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[Deliberative Property: Managing Complexity in Property Systems]

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Deliberative Property: Managing Complexity in Property Systems

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1. Introduction

Participation and deliberation within property systems has largely been understood as a public law issue, with for example stakeholder engagement forming a key pillar of environmental and planning regulation.[1] In fact, deliberation has significant private law impacts in the property context, with private law providing both incentives and opportunities for stakeholder engagement. This chapter aims to deepen our understanding of how this occurs in property law. It demonstrates how 'deliberative property' offers a pathway for mediating between the complexity-management concerns of two competing schools of thought in property theory, loosely termed 'progressive' and 'information' perspectives.[2] Deliberative property does so by facilitating information-intensive contextualisation of property disputes and direct stakeholder engagement, while at the same time containing the broader systemic impacts of such engagement. Deliberative property also provides additional points within property systems wherein *public* concerns about the use and distribution of property can be reflected in the legal ordering of private relations. The chapter illustrates these dynamics in action through two doctrinal case-studies drawn from Irish property law.[3]

'Progressive property' contends that property's complexity, in particular its distributive effects, means that contextualisation must be facilitated within property law.[4] However, a core critique of progressive property highlights the potential destabilising effects of *ex post* judicial revision of the strength and enforceability of property rights based on standards like

[1] For analysis of participatory decision-making processes in environmental and planning regulation, see e.g. E Scotford and R Walsh, 'The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context' (2013) 76 *Modern Law Review* 1010, R Walsh, 'The Evolving Relationship between Property and Participation in English Planning Law' in N. Hopkins (ed.) *Modern Studies in Property Law: Volume 7* (Oxford: Hart Publishing, 2013), p. 263

[2] On the differences between these schools of thought, including in respect of managing complexity, see J Baron, 'The Contested Commitments of Property' (2010) 61 *Hastings Law Journal* 917.

[3] In this respect, this chapter aims to diversify the range of doctrinal examples that inform and illustrate the development of property theory. For further elaboration of this goal, see R Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge: CUP, 2021), chp. 1.

[4] See e.g. the Statement of Progressive Property, arguing, '[b]ecause of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.' G. S. Alexander, E. M. Peñalver, J. W. Singer, and L. S. Underkuffler, 'A Statement of Progressive Property' (2009) 94 *Cornell Law Review* 743, 744.

fairness or reasonableness, or based on ideas of social obligation.[5] Progressive property has been challenged for failing to give sufficient weight to property's means and for neglecting property law's systemic dimensions.[6] In response to this critique, this chapter highlights and deepens a means-focused strand of progressive property theory that is centred on property law's deliberative dimensions. The chapter analyses a distinct category of 'modules' within property systems that both enable and contain stakeholder deliberation and information-heavy contextualisation.[7] Such deliberative modules allow for context-sensitive mediation of competing interests in property, including direct stakeholder interests and broader public objectives.[8] They can be sequenced and connected with classic private law moments of bi-lateral adjudication with varying degrees of closeness and influence, determined in part by the likely systemic effects of such interactions. As such, they offer an additional institutional pathway for complexity-management in property systems, responding to concerns of *both* the progressive property and information theory schools of thought.

Part 2 outlines the emergence of deliberative property and its situation within the broader progressive property school of thought. Part 3 turns to deliberative democracy theory to offer a deeper understanding of the potential *per se* value of deliberation, thereby filling a gap that was identified in earlier deliberative property work. Part 4 connects the ideas about deliberation that are explored in Part 3 to property law, demonstrating why deliberation has the potential to enhance the operational effectiveness and legitimacy of property systems. Part 5 continues the work already begun in deliberative property theory of mapping existing deliberative sites in property systems. It explores, through the prism of Irish property law, two doctrinal areas wherein deliberative processes are integrated with private law rules in a way that facilitates enhanced contextualisation without sacrificing predictability in respect of core private law remedies. These examples – drawn from mortgages law and landlord and tenant law – involve varying degrees of intensity of

[5] See e.g. H. E. Smith, 'Mind the Gap: The Indirect Relation between Ends and Means in American Property Law' (2009) 94 *Cornell Law Review* 959.
[6] *Ibid*. Within the progressive property school of thought, see e.g. R Dyal-Chand, 'Sharing the Climate' (2022) (122) (3) *Columbia Law Review* 581, 596, and J. W. Singer,'Property as the Law of Democracy' (2014) 63 Duke Law Journal 1287, 1307, acknowledging the importance of stable property rights. On the benefits of a predominantly rule based approach in property law, see e.g. H.E. Smith, 'Property and Property Rules' (2004) 79 *New York University Law Review* 1719; H.E. Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 1691, 'Mind the Gap' (n 4), 975.
[7] Henry Smith describes property as managing complexity through 'modularity': H.E. Smith, 'On the Economy of Concepts in Property' (2012) 160 *U. Pa. L. Rev*. 2097
[8] *Ibid.*, 2115.

stakeholder deliberation and varying degrees of connection between such deliberation and related private law decision-making by judges. They demonstrate the emergence of a liminal category of property duties that require *ex ante* stakeholder engagement, with the duty to engage influencing (to varying degrees) the enforceability of property rights in any ensuing private law disputes. Together, they support the chapter's claim that deliberative property facilitates context-sensitive mediation of competing property rights and wider social and economic concerns, while also maintaining systemic stability in property law. However, the case-studies also highlight the contingency of meaningful deliberation occurring within deliberative spaces in property systems, as well as the risks of participatory processes. Part 6 begins the work of mapping an institutional pathway for the future development of deliberative property. Part 7 concludes.

2. Progressive Property, the 'Means' Debate, and Deliberative Property

The fact that property has a 'social aspect' has come to be widely accepted by property scholars of various schools of thought.[9] However, the institutional processes that should guide the delimitation of that 'social aspect' remain contentious. While not advocating *ad hocery*, *'*progressive property' theorists generally accept a significant degree of contextual decision-making in property law in light of owners' social obligations.[10] The emphasis shifts to predictability for 'information theorists', who generally favour a greater degree of rule-based enforcement of property rights as a more efficient means of ensuring simplicity and predictability in property law.[11] In terms of institutional responsibility, progressive property scholars express comfort with judges intervening *ex post* to mediate between competing interests in respect of property on an evolving basis.[12] On the other hand, while not arguing that property law should be off-limits for judicial creativity, information theorists tend to prefer legislative reform as a means of development.[13]

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[9] See E Rosser, 'Destabilizing Property' (2015) 48 *Connecticut Law Review* 397, 402; S Hamill, 'Community, Property, and Human Rights: The Failure of Property-as-Respect' (2017) 27 *Journal of Law and Social Policy* 7, 13 and A. J. van der Walt, 'The Protection of Private Property Under the Irish Constitution: A Comparative and Theoretical Perspective' in E Carolan and O Doyle (eds.), *The Irish Constitution: Governance and Value*s (Dublin: Thomson Roundhall, 2008), pp. 398, 399.

[10] Baron (n 2), 961.

[11] See e.g. Smith (n 5).

[12] *Ibid.*

[13] Baron (n 2), 950-51. On the preference for legislative reform from an information costs perspective, see T Merrill and H.E. Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1.

However, a relatively under-explored strand of progressively-oriented scholarship has also adopted a means-focus, analysing the significance of deliberation between owners in the co-management of resources, whether collectively or individually owned. For example, Alexander juxtaposed what he termed 'governance property' and 'exclusion property', with the former concerned with the internal workings of the property 'box' and the latter focused on the relationships and interactions between owners and non-owners.[14] Analysing multi-ownership property, Alexander argued, '[g]overnance property institutions have proliferated in virtually every area of social life', involving mutually dependent property interests that create an imperative for cooperation and coordination.[15] Reflecting various progressive property values, Di Robilant stressed property's capacity to foster democratic values and deliberative decision-making as an historically-embedded strand of property thinking.[16] She analysed the deliberative dimensions of a range of innovative property forms, such as the Common Interest Community, the Community Land Trust, and the public trust doctrine. Echoing civic-republican property theory, she contended '[p]roperty forms with built-in deliberative mechanisms encourage a public-spirited, self-governing citizenry.'[17]

More recently, Dyal-Chand argued for co-management of resources between neighbours (broadly defined).[18] She advanced deliberative co-management as a means of achieving effective climate mitigation and encouraging communication, trust, sharing, and perhaps ultimately empathy, between neighbours.[19] Such co-management could be achieved through both existing private law doctrines and institutional innovations, for example the increased use of mediation to solve property disputes. Significantly, while Dyal-Chand advocated deliberation as a tool for dealing with property externalities, she also identified potential *per se* value in deliberation, arguing for further research on deliberation as an end in itself, '[t]he purpose of which is inspire more communication and ultimately trust.'[20] Such

