed that we now turn to the most recent of these attempts to introduce rent control and, using the above established principles, evaluate whether it could be constitutional in light of the case law.

The Rent Freeze (Fair Rent) Bill 2019 is currently at third stage in *Dáil Éireann*. By way of background, the Bill was first introduced by Sinn Féin TD, Eoin Ó Broin and aimed to amend the Residential Tenancies Act 2004 by introducing a three-year rent freeze.⁷³ It also compelled the Minister for Finance to initiate a report into a proposed tax credit for renters.⁷⁴ During the debating of this Bill in *Dáil Éireann*, the Minister for Housing at the time, Eoghan Murphy remarked that “[W]e have seen without even opening up this Bill is that it is unconstitutional”.⁷⁵ While the former minister’s position is certainly not an uncommon one, it is submitted that it is misguided and based on an incorrect understanding of the jurisprudence.

In analysing this Bill, it important to bear in mind that it bears several key differences from the Act that was held to be unconstitutional in *Blake*. Firstly, the Bill does not propose a permanent freezing of rents, something that would almost certainly be unconstitutional in light of previous authorities. *Blake* should not be considered as authority that a rent freeze is unconstitutional *per se*,⁷⁶ rather it acts as guide to what kind of proportionality requirements should be taken into account when drafting a statutory scheme. The provision under s2 of the Bill for the assessment of new tenancies would also help to alleviate potential concerns. While such a rent freeze certainly would be a major restriction of property rights,

⁷² Finn Keyes, ‘Property Rights and Housing Legislation’ (2019) Oireachtas Library and Research Centre Briefing Paper 12.

⁷³ S2 The Rent Freeze (Fair Rent) Bill 2019.

⁷⁴ *ibid*.

⁷⁵ *Dáil Debate*, Tuesday 10 December 2019, Vol 991, No. 1.

⁷⁶ Maddox (n 50) 27, 32.

it is proffered that it is far from the unreasonable and disproportionate situation that arose in *Blake* and that landlords would still be in a position to collect rents that are at market value. No compensation is provided although, it is submitted that it would not be necessary in this case as it can easily be distinguished from the far more severe impact of the restrictions in *Rafferty*.⁷⁷ It would not involve the permanent fixing of rents to a level that essentially deprived landlords of any form of reasonable income and arguably would survive any challenge to its constitutionality.

There are other factors that would fall in favour of a bill such as the above. In respect of deference in emergency scenarios, arguably the Court would be minded to show similar deference were the case to be made that rent controls were necessary to mitigate the impact of the housing crisis, the seriousness of which the Supreme Court itself has recently commented on.⁷⁸

It is submitted that lessons in this respect could be learned from the enactment of the Residential Tenancies and Valuation Act 2020 alongside the Emergency Measures in the Public Interest (Covid 19) Act 2020 which both were brought into being by the *Oireachtas* in response to the Covid-19 pandemic. Both of these acts contained wide-ranging provisions which, *inter alia*, provided for a rent freeze⁷⁹ and a total moratorium on evictions.⁸⁰ Clearly, in the circumstances of an unprecedented public health emergency, the State saw the merit in allowing the common good prevail over the rights of landlords to evict their tenants. Disappointingly, the Government ended these protections once the most severe lockdown measures were lifted and returned to its default position of doubting the constitutionality of rent freezes.⁸¹ The near complete volte face aside, it is arguably puzzling that the Government is unwilling to recognise that emergency measures taken to safeguard the common good would be protected by the Constitution's exception to private property rights. Unfortunately, from an academic point of view, the above legislation was never challenged although again it is likely that the Courts would have shown due deference to the *Oireachtas* during times of crisis. It has also been argued that rent controls have been allowed under proportionality justifications in ECHR jurisprudence, something that gives added weight to the

⁷⁷ *Rafferty v Minister for Agriculture* [2014] IESC 61, para 45.

⁷⁸ *Fagan v Dublin City Council* [2019] IESC 96 Irvine J at para 41.

⁷⁹ S4(5) Residential Tenancies and Valuation Act 2020. This legislation limits the freeze to 'relevant persons' and was given a sunset clause by virtue of statutory instrument.

⁸⁰ S5 Emergency Measures in the Public Interest (Covid-19) Act 2020

⁸¹ Jack Power, 'More than 360 people served eviction notices after ban lifted' *The Irish Times* (26 January 2021).

assertion that rent controls would be constitutionally permissible in Ireland under the proportionality doctrine.⁸²

VI. CONCLUSION

As mentioned, it is vital that action is taken to address Ireland's rental crisis and the efforts to strike a balance between protecting property rights and serving the needs of society are of relevance to policy-makers and analysts from any country. It is posited that the Irish constitutional situation is a great example of the clash between these two aims. The Constitution and its framers contemplated such issues. As has been examined throughout this article the Constitution, informed by the courts' analysis, clearly allows for a balancing of rights. Suggestions that an amendment to the Constitution specifically recognising a right to housing would be required to allow for a robust response to the rental crisis are misguided and unnecessary.⁸³ The author argues that, while it is easy to imagine that amending the Constitution would be the simplest solution, it is in fact overly costly and ultimately not required. It is submitted that by following the principles of proportionality, the *Oireachtas* could take decisive interventionist action along the lines examined above.

In conclusion it is posited that rent control is certainly constitutionally permissible in Ireland. As has been seen through examining the, admittedly complex and often context-specific case law and from analysing the key principles, the courts have adopted a balanced approach to considering the restriction of property rights, on the whole favouring the proportionality test throughout the substantive jurisprudence. It is submitted that with well drafted legislation that provides for proportionate restrictions, rent control would not only be constitutionally permissible in Ireland but would in fact be in keeping with the spirit of the Constitution's desire to balance property rights and the principles of social justice.

⁸² Brendan Glynn, 'The Big Freeze' (2020) 38(4) I.L.T. 55-57.

⁸³ Maddox (n 50) 27, 34.