[14] G. S. Alexander, 'Governance Property' (2012) 160 *University of Pennsylvania Law Review* 1853.
[15] *Ibid*, 1860.
[16] A di Robilant, 'Property and Democratic Deliberation: The *Numerus Clausus* Principle and Democratic Experimentalism in Property Law' (2014) 62 *American Journal of Comparative Law* 367. See also A di Robilant, 'Populist Property Law' (2017) 49 *Connecticut Law Review* 933.
[17] *Ibid,* 'Property and Democratic Deliberation', 409.
[18] Dyal-Chand, (n 6).
[19] On property sharing, see also Rashmi Dyal-Chand, 'Sharing the Cathedral' (2013) 46 *Connecticut Law Review* 647.
[20] Dyal-Chand, (n 6), 635.

inspiration could in turn, she argued, weaken the cultural and legal influence of ideas of exclusion as key drivers and justifications of property law.[21] Dyal-Chand noted the scope for *ex ante* deliberative tools to aid decision-making in respect of resources.[22] She echoed Alexander in recognising '…that deliberative co-management can occur along a spectrum of collaboration', involving varying levels of intensity of engagement and cooperation.[23]

These emerging strands of deliberative property theory demonstrate attentiveness to property's means as well as its ends.[24] However, they do not engage with the relationship between the deliberative perspective and systemically-focused critiques of progressive property; nor do they fully analyse the distinctive value of deliberation as a mode of decision-making. The next two parts turn to these issues, seeking to deepen scholarly understandings of deliberative property by analysing its roots in deliberative democracy theory, as well as assessing the particular salience of deliberation in the property context.

3. Understanding Deliberation's Value

As noted above, Dyal-Chand suggested that there may be *per se* value to deliberation amongst neighbours. However, she identified two potential concerns with deliberation as an end within property law: first, the potential loss of stability; second, '…the contexts in which deliberative co-management is too risky a strategy, as a social, economic, or cultural matter, as compared to bright line property rules.'[25] The latter concern is touched upon in Part 5, which highlights contingent risks of deliberative strategies in the property context, in particular the influence of underlying power dynamics on participation. This part and the next aim to comprehensively tackle the first of Dyal-Chand's concerns, namely the risk that deliberation will reduce stability within property law. First, the grounding theories of deliberation and deliberative democracy in which a coherent deliberative approach to property must find its roots are analysed. Second, those theories are applied to the property context to test Dyal-Chand's concern about stability.

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[21] What she termed '…the broader structures of ownership and exclusion that have buttressed the American vision of property ownership as a manifestation of autonomy – broadly defined'. *Ibid*, 583.
[22] *Ibid*, 623.
[23] *Ibid*, 639.
[24] For criticism of progressive property for neglect of property law's means, see e.g. Smith (n 5).
[25] Dyal-Chand (n 6), 636.

Although a broad church in conceptual terms[26], deliberative democracy theory can be loosely understood as prioritising reasoned argument as a means of securing rational and informed decision-making[27]. For example, Dryzek describes its core premise as follows: '[o]utcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question'.[28] Two key inter-related criteria for evaluation emerge from deliberative democracy scholarship: whether decision-making involves reason-giving; and whether it involves high quality, inclusive interpersonal deliberation.[29] As Di Robilant summarises in the property context, '[i]deally, property forms that establish democratic deliberative governance mechanisms yield decisions that are more informed, more inclusive, because they reflect a wider range of views, and more legitimate, because adopted after extensive reason giving.'[30] On this conception, reason-giving is essential to the legitimate exercise of authority, and is enhanced through deliberation.[31]

Deliberation is distinct from participation as it requires a certain *quality* of interpersonal engagement.[32] Arguments for and against decisions are to be weighed carefully on their merits.[33] An attitude of openness and flexibility is expected from participants: as Chambers states, 'one's preferences must be revisable in light of discussion, new information, and especially the acknowledgment of other people's reasonable claims.'[34] Mansbridge *et. al.* emphasise the importance of facilitating the identification and articulation of disagreement, including through 'the confrontation of reasons pro and con'.[35] Thus while participation can occur where a process simply allows a stakeholder to voice objections to a policy,

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[26] On this point, see J.S. Dryzek, *Foundations and Frontiers of Deliberative Governance* (Oxford: Oxford University Press, 2010), 2.
[27] Bohman describes deliberative democracy as encompassing '…any one of a family of views, according to which the public deliberation of free and equal citizens is the core of legitimate political decision-making and self-rule.' J Bohman, 'Epistemic Value and Deliberative Democracy' (2009) 18 (2) *The Good Society*, 28, 28.
[28] Dryzek (n 26), 23.
[29] On these criteria, see A Gutmann, 'Democracy, philosophy, and justification' in *Democracy and Difference,* S Benhabib ed (Princeton University Press, 1996) 340.
[30] Di Robilant, 'Property and Democratic Deliberation' (n 16), 371.
[31] Bohman (n 27), 28.
[32] For discussion of the meaning of deliberation and its relationship with participation, see e.g., C Pateman, *Participation and Democratic Theory* (Cambridge, Cambridge University Press, 1970); J Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford, Oxford University Press, 2000); J Rossi, 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-Making' (1997) 92 *Northwestern University Law Review* 173.
[33] J Habermas, 'Concluding comments on empirical approaches to deliberative politics' (2005) 40 *Acta Politica* 384.
[34] S Chambers, *Constitutional Referendums and Democratic Deliberation* in M Mendelsohn and A Park, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231, 237.
[35] J Mansbridge, 'Everyday Talk in the Deliberative System', in *Deliberative Politics: Essays on Democracy and Disagreement* (Stephen Macedo ed., 1999) 211–42, 225–6,

deliberation presupposes deeper engagement between stakeholders on problem-solving, as well as flexibility as to outcome.

From an institutional perspective, deliberative democracy can operate at multiple levels, with macro, micro, and systems, or integrated, approaches to deliberative democracy all identified in the literature.[36] At the micro-level, there are intentionally created deliberative processes and structured forums for democratic decision-making, such as parliaments and courts. At a macro-level, we find informal, often unstructured, forms of public deliberation, such as deliberation fostered by media and social movements.[37] Responding to this 'multi-level' structure, Mansbridge and others articulated an overarching 'systemic' approach to deliberation.[38] Four loose, and overlapping, arenas are identified within deliberative systems: '…the binding decisions of the state (both in the law itself and its implementation); activities directly related to preparing for those binding decisions; informal talk related to those binding decisions; and arenas of formal or informal talk related to decisions on issues of common concern that are not intended for binding decisions by the state.'[39] Connections between 'sites of law and policy making' and other dimensions of the public sphere are central to systemic analyses.[40] Furthermore, complex regimes of decision-making such as fields of law are identified as sites with distinct deliberative capacity.[41]

Expected dividends of deliberative decision-making include: greater respect for and acceptance of decisions[42]; epistemically superior decisions based on better informed preferences and greater attention to the public good[43]; and better management of complexity based on an improved knowledge base[44]. Deliberation is identified as having the

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[36] See R. E. Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (OUP, 2008), 2, C. M. Hendriks, 'Integrated Deliberation: Reconciling Civil Society's Dual Role in Deliberative Democracy' (2006) 54 *Pol. Stud.* 486.
[37] J Mansbridge, 'Everyday Talk in the Deliberative System' in Stephen Macebo ed, *Deliberative Politics: Essays on Democracy and Disagreement* (OUP 1999).
[38] See Mansbridge (n 35), 211, J Mansbridge, J Bohman, S Chambers, T Christiano, A Fung, J Parkinson, D.F. Thompson, M.E. Warren, 'A systemic approach to deliberative democracy' in *Deliberative Systems – Deliberative Democracy at the Large Scale*, J Parkinson and J Mansbridge eds, (CUP, 2012), 1.
[39] *Ibid*, 'A systemic approach to deliberative democracy', 9.
[40] A Bachtiger and J Parkinson, *Mapping and Measuring Deliberation* (OUP, 2019), 85.
[41] See e.g. Jonathan Kuyper's analysis of the deliberative capacity of the complex global regime of intellectual property law: 'Deliberative Capacity in the Intellectual Property Rights Regime Complex' (2015) 9 *Critical Policy Studies* 317.
[42] R.E. Goodin and J.S. Dryzek, 'Deliberative Impacts: The Macro-Political Uptake of Mini-Publics' (2006) 34 *Pol. & Soc'y* 219, 233.
[43] Gutmann, (n 29).
[44] See Y Papadopoulos, 'On the Embeddedness of Deliberative Systems: Why Elitist Innovations Matter More', in *Deliberative Systems: Deliberative Democracy at the Large Scale*, at 125-150, 126–7.

potential to maximise the reasonableness of decisions, and of the exercise of authority through such decisions.[45] Preferences are understood to become more informed and 'public regarding', leading to decisions that better manage complexity and reflect all competing interests.[46] Deliberation ideally allow us to respond effectively to the problem of 'bounded rationality', and to the fact of moral pluralism and disagreement.[47] Perhaps most significantly, through deliberation, the exercise of authority is more closely connected to those subject to it, through greater opportunities to influence the exercise of authority and greater reason-giving by those exercising authority. As Böker puts it, 'the deliberative ideal subjects the exercise of authority to a need to re-create itself on an ongoing basis through processes of discursive challenge and justification.'[48]

Against this theoretical backdrop, property law emerges as a complex sub-system that has the potential to act as a site of connection between the macro and micro levels of a broader deliberative system. Property law offers opportunities for inter-personal deliberation that are structured and informed by relevant legal rules and regulatory principles, but which emerge spontaneously in response to interactions between persons in respect of the use and/or distribution of valuable resources. In short, deliberative property has the potential to 'infuse the existing spaces of everyday life with democracy.'[49] The next part contextualises these arguments about the benefits of deliberation in respect of property law.

4. Situating Deliberation Within Property Systems

The systemic perspective on deliberation considered in Part 3 chimes with a similar emphasis in property theory on the systemic dimensions of property law, or its 'architecture'.[50] Like Mansbridge et al, Smith advocated for a concrete understanding of the

[45] B Manin, E Stein and J Mansbridge, 'On Legitimacy and Political Deliberation' (1987) (15) 3 *Political Theory* 338, 363.
[46] See e.g J Fishkin, *When the Public Speak: Deliberative Democracy and Public Consultation*, Oxford: OUP 2009. See also Gutmann (n 29), arguing at 344: '…the legitimate exercise of political authority requires justification to those people who are bound by it, and decision making by deliberation among free and equal citizens is the most defensible justification anyone has to offer for provisionally settling controversial issues'.
[47] Di Robilant, 'Property and Democratic Deliberation' (n 16), 407.
[48] M Böker, 'Justification, critique and deliberative legitimacy: The limits of mini-publics' 16 (1) *Contemporary Political Theory* 19, 25. See also Manin et al (n 45), 362, arguing, '[t]o make room simultaneously for the indeterminacy of justice and the necessity for decision, those in power and their idea of the common good must be questioned, if not constantly, then at regular intervals.'
[49] H Asembaum, 'Rethinking Democratic Innovations: A Look Through the Kaleidoscope of Democratic Theory' (2021) *Political Science Review* 1, 4.
[50] On the significance of property's architecture, see e.g. H. E. Smith, 'Restating the Architecture of Property' in B. McFarlane and S. Agnew (eds.), *Modern Studies in Property Law Vol. 10* (Oxford: Bloomsbury, 2019), 19; 'Complexity and the Cathedral: Making Law and Economics More Calabresian' (2019) 48 *European Journal of Law and Economics*

role of system in property law, and for greater attention to be paid to property's systemic dimensions in modifying legal rules, whether judicially or through legislative reform. [51] Smith identified property law as a 'complex system' – one wherein '…the effect of the system…is not the additive sum of the effects of the parts, such as rules or interests'.[52] The complex nature of property law in turn shapes its structure, or 'architecture'. Smith emphasised the internal self-sufficiency of discrete modules as crucial to an efficient system, noting: '[i]f in a system every element could in principle interact freely with any other, the problems of multiple interaction and complexity effects would soon become intractable.'[53] The proposed solution was a modular structure within property law: '[p]roperty divides the world of horizontal interactions into modules, largely surrounding the legal thing, which allow intensive activity inside boundaries and stereotyped interactions between modules.'[54] At the same time, Smith identified the unavoidable need for module-interaction: '[f]or spillovers and collective action problems, these components of the system, 'modules', must be enriched at their interfaces with more targeted rules and standards.'[55] Thus, as in deliberative systems, the degree and intensity of connection between parts of a property system is a contested and evolving question.

Smith's focus was on fine-grained use-specifying rules and standards – what he termed elsewhere 'governance rules' – as the key channel for interaction between modules in cases of complex use-disputes.[56] However, property systems do not always approach complexity-management in respect of use-rights by specifying and assigning a list of permitted and limited uses of land. Rather, they sometimes operate by establishing deliberative processes – deliberative 'modules' within the property system - that involve a range of stakeholders, usually capturing broader public interests as well as the interests of immediately impacted groups and individuals. Interactions between such deliberative modules and *other parts* of a

43; 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 1691; 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31 *Journal of Legal Studies* 453; T. W. Merrill and H. E. Smith, 'The Morality of Property' (2007) 48 *William & Mary Law Review* 1849.

[51] Smith (n 45, H. E. Smith, 'Property is Not Just a Bundle of Rights' (2011) 8 (3) *Econ Journal Watch* 279, 283.

[52] Smith, 'Restating the Architecture of Property' (n 50).

[53] *Ibid.*

[54] Henry E. Smith, 'The Persistence of System in Property Law' (2015) 163 *University of Pennsylvania Law Review* 2055, 2057.

[55] *Ibid*, 2066. See also Smith, 'Property is Not Just a Bundle of Rights' (n 51).

[56] See e.g. Smith (n 50) 'Exclusion versus Governance'; T. W. Merrill and H. E. Smith, 'The Morality of Property' (2007) 48 *William & Mary Law Review* 1849.

property system may be more-or-less stereotyped depending on how nuanced and contextualised a determination on use needs to be, but the aim of deploying deliberative modules is to facilitate 'permitted' and 'restricted' uses to be worked out between stakeholders. Such stakeholder deliberation often occurs 'in the shadow' of principles that reflect broader interests, for example, financial regulations designed to protect consumers.

As such, deliberative processes are an important complexity-management tool in property systems. Managing complexity *between* stakeholders, often *before* any judicial involvement in the relevant property relationship, and *in light of* broader concerns, may assist property law's difficult balancing act of ensuring both reasonable stability of expectations and reasonable scope for necessary change. Through deliberation, early notice of evolutions in limitations on rights, or of obligations, can be given to owners. The pace of implementation of those obligations is inevitably slowed by being filtered through a deliberative process, again allowing further time for expectations to adjust.[57] As Serkin puts it, '[t]ime is its own form of transition relief'.[58] Accordingly, deliberative property can assist in achieving one of the key requirements for a stable yet responsive property system – smooth transitions between evolutions in legal rules.[59]

In addition, the communication between stakeholders that is encouraged through the integration of deliberative modules within property systems can facilitate the disclosure of information. Against this backdrop of disclosure, more effective negotiation can occur to particularise and adapt interpersonal rights and responsibilities to a specific property context and problem, thereby creating scope for more mutually beneficial solutions. In this way, deliberative engagement may be a source of 'self-generated norms' between stakeholders.[60] For example, as is discussed in Part 5, engagement between a landlord and tenant may generate an informal agreement to accept a breach of covenant or a partial remediation of a breach, while engagement between a mortgagor and mortgagee may

[57] On this issue, see e.g. H Doremus, 'Takings and Transitions' (2003) 19 *Journal of Land Use & Environmental Law* 1, C Serkin, 'What Property Does' (2022) 75 *Vanderbilt L Rev* 891, C Serkin, 'A Case for Zoning' (2020) 96 *Notre Dame L Rev* 749.
[58] *Ibid*, Serkin, 'What Property Does', 952.
[59] As Smith puts it, '…a modular architecture is not a method of preventing change but rather of achieving it with minimal disruption to the system': 'Persistence of System', (n 54), 2074.
[60] S Blandy, S Bright and S Nield, 'The Dynamics of Enduring Property Relationships in Land' (2018) 81 *Mod L Rev* 85, 91.

generate alternative repayment plans, debt write-downs, or forbearance or delay in the enforcement of rights in recognition of potential hardship. Where such contextualisation occurs through an established framework for deliberation, its occurrence (although not its content and outcome) is predictable. By ventilating the competing interests at stake in a property problem at an early stage, deliberation can help to pre-empt the need for the kind of discretionary *ex post* decision-making by judges that has been the subject of criticism from a systems perspective.[61] Furthermore, the outcome reached through the deliberative process usually carries significant weight in any subsequent judicial action in respect of the rights and obligations worked out in that process, thereby minimising *ex post* judicial intervention.[62]

Part 5 tests these arguments about deliberative property's potential through doctrinal analysis, demonstrating how a 'modular' structure with a deliberative dimension operates in parts of the Irish property law system.

5. Deliberative Property in Action

(i) Mapping Deliberative Property's Structure

This part builds on the conceptual analysis in the previous parts by exploring deliberative property in action. Specifically, it uses a deliberative lens to better understand two doctrinal examples of a liminal category of duties that are implemented through *ex ante* interpersonal deliberation, but which influence the availability of private law remedies for property right holders. Such stakeholder deliberation is used to mediate between competing property rights claims against the backdrop of overarching public policy concerns. Where property rights-holders seek to avail of private law remedies, courts enforce the obligation to deliberate without enquiring into the substance of that deliberation. In this way, the impact of information-intensive, context-focused deliberation is contained from a systems perspective.

[61] See Smith, 'Mind the Gap' (n 5), 'Property is Not Just a Bundle of Rights' (n 51), 283.
[62] On the added weight given to decisions with a participatory dimension by judges, see the analysis of English compulsory purchase litigation at Walsh, 'Property and Participation in English Planning Law' (n 1), 280.

To illustrate these dynamics within property systems, two examples from Irish property law are analysed in this Part: mortgagees' duties in respect of mortgage arrears management and commercial lessors' duties in respect of lessees' breaches of leasehold covenants. Both illustrate how deliberative property can work in practice: a) to facilitate direct stakeholder engagement through *ex ante* deliberation; b) to require such deliberation by making proof of engagement a prerequisite to accessing core private law remedies; and c) to contain the systemic effects of context-sensitive deliberation by minimising the impact of the *substance* of that deliberation on subsequent property decision-making. Amongst common law jurisdictions, Ireland provides a useful case-study for examining this liminal category of deliberative property duties, in particular because Ireland's property law system operates against the backdrop of a constitutional framework that takes an explicitly progressive approach to property rights.[63] Substantively, the two examples considered raise classic progressive property concerns about ensuring fairness as between property rights holders with (generally) unequal bargaining power, as well as concerns about the potential destabilising effects of a fairness-focused approach to property problem-solving.

(ii) Mortgagees' Duties in Arrears Cases

Since the economic crisis and related housing market crash, Ireland, like many jurisdictions, has significantly increased regulatory control of mortgage relationships.[64] Areas of regulatory focus have included consumer credit, for example new affordability and suitability testing requirements, and arrears resolution codes for primary residences.[65] In Ireland, these regulations have primarily been introduced through codes of conduct underpinned by the statutory power of the Central Bank to impose administrative sanctions on lenders for non-compliance.[66] However, a significant legal debate arose in Ireland concerning the relevance of non-compliance with such codes of conduct in remedies

[63] On Ireland's constitutional property framework, see generally Walsh, (n 3).
[64] Blandy et al (n 60), 112. Blandy et al provide a helpful analysis of the soft-law regulatory measures introduced to protect mortgagors in the U.K. context. Notably, those measures have been held to have no impact on private law adjudication, with regulatory pressure rather than judicial activism the key driver of the protective agenda: see *Thakker v Northern Rock (Asset Management) Plc* [2014] EWHC 2107. As Sarah Nield puts it, forbearance remains in essence a matter of private negotiation between lender and borrower and does not alter the lender's right to possession': S Nield, 'Mortgage market review: "hard-wired common sense?"' (2015) 38 *Journal of Consumer Policy* 139, 152.
[65] See e.g. the 2013 Code of Conduct on Mortgage Arrears https://www.centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/24-gns-4-2-7-2013-ccma.pdf and the 2012 Consumer Protection Code 2012 https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/4-gns-4-2-7-cp-code-2012.pdf.
[66] Section 117 of the Central Bank Act 1989.

applications by mortgagees. Where a mortgagee applied to court to access a private law remedy such as an order for possession, sale, or the appointment of a receiver, could the mortgagee be denied that remedy where there was evidence of non-compliance with codes of conduct? In this way, could regulatory duties to mortgagors influence the availability of core private law remedies? As the Irish Supreme Court pointed out in *Irish Life and Permanent v Dunne*, this raised a highly significant question concerning the interaction between public law regulatory codes that require stakeholder engagement on the one hand, and private law rights on the other hand.[67]

Initially, at High Court level, the view was taken that non-compliance with any aspect of the Code of Conduct could preclude a mortgagee from accessing court-ordered remedies as against defaulting mortgagors. For example, in *Stepstone Mortgage Funding Limited v. Fitzell*, Laffoy J held that where a mortgagee failed to communicate to a mortgagor that there was an internal right to appeal a decision of its Arrears Support Unit, the mortgagee was not entitled to a court order for possession.[68] However, disquiet was expressed by some High Court judges, particularly about the challenges of assessing the appropriateness of arrears resolution outcomes.[69] Resolving the debate, the Supreme Court ultimately concluded that only one duty in the Code of Conduct – the duty of a mortgagee to observe a moratorium period of eight months following arrears before applying to court for a remedy like possession or sale – was judicially enforceable.[70] Mortgagees were required to provide affidavit evidence of compliance with the prescribed moratorium period, with oral evidence only required in cases of dispute. However, the Court concluded that vaguer aspects of the Code, such as the obligation to take 'every reasonable effort' to agree alternative repayment options, were not judicially enforceable.

Striking a compromise between the competing public and private interests in issue, the Court identified observation of the moratorium period as an *ex ante* duty imposed on mortgagees that could constrain the enforceability of mortgagees' rights through private

[67] *Irish Life and Permanent v Dunne* [2015] IESC 46, Clarke J, [5.2]. For analysis of similar debate on the impact of the regulatory environment on the private law rights of mortgagees, see Blandy et al (n 60), 100-102, and *Thakker* (n 64).
[68] [2012] IEHC 142.
[69] See e.g. *Irish Life and Permanent v Duff* [2013] IEHC 43, *Ryan v Danske Bank* [2014] IEHC 236, *Stepstone Mortgages v Clarke* [2015] IEHC 105
[70] *Dunne* (n 67).

law remedies. In the Court's view, the moratorium period was the key to facilitating the process of deliberation and engagement that was prescribed in the Code of Conduct. Accordingly, a failure to protect that time in the private law context would defeat the very purpose of the Code of Conduct on Mortgage Arrears. The Court concluded that to grant an order for possession in such circumstances would involve it participating in an illegal act.[71] On the other hand, the Court expressed concern that were judges to engage in analysing the substance of the full history of arrears engagement between mortgagee and mortgagor, excessive system-wider destabilisation could occur. As Clarke J put it, '…if, and to the extent that, the Code might be held to affect the private law rights and obligations of a financial institution and a borrower, a court will be required to assess compliance or otherwise with the Code in virtually every possession application.'[72] Furthermore, the Court doubted the democratic legitimacy of any such exercise, taking the view that for a wider range of duties to impact upon the enforceability of mortgagees' powers, primary legislation rather than a code of conduct would be required. Finally, it raised questions about system capacity, noting '…courts do not at present have the necessary resources to engage in detailed analysis of the merits or otherwise of debt resolution procedures and proposals in every, or virtually every, repossession case.'[73]

Nonetheless, the Supreme Court's decision to enforce the moratorium period in the context of remedial applications created a liminal type of duty for mortgagees, cross-cutting public and private law through its impact on the enforceability of mortgagees' rights. The apparent aim was to incentivise the kind of context-specific deliberation between mortgagors and mortgagees directed towards solving arrears problems that was intended by the Code of Conduct. By making access to judicial remedies such as orders for possession and sale contingent upon proof of compliance with the moratorium, the Court created a strong incentive for compliance from a mortgagee perspective. However, insofar as other, vaguer provisions in the Code of Conduct were classified as non-justiciable by the Court, this example also illustrates courts taking a restrained approach to the impact of stakeholder deliberation on private law rights. The focus was on ensuring that there was an opportunity

[71] *Ibid*, [5.18].
[72] *Ibid*, [5.17].
[73] *Ibid*, [5.21].

for *ex ante* deliberation through the enforced moratorium period, which in turn would reduce the need for judicial balancing of the interests of mortgagees and mortgagors in the context of remedial determinations. The substance of the deliberation on complex issues such as alternative repayment options and affordability was contained within the pre-litigation deliberative module, which was not re-opened by the courts. In this way, interactions between the 'deliberative module' and the 'remedial module' within the property system were enabled to operate on a largely stereotyped basis, with minimal 'enrichment' at the interface.[74]

A multi-level deliberative-system lens helps to explain this approach, with public and private law aspects of the property system working together to create a balanced process for responsible lending. First, broadly-based deliberation occurs between legislators, administrators, lenders, and borrowers' representative groups in the formulation of appropriate codes of conduct, attending to a wide range of social and economic concerns associated with mortgage lending. Second, the judicially-enforced moratorium period ensures that time and space – a 'window of opportunity'[75] - is allowed for direct engagement between mortgagor and mortgagee on appropriate arrears management, guided by the public-regarding principles in the Code. Through such interpersonal deliberation, the parties who are most directly impacted by the mortgage relationship and have the best information are given the opportunity to negotiate a context-appropriate solution and avoid seeking (expensive) legal recourse through the courts.

In this way, the Supreme Court's approach in *Dunne* facilitated two discrete modules within the property system in operating largely autonomously, with the minimum interaction between modules necessary to ensure the fulfilment of core public objectives in respect of residential mortgages. The influence of public law regulation was channelled through a tightly-managed, partial integration into the private law decision-making process: private law rights were minimally qualified at an *ex ante* stage through the obligation to allow time for deliberation, but were maximally protected in remedial terms. Accordingly, the rights of

[74] The idea of stereotyped interactions here is developed from Smith, who argues '[p]roperty divides the world of horizontal interactions into modules, largely surrounding the legal thing, which allow intensive activity inside boundaries and stereotyped interactions between modules.' Smith, 'Persistence of System' (n 54), 2057.
[75] [2015] IESC 46, [5.18].

the mortgagee largely retained their clear-cut, 'on/off character', while at the same time the interests of both mortgagors and mortgagees, and wider systemic interests in respect of mortgage disputes, were mediated through detailed, context-specific arrears management processes. Operating together, these elements combined to provide a good example of 'organised complexity' in property law, '…dealing simultaneously with a sizable number of factors which are interrelated into an organic whole.' [76] The resulting organisation allowed for evolving attention to the complex array of values and social concerns implicated in mortgage lending, while at the same time preserving core systemic predictability. It also facilitated the (usually) 'weaker' party in the property relationship – the mortgagor – in having a formal voice in respect of arrears management outside of costly and intimidating legal proceedings.

(iii) Breach of Commercial Leasehold Covenants

In Irish law, closely reflecting the English legal position, most commercial leases contain 'forfeiture clauses' providing that a breach of covenant by the tenant either causes the lease to be forfeited or allows the landlord to 're-enter' the relevant premises, with the resulting termination of the lease.[77] The effect of these clauses is to make a lease 'voidable at the landlord's option' in the event of tenant breach.[78] Gray and Gray describe this common law right of re-entry as 'the most draconian weapon in the armoury of the landlord whose tenant has committed a breach of covenant.'[79] Reflecting its practical significance, the right of re-entry is recognised in Irish law as a distinct proprietary right.[80] Thus qualifications on the exercise of the right of re-entry are significant from a lessor perspective. Considered against this backdrop, the legal rules regulating the exercise of rights of re-entry in respect of commercial leases in Ireland offer another example of how *ex ante* engagement between property stakeholders can be required through legal rules that are reinforced by a specified link with private law remedies. As will be seen, this example demonstrates a more intense degree of connection and potential substantive influence between the deliberative and remedial modules than the mortgages example.

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[76] W Weaver, 'Science and Complexity' (1948) 36 *American Scientist* 536, 539.
[77] In Irish law, standard forfeiture procedures are replaced with a distinct termination process for residential tenancies: Residential Tenancies Act 2014. For the English position, see s. 146 of the Law of Property Act 1925.
[78] A Lyall, *Land Law in Ireland* (3rd edition, Roundhall, 2010), 672.
[79] K Gray and S Francis Gray, *Elements of Land Law* (OUP, 2009) 469.
[80] *Ibid.*, 471.

To access forfeiture as a remedy for tenant breach of covenant, commercial lessors must comply with a statutory notice requirement and must wait to enforce their rights in respect of re-entry until the lessee has a chance to respond to the notice by remedying the breach. In Irish law, this process for breaches of covenants in commercial leases *other than* non-payment of rent is established through section 14 (1) of the Conveyancing Act 1881.[81] This section requires a landlord to serve notice on a tenant who is in breach of covenant. The notice must address three key issues: it must specify the breach of covenant complained of; require it to be remedied if it is capable of remedy; and require the lessee to make monetary compensation for the breach.[82] In doing so, the notice must include sufficient context-specific detail to enable the tenant who receives it to understand and remedy the breach.[83] It must also specify a reasonable time-frame for remediation, the length of which will depend on the circumstances of each case.[84] It is open to the tenant to request further time if an unreasonably short period of time is allowed.[85] Service of a s. 14 notice is designed to trigger engagement between landlord and tenant on the required remediation and on a reasonable time-frame for remediation. It also raises the possibility of a tenant applying to court for discretionary relief against forfeiture.[86] The discretionary power conferred on judges by s. 14(2) has been held to be exercisable on the same grounds as the jurisdiction to grant equitable relief against forfeiture for non-payment of rent.[87] This backstop protection for tenants enhances the strength of their position vis-á-vis the landlord in interpersonal engagement on remediation. However, judicial intervention is only

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[81] An almost identical process is established by s. 146 of the English Law of Property Act 1925. If a landlord cannot show compliance with the notice requirements set out in that section, any right of re-entry of forfeiture cannot be enforced.
[82] A precise sum of compensation does not have to be specified: *Silvester v Ostrowska* [1959] 3 All. E.R. 642; *Crofter v Genport*, (unreported, High Court (Ire), December 6th, 1995). Furthermore, compensation does not have to be requested if a landlord does not want it: *Lock v Pearce* [1983] 2 Ch. 271.
[83] *Fletcher v Nokes* [1897] 1 Ch. 271.
[84] *Hick v Raymond & Reid* [1893] AC 22, 29, *Aikici v LR Butlin Ltd* [2006] 1 WLR 201 at 83-84, *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340.
[85] *Foley v Mangan* [2009] IEHC 404, 29-30.
[86] S. 14 (2) of the Conveyancing Act 1881 states: '[w]here a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.
[87] *Foley v Mangan* [2009] IEHC 404, 446. Note that interpreting the equivalent legislation in English law, the Court of Appeal in *Billson v Residential Apartments Ltd* [1992] 1 AC 494 held that equitable relief was ousted by the relevant statutory provision in respect of relief (s. 146(2) of the Law of Property Act 1925). Sir Nicholas Browne Wilkinson VC reached that decision 'reluctantly', in light of legislative reform on the issue.

triggered by a relief application. Absent such an application, once the notice process has been completed and no remediation is forthcoming within the designated time-frame, a landlord can in fact recover possession of the relevant premises directly, provided that is done peaceably.[88]

Here again we see the potential for deliberative modules within a property system to both trigger and contain context-specific stakeholder deliberation. Service of the s. 14 notice alerts the tenant to the nature of the breach and the desired response, while allowing time for that to occur. This enables the tenant to negotiate with the landlord in respect of remediation expectations and time-fames. Unlike in the mortgages example considered in the previous section, the possibility of fairness-focused *ex post* judicial intervention is raised by the statutory right for a tenant to seek relief. This creates closer connections at the interface between the deliberative and remedial modules, giving the deliberative module the potential to exert greater influence on the application of private law rules. However, deliberation between landlord and tenant occurs 'in the shadow' of the possibility of judicial relief, which should encourage a landlord to negotiate reasonably with a tenant. Furthermore, compliance with the notice requirement and the 'reasonable period' requirement weights the scales in any ensuing legal dispute in favour of enforcing the landlord's private law rights in respect of forfeiture and/or re-entry: where a tenant has been appropriately informed of a breach and given time to respond, the case for granting relief will be significantly weakened. The prior period allowed for deliberation and engagement may also serve to illuminate for a judge whether the breach in question was in fact remediable, and whether relief ought to be granted in the interests of fairness, thereby structuring the discretion in respect of relief that is conferred on judges.[89] In these ways, the scope for substantive judicial engagement with the reasonableness or otherwise of the conduct of the parties to the lease is minimised by the prior deliberative module.

(iv) Learning from Deliberative Property 'In Action'

[88] *Sweeney Ltd v Powerscourt Shopping Centre Ltd* [1984] IR 501.
[89] For examples of disputes about remediability, see e.g. *Billson v Residential Apartments Ltd* (1990) 60 P. & C. R. 392, *Savva v Houssein* (1996) 73 P. & C.R. 150,

The case-studies considered in this part illustrate the argument made by both Alexander and Dyal-Chand that deliberative property captures a wide spectrum of rules and processes within property systems that may involve more-or-less intense deliberation and engagement between property stakeholders.[90] Related to that, the case-studies expose variations in the degree of connectedness and mutual influence between deliberative and remedial modules on these issues. The intensity of 'enrichment' at the interface varies, reflecting in part the wider systemic impacts of the property relationship in issue, and of the information involved.[91] For example, reflecting broader societal concerns associated with stable financial markets and the connection with mortgagees' remedies, substantive influence between deliberative and remedial modules is kept to a minimum.[92] The commercial leasehold covenants example demonstrated closer connections between deliberative and remedial modules, which may be explained in part by the narrower range of impact of the issue at stake. Third-party informational demands in respect of the content of such deliberations are likely to be relatively minimal, with non-rent breaches of leasehold covenants generally heavily context-dependent. Furthermore, while the potential for *ex post* judicial intervention remains stronger in the leasehold example than in the mortgages example, it is still made more predictable and structured by the prior deliberative process.

Both examples showed how deliberative property modules, as well as facilitating direct stakeholder engagement and contextualisation in respect of a property law dispute, also enable broader public objectives to influence the resolution of such disputes at an early stage, prior to judicial intervention. For example, the Code of Conduct on Mortgage Arrears reflects the collective interest in keeping people in their homes wherever possible and in encouraging negotiated arrears solutions as a cheaper alternative to court proceedings. The emphasis on notice and engagement in respect of the remediation of breaches of leasehold covenants reflects wider concerns about power imbalances between landlords and tenants in the commercial context, and about the injustice of premature termination of long commercial leases due to minor breaches by tenants. Deliberative modules provide an opportunity for those systemic objectives to inform dispute resolution without requiring

[90] Dyal-Chand (n 6), 638, Alexander (n 14), 1879.
[91] See Merrill and Smith (n 13), 797-798, arguing that more fine-grained rules are appropriate where third-party informational are limited demands.
[92] On the significant third-party informational demands that arise in respect of securities, see *ibid*, 838.

judges to deal directly with the complex questions of fairness or reasonableness raised by such multi-dimensional policy concerns.

However, while the types of combinations of public and private law measures considered in this part can facilitate and incentivise meaningful collaboration in property problem-solving, ultimately there is no guarantee that the type of deep, open-minded engagement presupposed by deliberative democracy theory will occur between stakeholders in a property dispute. Evidence of engagement is required in both the mortgages and leasehold examples as a condition of accessing core private law remedies, and deliberation is encouraged to varying degrees. Nonetheless, the quality of engagement depends on the response of the stakeholders in any given dispute. In the mortgage arrears context, detailed guidance within codes of conduct establishes an expectation of deliberation: for example, mortgagees are expected to fully engage with a mortgagor's personal circumstances, adopting an open-minded approach to considering alternative repayment options provided a mortgagor is actively participating in the process.[93] Notwithstanding these requirements, there is evidence of a 'box-ticking' approach adopted by some mortgagees, with the approach of the Supreme Court in *Dunne* leaving no scope for judges to intervene *ex post* in respect of such poor quality engagement.[94] The leasehold covenants example imposes a less demanding requirement on lessors and lessees – a simple notice requirement designed to trigger engagement on remediation. The overarching possibility of tenant relief incentivises meaningful deliberation where a tenant responds to a notice, but a 'box-ticking' approach to the service of notice on a tenant remains a possibility. Thus, the kind of modular legal structure combining deliberative elements with private law remedies that was analysed in the case-studies can encourage deliberation, but cannot itself create it.

[93] For example, the 2013 Code of Conduct on Mortgage Arrears requires lenders to: '…pro-actively encourage borrowers to engage with it about financial difficulties which may prevent the borrower from meeting his/her mortgage repayments.' (p. 8) and 'the language used in communications must indicate a willingness to work with the borrower to address the situation and must be in plain English so that it is easily understood' (p. 9). See https://www.centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/24-gns-4-2-7-2013-ccma.pdf (last visited 12th June 2023).

[94] See e.g. *Stepstone Mortgages v Hughes* [2015] IEHC 487. For similar evidence of 'box-ticking' in the U.K. context, see Susan Bright and Lisa Whitehouse, *Information, advice and representation in housing possession cases* (2014) Universities of Oxford & Hull, 24-25, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430096 (last visited 2nd November 2023).

On the other hand, both examples show that deliberative modules can reliably promote reason-giving to support the exercise of authority by a property right-holder: a s. 14 notice requires specification of what a landlord wants to remedy a tenant's breach of covenant; arrears management pursuant to the Code of Conduct specifically requires reason-giving by a mortgagee.[95] Such reason-giving is an important first-step towards collaborative problem-solving. However, notably the 'enrichment' between deliberative and remedial modules in both examples involved no substantive enquiry into the quality or reasonableness of the reasons given within the deliberative module. The mere fact that the legally stronger party in a property relationship is required to give reasons may serve to soften notions of 'despotic dominion', but the reasons provided may be unreasonable to a weaker party, particularly absent a legal prescription as to the types of reasons that are permissible. Such 'unreasonable' reason-giving may serve to reduce rather than enhance trust between property stakeholders.

This leads to a further cautionary note about deliberative property's potential. Deliberation does not guarantee progressive outcomes: mortgagees may decline to act reasonably in arrears management discussions; lessors may impose burdensome remediation demands despite tenant representations. The structure analysed in the examples in this chapter shows private law rules being adapted to require that deliberation is facilitated, but without demanding any particular substantive outcome from such deliberation (for example, property sharing).[96] Moreover, courts are in fact less likely to intervene *ex post* on these matters (for example, to protect weaker parties) where there has been a prior deliberative process.[97] Therefore, notwithstanding the occurrence of *ex ante* deliberation between key stakeholders, outcomes in such property disputes may be inequitable in the burdens imposed on individuals and communities.[98] As Di Robilant summarises, '…deliberative

[95] It must document reasons for all alternative repayment options that it determines are not suitable for the mortgagor (p. 18) and provide those reasons to the mortgagor (p. 19). See https://www.centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/24-gns-4-2-7-2013-ccma.pdf (last visited 12th June 2023).

[96] On property sharing, see e.g. Dyal-Chand (n 19).

[97] For analysis of the judicial weight given to the outcomes of participatory processes, see Walsh, 'Property and Participation in English Planning Law', (n 1).

[98] For example, urban regeneration schemes often occur through robust participatory processes while still unfairly impacting on politically weak communities. See C Allen, *Housing Market Renewal and Social Class* (London, Routledge, 2008); G Macleod and C Johnstone, 'Stretching Urban Renaissance: Privatizing Space, Civilizing Place, Summoning "Community"' (2012) 36 *International Journal of Urban and Regional Research* 1; B Nevin, 'Housing Market Renewal in Liverpool: Locating the Gentrification Debate in History, Context and Evidence' (2010) 25 *Housing Studies* 715.

democracy does not give justice any special priority over process.'[99] Furthermore, deliberative modules may give another platform to already engaged stakeholders, creating a risk of entrenching interests through enclave thinking.[100] This creates the potential for a distorting impact on the outcomes of deliberation.[101]

Despite these reservations, by affording weaker parties in property relationships a formal opportunity to be heard at an early stage in a dispute without the problematic trappings and costs of legal proceedings, deliberative property can enhance the procedural standing of 'property outsiders', thereby mitigating (at least partially) imbalances in power within a dispute.[102] In this respect, the emphasis on the inclusion of all interested parties within deliberative democracy theory aligns procedurally with progressive property theory's goal of a more inclusive body of property law. Over time, stakeholder engagement may serve to enhance mutual trust and respect between weaker and stronger property rights holders, and may trigger a broader move away from an understanding of property as conferring a 'despotic', wholly self-regarding right to exclude, towards an understanding of property as conferring power that must be exercised on a reasoned basis, taking account of its impacts on all relevant interests.[103] Against such a backdrop of reason-giving, stakeholders might be better equipped, and more willing, to mutually agree solutions to complex property disputes.

6. Moving Deliberative Property Forward

As the case-studies in Part 5 demonstrated, there are risks with deliberative strategies in property problem-solving and no guaranteed outcomes, whether in terms of the quality of inter-personal deliberation that might be triggered or the vindication of progressive

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[99] Di Robilant, 'Property and Democratic Deliberation', (n 16), 410.

[100] Discussing the planning context, Shaw and Lord suggest that: 'There is evidence to suggest that in some contexts early consultation has occurred and that some hard-to-reach groups are becoming more involved in planning, although this is far from a widespread experience.' D Shaw and A Lord, 'From Land-Use to "Spatial Planning": Reflections on the Reform of the English Planning System' (2009) 5 *Town Planning Review* 415, 427. See also e.g. S Herbert, The Trapdoor of Community' (2005) 95 *Annals of the Association of American Geographers* 850, 856-858, G.S. Alexander, 'Dilemmas of Group Autonomy: Residential Associations and Community' (1989) 75 *Cornell L Rev* 1, 52.

[101] P Brest, 'Constitutional Citizenship' (1986) 34 *Cleveland State Law Review* 175, 196. On potential responses to these challenges, see di Robilant, 'Property and Democratic Deliberation', (n 16), 414-416.

[102] L. Fox-O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 67 *Current Legal Problems* 409.

[103] As Simone Chambers puts it, '[a]t the core of deliberation is an ideal of mutual accountability among citizens and groups, and between citizens and elites.' S. Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendelsohn and Andrew Park eds, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2001) 231, 237.

property values. In seeking to integrate deliberation into property systems to facilitate contained contextualisation, care is required in designing and implementing processes for engagement, and in studying the 'real-world' impacts of such processes. As Abbot and Lee rightly argue, 'a move to participation needs to be informed by an awareness of the existing distribution of power and how participation will affect that power'.[104] Furthermore, deliberative modules will add a variety of costs to property systems: interpersonal deliberation will impose costs and capacity demands on participants; dispute resolution may be slower if deliberation does not resolve the issue; formal structures for facilitating engagement may need to be established and funded. This analysis begs the question of when, and for what purposes, deliberative strategies may be most appropriate in property systems. A firm position on this question requires wider jurisdiction-specific doctrinal mapping and analysis of deliberative sites within private law than space allows in this chapter. However, the remainder of this section will offer a preliminary assessment of when and why deliberative modules may be a useful addition to property systems.

The 'enduring' nature of many property relations may prove to be an important lever in attempting to embed commitments to meaningful deliberation within property systems, and in identifying appropriate contexts for deliberative property strategies.[105] In respect of such relationships, the 'pay-off' of enhanced trust and collaboration is likely to be heightened for the parties, as its benefits may have a lasting impact. As Blandy et al put it, '…most property relationships are lived relationships, affected by changing patterns and understandings of spatial use, relationship needs, economic realities, opportunities, technical innovations, and so on', with resulting relational subtleties and nuances likely to be beyond the grasp of standard legal proceedings and judicial decision-making.[106] In contrast, parties to enduring property relationships have detailed knowledge of the nuance and context of such relationships, which better equips them to agree a tailored solution to a dispute. Furthermore, they are incentivised to do so: through the lived reality of such relationships, it becomes apparent that '…the self-interested individualism generally

[104] M Lee and C Abbot, 'Public Participation under the Aarhus Convention' (2003) 66 *MLR* 80, 107.
[105] On the distinctive features of enduring property relations, see Blandy et. al, (n 60).
[106] *Ibid*, 86.

generated by the title deeds' needs to be replaced with a more co-operative approach.[107] Accordingly, Blandy et al stress the need for discretionary decision-making spaces in the context of such relationships – spaces that this chapter suggests could benefit from having a deliberative dimension.

Deliberative property need not be confined to the (apparently broad) category of enduring property relationships. For example, such processes have long been important at the public/private law interface in property in planning and environmental contexts, where the relationships and interests mediated through participation are not always enduring in nature.[108] However, in thinking about where the risks of deliberative property are outweighed by the benefits of a deliberative strategy, enduring property relationships may be a good place to start. In contexts such as mortgages law, landlord and tenant law, and neighbour law, parties to property relationships often have strong independent interests in collaboration. At the same time, overarching public objectives such as secure housing and sustainable land-use form key backdrops to the dynamic evolution of such relationships. Deliberative property offers a means of mediating between those objectives and competing property rights in a manner that sits somewhere between the two extremes of generalised legislation or regulation on the one hand, and *ex post*, case-specific judicial intervention through private law decision-making on the other hand. The former public law route has the benefit of reduced information costs; the latter private law route poses greater risks of system-destabilisation but facilitates greater contextualisation and tailoring of outcomes. Deliberative property may offer a loose institutional blue-print for harnessing some of the key strengths of these institutional routes while mitigating some of their down-sides. Public objectives can inform and shape structured stakeholder deliberation, generating negotiated solutions within parameters defined by such objectives. In this way, parties to a property relationship are themselves given a degree of agency to interpret and apply public objectives to their own situations, for example in resolving a mortgage arrears dispute in light of systemic housing security and lending-market stability goals.[109] Judicial intervention

[107] Drawing on relational contract theory, they suggest that enduring property relationships are likely to reflect '…solidarity, reciprocity, flexibility and role integrity': *ibid*, 91.
[108] For analysis, see e.g. Scotford and Walsh (n 1).
[109] On the potential significance from a progressive property perspective of the 'bottom-up', agency enhancing approach as compared to a top-down regulatory strategy, see R Walsh 'Property, Human Flourishing and St Thomas Aquinas: Assessing a Contemporary Revival' (2018) 31 *Canadian Journal of Law and Jurisprudence* 197, 216–19.

remains possible where deliberation fails to resolve the dispute downstream, but the judicial function in such instances is given greater structure and predictability through the ventilation of issues and testing of arguments within the prior deliberative stage.

Another potential indicator for when and how deliberative modules may be particularly suitable within property systems are the substantive private law rules with which such modules would interact. Where the relevant private law rules are very clear-cut in nature, adopting an on/off approach to the relevant rights and duties, deliberative modules may add less value in terms of avoiding or minimising *ex post* judicial intervention or reducing the level of discretionary jurisdiction required to be exercised by judges in the event of intervention. Nonetheless, contained *ex ante* deliberative modules may enhance the actual and perceived legitimacy of the exercise of authority through such on/off rules by ensuring that all impacted parties have a meaningful opportunity to be heard.[110] Where the relevant legal rules are standard-based and 'muddier' in nature, the added value of giving *ex ante* deliberation outcome-influence may increase.[111] For example, deliberation may facilitate more structured application of standards, as was observed in respect of tenant relief in the leasehold covenants example. Stakeholders closest to the 'mud' may be best equipped to identify and agree an appropriate solution to the problem, or at the very least to test the issues in full and thereby potentially reduce the range of inquiry in any *ex post* judicial decision-making.

Further institutional design questions for the development of deliberative property include the position of groups and constraints on reason-giving. First, stakeholder deliberation within property systems may involve groups as well as individuals, as confirmed by the extensive literature on common interest communities in U.S. property scholarship.[112] Indeed, ongoing controversies worldwide on the safety of various types of residential property mean that engagement and negotiation within and by representative groups is

[110] On perceived legitimacy, see D Jacobs and W Kaufmann, 'The right kind of participation? The effect of a deliberative mini-public on the perceived legitimacy of public decision-making' (2021) 23 *Public Management Review* 91. On enhancing trust in public decision-making through deliberation, see S Boulianne, 'Building Faith in Democracy: Deliberative Events, Political Trust and Efficacy Political Studies' (2019) 67 *British Journal of Political Science* 4, H Werner and S Marien, 'Process vs. Outcome? How to Evaluate the Effects of Participatory Processes on Legitimacy Perceptions' (2022) 52 *British Journal of Political Science* 429.
[111] C. M. Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford Law Review* 577.
[112] Serkin, 'A Case for Zoning' (n 57), 794-798.

likely to be an increasingly common feature of property systems.[113] Such crisis-driven, *ad hoc* engagement may be a starting point for the evolution of longer-term deliberative processes.[114]

Second, reason-giving in the examples considered within this chapter was not substantively constrained: mortgagees and lessees were required to explain what they wanted and why in the applicable stakeholder engagements, but there were no legal constraints imposed on the reasons that could be given. An alternative approach may be for the law to specify types of reasons that are or are not permissible within particular deliberative modules. This might be grounded in equality concerns, for example through a prohibition on reasons with potential or actual discriminatory dimensions, or for substantive reasons associated with a given property problem. For example, to enhance security of tenure, landlords might be restricted in the kinds of reasons for which they can terminate tenancies.[115] Deliberative democracy theory sets a loose requirement for 'principled' and 'comprehensible' reason-giving[116], with Di Robilant going so far as to infuse this requirement with substantive values of inclusion and fairness, and with a requirement for outcomes reflecting those values[117]. Calibrating the appropriate degree of external control of reason-giving will be an important institutional task in any integration of deliberative modules into property systems, one which will reflect different views that may emerge on the appropriate balance between fairness and stability on an issue-by-issue basis.

Questions of sequencing and voluntarism must also be addressed in the design of deliberative modules within property systems. The focus in this chapter has been on *ex ante* deliberation as a mandatory condition of access to private law remedies. However, other

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[113] Recent crises that have triggered political controversy and engagement with representative groups include the post-Grenfell cladding scandal in the U.K. (see https://www.theguardian.com/society/2023/jan/29/mental-torture-six-years-grenfell-uk-residents-cladding-deal, and the Oxford 'Housing After Grenfell' blog: https://blogs.law.ox.ac.uk/housing-after-grenfell-blog/20), and the Mica scandal in Ireland (outlined at https://www.irishtimes.com/news/ireland/irish-news/q-a-what-is-mica-and-why-are-people-protesting-over-it-1.4593301).

[114] In this way, deliberative property may form another important element of 'property moments' generated by crises, on which see N. M. Davidson and R Dyal-Chand, 'Property in Crisis' (2010) 78 *Fordham Law Review* 1607.

[115] See e.g. the restricted grounds for terminating so-called 'Part IV tenancies' under s. 34 of the Irish Residential Tenancies Act 2004, which limits landlords to recovering possession for specified and evidenced reasons, such as substantial renovation or recovery for personal/family use.

[116] See e.g. A Gutmann and D Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 3, arguing that the reasons given in the deliberative process 'should appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject.'

[117] Di Robilant, 'Property and Democratic Deliberation (n 16), 411.

approaches are possible. The sequencing of deliberative modules and other modules within property systems may vary. In addition, some property contexts may be institutionally best served by rules that *require* stakeholder deliberation; others by rules that *facilitate* such deliberation on a voluntary, opt in basis.

For example, in the law of servitudes, complex issues associated with the extinguishment of such private rights are often dealt with through statutory processes designed to 'mop up' the mess created by obsolete or unreasonable property rights, taking account of the competing interests of stakeholders.[118] Here, deliberation enters the stage late in the property relationship to facilitate an orderly solution to its demise, with a focus on minimising land-use conflicts through mutually beneficial solutions.[119] Famously in *Bradley v Heslin*, Norris J called for neighbourly cooperation in resolving a dispute about gate-opening at a shared entrance to two houses.[120] In doing so, he signalled a general need for a move away from voluntary to compulsory mediation, saying: '[i]n boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves.'[121] In urging a negotiated solution, he provided parameters for deliberation by sketching an outline of a reasonable compromise between the competing claims advanced by the neighbours. Legal rules in respect of co-ownership often deploy deliberation in a similar way. For example, Irish law requires a joint tenant seeking to sever a joint tenancy in the first instance to notify the other joint tenants in writing, with a view to negotiating their consent to severance.[122] Where that stakeholder-led approach fails, judges apply legislatively-structured discretion to reach a wind-down solution that takes account of the interests of all co-owners.[123]

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[118] See e.g. s. 84 of the Law of Property Act 1925 (UK), which empowers the Lands Tribunal to discharge or modify restrictive covenants, and s. 50 of the Land and Conveyancing Law Reform Act 2009 (Ire), which enables courts to make orders discharging or modifying freehold covenants upon the application of a servient owner, but bearing in mind representations from any other interested parties. In respect of the extinguishment of easements via stakeholder engagement , see e.g. in Australia, s. 89 of the Conveyancing Act 1919 (NSW), and in Canada, s. 35 of the Property Law Act (British Columbia) 1996, and the recommendations of the Law Commission for a statutory process for extinguishment in its final report on *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com. No. 327, see also Consultation Paper No. 186, March 2008).

[119] See e.g. the decision of the U.K. Supreme Court in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45, where Lord Burrows held that cynical breaches of restrictive covenants by developers should weigh against the discharge of such covenants, especially '…where that cynical conduct has produced a land-use conflict that would reasonably have been avoided altogether by submitting an alternative plan': [58].

[120] [2014] EWHC 3267 (Ch).

[121] *Ibid,* [24].

[122] Section 30 of the Land and Conveyancing Law Reform Act 2009.

[123] Section 31 of the Land and Conveyancing Law Reform Act 2009.

However, meaningful deliberation cannot be compelled on an interpersonal basis, meaning the view may be taken that in at least some contexts, it should only be facilitated where parties retain a sufficient basis of trust to wish to engage on a voluntary basis. For example, the interaction between mortgages law and personal insolvency law is managed in Irish law through *optional* stakeholder deliberation, which is triggered by the application of a mortgagor during court proceedings for repossession for a postponement to enable engagement with the personal insolvency process.[124]

Finally, a key institutional design decision will centre on the intensity of 'enrichment' between deliberative modules and other parts of the property system, particularly whether judges should substantively 're-open' deliberative modules in subsequent private law decisions. The examples considered in this chapter left the deliberative module largely closed, in order to minimise substantive *ex post* judicial intervention. This serves to contain the complexity of case-specific stakeholder deliberation and reduce information costs elsewhere in the property system. However, other problems within a property system may demand a different balance between context-sensitivity and stability. For example, in unresolved co-ownership disputes, there may be no meaningful alternative to judges 're-opening' the case-specific deliberative module to reach a fair conclusion, with attendant costs in terms of legal complexity and unpredictability.

This analysis shows that deliberative property is best understood not as a unitary approach or idea, but as a broad and evolving suite of institutional tools that can be adapted and deployed within private law, as well as through public law measures, to better connect property decisions to the actual context of property problems and the interests of key stakeholders. The decision as to whether, and how, to deploy these tools within property systems, and of how to calibrate their relationship to other parts of those systems, will ultimately be context-sensitive and guided by the goals of institutional designers in respect of both the structure and substance of property law.

7. Conclusions

[124] Section 2 of the Land and Conveyancing Law Reform (Amendment) Act 2013.

The key focus of this chapter has been on the structural question of how to achieve both context-sensitivity and stability within property systems through stakeholder deliberation. The case-studies analysed in the previous parts show how deliberative property can facilitate close engagement and debate between immediately impacted property stakeholders while minimising the risk of that detail and context-specificity spilling over into the interpretation and application of generally-applicable private law rules. The deliberative module, which is given extra force through its connection to private law disputes, enables interpersonal engagement between property rights-holders and facilitates a context-sensitive approach to resolving property disputes. Wider interests, such as the interests of indirect stakeholders and public policy concerns, can also influence the deliberative process, for example through regulation that directs stakeholder deliberation. However, the contained nature of the deliberative module means that systemic stability and predictability is protected in respect of core private law remedies.

As this chapter has shown, well-established legal doctrines through which common law property systems already operate contain many sites for stakeholder deliberation. These sites merit further exploration. In particular, the variable intensity of links and connections between deliberative modules and other parts of property systems merit close study, as well as the rationales for deploying deliberative approaches. Tentatively, the analysis in this chapter suggests that such approaches may be most useful in managing enduring property relations wherein the enhanced trust that mutual reason-giving might foster could be most valuable and the avoidance of court proceedings most efficient. Close and deep links between deliberative modules and other parts of a property system may be most appropriate where legal standards are applied, and where fairness (whether procedural or substantive or both) is a primary concern in property decision-making. However, a wider mapping of deliberative sites in property law systems is needed to test these preliminary views.

Furthermore, future scholarship should seek to better understand when and how deliberation can enhance trust between parties to a property relationship on the one hand, and in the legal decision-making processes that regulate such relationships on the other hand. Such analysis should consider the important question of how relationships and

decisions are *perceived* by those subject to them, as well as normative questions of legitimacy in decision-making.[125] Deliberative democracy scholarship identifies an enhanced perception of fairness flowing from an identification with decision-makers as 'ordinary' – 'like us'.[126] Insofar as that finding holds true in property decision-making, stakeholder deliberation may have the potential to significantly enhance wider trust in property law.

Finally, but perhaps most significantly, attention needs to be given to encouraging good deliberation where property stakeholders are brought together by deliberative modules within property systems. As Arnstein notes: '[t]here is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process.'[127] The dynamics of power that can influence the practice of deliberation need to be accounted for in deliberative property, with consideration given to who *in fact* engages, not merely who is *permitted to* engage.

That final step in deliberative property's future research agenda will critically influence its value as a means of facilitating not just the enhanced context-sensitivity sought by the progressive property school of thought, which has been the primary focus of this chapter, but also the enhanced fairness and justice in property outcomes that progressive property seeks. For example, Davidson argues that people expect 'responsiveness, fair adjustment, and inclusion' from property systems.[128] This chapter has shown the potential of deliberative property as a vehicle for enhanced responsiveness and procedural inclusiveness. Such changes may encourage, but certainly do not of themselves guarantee, fair adjustment and substantive inclusion in property systems. This observation signals the need for further work on deliberative property's utility as a tool for advancing progressive property's equity-enhancing agenda, in particular for meaningfully redressing imbalances in power between 'property insiders' and 'property outsiders'.[129]

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[125] On the perceived and actual legitimacy of decision-making, and the role of deliberation, see Jacobs and Kaufmann (n 110) and Werner and Marien (n 110).
[126] See J Pow, L van Dijk, S Marien, 'It's Not Just the Taking Part that Counts: 'Like Me' Perceptions Connect the Wider Public to Minipublics' (2020) 16 *Journal of Deliberative Democracy* 43.
[127] S.R. Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *Journal of American Planners* 216, 216.
[128] N Davidson, 'Property's Morale' (2011) 110 *Mich. L. Rev.* 437.
[129] Fox-O'Mahony (n 102).